Aged Care Justice

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Joint Submission in Response to the Exposure Draft – Aged Care Bill 2023

Introduction

Aged Care Justice Inc. (ACJ) has collaborated with multiple advocacy organisations to form this submission, including; Allied Aged Care, Aged Care Crisis, Aged Care Reform Now, Carers' Circle, Older Women's Network NSW and Quality Aged Care Action Group Inc.

The Exposure Draft – Aged Care Bill 2023 (Draft) proposes new regulations for safe and quality aged care for Australians receiving Commonwealth-funded aged care services. The Draft is promoted as being 'person-centred' and 'rights-based', however, there are many gaps in the legislation creating concerns about rights enforcement, clinical care requirements, workforce standards and effective and transparent governance of Providers.

The Royal Commission into Aged Care Health and Safety (Royal Commission) recommended a move against large institutions to small-scale congregate living that facilitates a small household model of care, which the Government supported. The Draft's proposed new obligations for Providers will require additional Government funding, otherwise smaller Providers will be driven out of the market due to increased operational costs. Dedicated funding is vital if the Government is to transition toward a community style model.

There is also concern that because the legislation only applies to Commonwealth-funded aged care services, privately funded services will not be subject to the same level of regulation, placing private residents and home care recipients at disadvantage and risk. As the private aged care sector continues to grow, more older Australians will not be safeguarded by the Draft's protections.

The Draft has not gone far enough in restoring public confidence and ensuring reforms are responsive to the needs and wants of people with complex health conditions, who may be totally dependent on aged care services for their safety and wellbeing.

Key Changes Required

We have provided a response by topics below and would like to see amendments made to the Draft to achieve significant change to improve the lives of aged care recipients.

1.0 Workforce

The aged care workforce consisting of workers with a variety of skills requires long term planning, mandatory minimum skills, training, specialised training, and enforced ratios;

1. **Planning** An aged care workforce planning division or committee is vital to ensure there are incentives to promote a skilled workforce, including in regional and rural Australian areas. This will require dedicated Government funding to deliver a 5 to 10 year plan.

2. **Registered Nurses**. The Draft includes a provision for one registered nurse on site at all times in residential care, but does not include any ratios for enrolled nurses. This is important in providing appropriate clinical care to aged care residents with a variety of clinical care needs. The requirement of one registered nurse is regardless of facility size which may not be adequate for large facilities.

3. **Care Workers**. Care delivery should include a transparent and accountable system of continuous training of skilled workers with minimum mandatory skill standards, specialised care skills, and mandated care worker ratios.

4. **National Registration of Workers**. The Registration of workers under a national body with prescribed professional requirements is necessary for continuous delivery of quality care. This task should be performed outside of the ACQSC and we recommend it sit with AHPRA so that it is aligned with the health industry. This not only supports building trust in the system from a recipient perspective, but will also help professionalise the system and create better career pathways for aged care workers.

5. **Register**. There should be a Public Register of all workers beyond the aged care worker screening database referenced in Division 7 of the draft legislation. It should include the Aged Care Screening information, qualifications, ongoing training and any official findings that impact a persons's ability to work in aged care. Screening or registration should be retrospective so that it applies to all aged care workers currently in the system, not just those seeking entry. The register should be linked to the Star Ratings system for increased transparency.

6. **Reporting**. Providers should provide public reporting on mandatory hours of care, skill mix, staff ratios for nursing and personal care workers, and details on workforce issues impacting delivery of services (this is particularly important in addressing gaps in workforce availability in regional and rural areas and identifying issues early). Mandating workforce standards and reporting will require providers to ensure they have a workforce capable of delivering care in accordance with the Statement of Rights. QACAG would like to see real-time reporting by Providers so consumers can make informed decisions.

7. **The Systems Governor** should be responsible for workforce issues, adherence to ratios, care minutes, and planning and recommendations for maintaining a viable aged care workforce.

8. **Workforce Standards**. The Draft provides for the setting of Quality Standards but does not include the setting of a workforce standard. QACAG believe this is fundamental to ensuring Providers are accountable for their workforce. A well respected and cared for workforce will deliver better care. The Quality Standards should include elements like training, numbers, professional obligations, WHS rights, and worker voice.

9. **Decentralised System**. Aged Care Crisis (ACC) would like to see a more decentralised system where there is wide representation, as the Systems Governor is part of a highly centralised system where all the power is concentrated in only a few hands.

2.0 Clinical Care

Access to prompt clinical care that can identify clinical issues, provide appropriate support following hospital discharge, and provide proactive allied health support, is vital in both supporting the Statement of Rights and delivering high quality care, as defined in the Draft. Best practice clinical support requires the following;

1. General Practice. Access to appropriate medical support. We support the Royal Commission recommendation for aged care accreditation for General Practice.

2. Multidisciplinary Teams. We support the Royal Commission recommendation for the introduction of multidisciplinary outreach services for individuals accessing aged care, based on their clinical need. The teams should include; nurse practitioners, allied health practitioners such as dentists, physiotherapists and pharmacists, access to geriatric, psychiatric, and palliative care specialists, including escalation to other relevant specialists as needed.

3. Evidence-based care and freedom from inappropriate or potentially harmful practices.

4. Home Care. More information is required on home care personalised budget entitlements to support physical and mental health at home.

3.0 Supporters and Representatives

The Draft has introduced the appointment of Supporters and Representatives, either appointed by the person receiving care or by the Systems Governor, who are authorised to speak for the person and receive relevant information on issues related to funded aged care services. This initiative requires further information to support the rights of the person receiving care on the selection, background, and training of Supporters and Representatives, noting they may not be family members and their decision may override an existing Power of Attorney or Guardian. ACRN would like to see aged care recipients able to nominate both a representative and a supporter, if they wish, however this person cannot be an employee of the facility.

Uniformity across state, territory and federal jurisdictions in relation to powers of attorney and guardianship laws is required to bring clarity as to how the powers of the different representative roles interact in aged care settings.

ACC would like a community-led system in which community has a key role and experts provide mentorship and support. We need local people with knowledge and/or access to experts. They would be regularly onsite getting to know the residents and families, and so would be trusted. They can provide support to residents, families or even staff when they need help and guidance. Such supporters would be in a position to identify and stop elder abuse by family or staff and guide families into the arbitration system, if required.

4.0 Reporting and Transparency

The Draft refers to the rules (yet to be drafted), regarding public reporting obligations, with respect to Registered Providers and the Worker Screening Database. Public reporting is vital in ensuring the obligations under the Statement of Rights are supported and to restore public confidence in aged care service delivery.

1. **Public Reporting**. Providers should publish their annual report on the ACQSC portal for increased transparency.

2. **Additional Reporting**. Providers should publicly report tracking against quality indicators that include relevant benchmarks to identify how they are progressing to deliver better services and identify any gaps that require funding and support.

3. **Non-Compliance**. Public reporting of registered providers who are late in reporting, not reporting, and penalties applied due to non-reporting.

4. **Self-Reporting Issues**. ACC have concerns about the reliability of providers self-reporting and believe a community-led system would mean providers would be accountable to the community bodies who would know exactly what is happening at the facility level, and be vetting the data released for accuracy.

5. **Ongoing Probity Checks**. There should be regular probity checks of Responsible Persons.

5.0 Aged Care Quality and Safety Commission

The Aged Care Quality and Safety Commission (ACQSC) has been given much needed increased functions and powers for monitoring, investigating and enforcement. However, the ACQSC needs to work on improving public confidence, particularly with the Star Rating System, in the transparency of its investigations, reporting, and enforceability.

1. We are disappointed that the Royal Commission recommendations for an independent Regulator, or a Regulator that is an authority with a Board and a CEO reporting to the Board, was not followed. This decision will impact community confidence due to the perception that the Regulator is conflicted between promoting best practices with Providers and representing recipients of aged care services. The fact that the ACQSC is not independent of the Government provides uncertainty of the goals and budget restrictions of future Governments and the impact on prioritising quality and safe care. ACRN would like to see, at the very least, the Complaints Commissioner being independent of the ACQSC, given the conflict between the ACQSC's regulatory and remedial roles. QACAG would support the ACQSC Commissioner being subject to accountable governance measures.

2. The ACQSC should have the resources to develop a network of offices, including regional offices, to ensure local issues relevant to the community are supported. This system will build on community capacity to identify and deliver resources and respond to issues and complaints. ACRN states that the ACQSC Commissioner has discussed compliance being managed at a Provider level, which is a questionable move, as it advantages large providers and does not consider the individual.

3. Audits of facilities must be subject to rules which remove conflicts of interest, for example, if an auditor is contracted by the ACQSC they must not also be contracted by the facility they are auditing.

4. ACC supports the decentralisation of the ACQSC to improve complaint resolution. ACC believes the suggestion made by the Grattan Institute of having local community advisory groups working with metro and regional hubs under a central body would increase support and transparency. ACC feel that instead of government selected appointments from the community, this central body should have representation on most central advisory, governing, and regulatory bodies. This would create a more balanced system and make it more accountable to the community it is there to serve.

6.0 Complaint Handling

The Statement of Rights promises a 'fair and prompt' complaints management system. The Statement of Principles also states that Providers must underpin their services with the Statement of Rights principles and obligations. A fair complaints management system requires confidence that the complaints resolution system will; be transparent; be compassionate and supportive in clarifying the complaint; provide information of support or relevance to the complaint; include the complainant in the process; assist the complainant in understanding the options in complaint resolution, and; ensure the complainant understands their rights.

Recommendations to ensure a fair complaints management system include;

1. An independent Complaints Commissioner. The Complaints Commissioner is appointed by the ACQSC Commissioner and is not an independent or statutory appointment. The ACQSC also retains responsibility to collect, report and refer complaints. Public confidence requires an independent body to review complaints, that does not have any conflicts with the prioritising of funding or promoting best practice with Providers.

2. A complainant has limited rights of appeal in response to a decision made by the ACQSC. They have the same rights as the current Aged Care Act - right of review or appeal to the Ombudsman. We recommend the Inspector-General or an independent body reviews appeals of ACQSC determinations.

3. The Protected Information provisions in the Draft make it an offence to share specific information regarding an aged care issue. This provision may limit the rights of a complainant in providing evidence to support their complaint. Factual information relevant to a Provider should be public information.

4. QACAG suggests a system that allows workers to raise concerns about staffing levels and working conditions outside of the whistleblowing measures, particularly given the risk based system for regulation proposed. There is no measure for data capture from workers, yet they have the most intelligence on how a service is operating after the service users and families themselves.

5. ACRN would like clarity on the 'reasonable excuse' defence for strict liability offences. Their concern is the ACQSC having too much discretion in determining if there is a breach of a statutory duty.

6. ACC would like to see trusted local community involvement in complaints handling, as suggested by the Giles Report (1985).

7.0 Compensation Pathway

The Draft provides a compensation pathway for individuals who have been harmed by certain unsafe practices resulting in specific injuries or death. The compensation pathway is difficult to access, is on application by the ACQSC or an individual, and requires the following;

1. The offence must amount to a 'serious failure' of a statutory duty by the Provider or an individual providing aged care services, and there must be a finding of guilt.

2. To be found guilty, the Court must be satisfied beyond reasonable doubt not on the civil test of the balance of probabilities, requiring a higher level of evidence.

3. The offence has to result in a 'serious injury or illness' as defined in the Draft, and the individual must have required 'immediate treatment' for specific injuries or illness for it to be deemed 'serious'. The wording 'immediate treatment' should be reviewed, as in the context of aged care, a person's cognitive and physical complications may mean it is difficult to identify if immediate treatment is required. It may also discourage a Provider from seeking immediate treatment.

4. Rodney Lewis AM, Senior Solicitor, Elderlaw Legal Services, and ACJ Consultant, states 'it is not unusual for a claimant to be required to wait upon a conviction of an offence (to avoid prejudice to the accused person when the facts are litigated and debated in the civil court) before being able to proceed with their civil claim. In the case of aged care injury under the Draft, the resident must await the outcome of the criminal proceedings and if the accused is acquitted, there is no claim for breach of the Act'.

The Royal Commission recommended that an application for compensation may be sought for 'any loss or damage' resulting from the contravention of a civil penalty provision.

8.0 Service Agreement and Individual Enforceable Rights

The current Aged Care Act lists the minimum requirements for the Resident and Home Care Agreements, but the Draft makes no references to any agreement between the aged care recipient and the Provider. Service agreements are important in ensuring the parties to the contract are familiar and understand the products and services to be provided, and should be included in the Act.

Rodney Lewis says that 'since there is little opportunity and an unwillingness of Providers to enter into serious negotiations, the new Aged Care Act should oblige providers to accept fair and reasonable alterations and additions to the contract which have the effect of an equitable balance of power between the parties. This could also be achieved by 'peak body' consultations on a standard set of clauses'.

The Resident and Home Care Agreement should include the following:

1. A clause that includes explicit reference to the Statement of Rights and Quality Care Standards so that the parties agree to the level of services and products to be delivered.

2. Alternative dispute resolution, as the inclusion of a clause which allows for conflict resolution is vital to ensure issues can be dealt with in a timely manner through conciliation and mediation, and if necessary, arbitration, producing a result with which both parties must comply.

3. A clause which allows access to legal support for aged care recipients and their representatives. This will promote quick and efficient resolution of complaints, as the current complaint system to the Regulator may be useful for only systemic issues or issues that need a high level of investigation. A dedicated funded aged care community legal centre would promote education on legal rights and assist with conflict resolution (in informal and formal settings), where aged care recipients and their supporters have access to a multidisciplinary team of legal and health professionals. This process may de-escalate any conflict between the Provider, the person receiving care, and the family, and with the assistance of skilled professionals, the focus will be on appropriate care delivery.

If a service agreement does not incorporate the Statement of Rights, conflict resolution, or access to legal support, an individual's only recourse when they believe their Statement of Rights has been breached is to complain to the regulator, the ACQSC.

Please see Annexure 1 for a summary of aged care complaints received by ACJ, and how a funded Aged Care Community Legal Centre can resolve complaints and improve outcomes.

9.0 Restrictive Practices

The Draft states that the requirements for the consent of restrictive practices will be prescribed in the rules. ACJ supports that the rules should provide that restrictive practices must be authorised by an independent expert following the assessment of the proposed use of the practice. The QLD Public Advocate, John Chesterman, has publicly suggested that an authorisation model managed by clinical experts, which the disability sector currently has in place in some jurisdictions, would ensure the proper considerations are made when deciding to approve the use of a restrictive practice. The current model allows for a wide range of people without any expertise to consent to a restrictive practice on behalf of a care recipient, risking the increase of unnecessary restrictive practices and potential human rights violations.

10.0 Other

1. Auditors and assessors of an individual's care needs should have a mix of skills including a health background.

2. When entering a care arrangement, the support or service plan must be co-designed with the individual and/or their representative. ACRN would like the assessment process to be removed from the Provider.

3. Strengthened transparency of provider usage of allocated funding for specific uses, such as physiotherapy and other allied health funding.

4. Increased probity checks to alleviate concerns of providers restructuring to avoid liability.

5. ACC challenge the current market-led system, which they believe is the underlying cause for the failures of the aged care sector. ACC believe that structural changes to the market are necessary as the current system is driven by economic competition where providers fail or are put out of business if they don't make enough money, but not if they provide poor care.

6. In Consultation Paper No.2 on the Draft, it was proposed that a review be conducted five years after the Act's implementation. Due to the complexity of the legislation and the unknown effects of its provisions, this review period should be reduced to three years.

7. The Draft refers to Australia's obligations under the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities, but does not mention the United Nations Principles for Older Persons. **See Annexure 2**, for the United Nations Principles for incorporation into the Draft.

8. Some of the organisations who jointly formed this submission have penned individual responses to the Draft, which are linked here: Aged Care Crisis Submission, QACAG Submission

Conclusion

We, at Aged Care Justice receive complaints from recipients of aged care services and family members seeking the support of our legal referral services to identify any breach of care. Often they quote the current Charter of Rights, including the right to 'safe and quality services', to 'live without abuse and neglect' and to 'have my complaint dealt with fairly and promptly'. The callers say that their rights have been breached but 'no one is listening', and are advised that the ACQSC has reviewed their complaint and the Provider has now changed their practices so no further action is required. These callers are angry and cannot understand why there are no consequences for the Provider in circumstances where their lack of care has resulted in injury, for example. They feel the Provider repercussions were not proportionate to the injury caused, given the numerous complaints. Will the above callers experience change under this Draft? The Draft increases the promises of improved quality care, and states that an individual has a right to have their complaints dealt with 'fairly and promptly', but what is fair?

The Draft delivers on a range of expectations, however, more must be done to restore public confidence. The Draft lacks reform in key areas such as clinical care, independent community-based complaint handling, pathways to resolution on care issues, and falls short in supporting and empowering the person receiving care.

Annexure 1.

Funded Aged Care Community Legal Centre

ACJ support the objectives of the Draft in promoting 'person-centred care' with a focus on the needs of the older person.

The presumption of capacity in the Draft, whilst promoting autonomy, is problematic in aged care settings, due to misunderstandings on the impact of changing physical and mental health on true decision making. Person-centred decision making may require cognitive ability to consider and balance options, as opposed to merely responding to a question. In reality, decision making in aged care settings includes the recipient, medical and clinical support staff, carers, and families.

Decision making is complex in a changing environment for vulnerable people. Many of our complaints are due to differences in opinion on supported decision making, which causes conflict between the parties and unintended consequences for the aged care recipient. The State Tribunals do not have the jurisdiction or the authority to deal with this issue in a timely manner to decrease conflict, and appointing the Public Trustee may result in increased family conflict due to perceptions that the Public Trustee has insufficient knowledge and history of individual needs.

Legal education on supported decision making, including appropriate use of Powers of Attorney, and a non-adversarial setting for dispute resolution is crucial to promote healthy outcomes for all parties, particularly the aged care recipient. This service must be delivered by an institution totally independent of the aged care sector for impartiality and to increase consumer confidence, so we suggest a funded Aged Care Community Legal Centre.

Given the low consumer confidence in complaint handling and that the Government has not promoted the Royal Commission recommendations for an independent Regulator, or an independent Complaints Commissioner, the Government should support an independent conflict resolution process. A dedicated Aged Care Community Legal Centre can promote aged care rights information and informal mediation to promote early solutions to aged care issues, which prevent escalation of issues and associated harm.

We have included a table on the following page, which provides a summary of the type of complaints received by ACJ, and reveals the need for a funded, independent, aged care legal rights support service.

Aged Care Justice Complaints Summary: October 2020 - February 2024

Aged Care Justice Inc. (ACJ) is a registered charity supporting Australians living in residential aged care or receiving home care, by providing access to legal services, educational material on aged care rights and lobbying for sector reform. ACJ was formed in 2020 by senior legal and clinical professionals to ensure all Australians receive quality aged care services and are treated with dignity and respect. When a person contacts ACJ, we listen to their issue and connect them with a lawyer with experience in aged care issues who will provide a free legal consultation anywhere in Australia. Our panel of firms have agreed to identify the most efficient and economical way to proceed after the initial consultation, which may include pro bono assistance. Our Chair is Sue Williamson, Partner, Dentons. Our joint Patrons are the Honourable Tony Pagone AM KC, a former Federal Court Judge and Chair of the Royal Commission into Aged Care Quality and Safety, and ACJ Founder, Dr Bryan Keon-Cohen AM KC .

Since inception, Aged Care Justice has assisted over 160 complainants (across Australia) wanting to understand their legal rights and seek justice for harm caused to a family member. Many complainants are passionate about reform and justice, as they want to be confident that all vulnerable people will receive quality aged care services in a compassionate and friendly environment.

ACJ has received over 21 complaints and queries in the past month, the most concerning are those alleging major gaps in clinical care, resulting in significant injury or death. It is discouraging that these facilities lacked infection protocols, mismanaged medications, and could not provide appropriate post hospital care or essential aged care services.

Other significant issues are the alleged misuse of Power of Attorney, resulting in banning family and other persons from visiting their loved one in home care or residential care. Family members say decisions made by the POA do not support the best interests of the person receiving aged care services. Increasingly, we are also receiving general questions on legal rights with respect to the aged care contract, and the right to change aged care facilities. Most matters have been resolved without the need to commence legal proceedings.

Please see next page for Complaint Summary Table

ACJ Complaint Summary Table

Date	Complainants by State/Territory	Home Care (HC)/Residential Facility (RF)	Alleged Issues (HC)/Residential Facility RF)
1 January 2024- February 2024	**Complainants: 22** Victoria 50% WA 15% Queensland 5% Tasmania 10% NSW 10% SA 5% ACT 5%	**Overall** 27% HC 60% RF 13% other	**Alleged Issues** RF . Wrongful Death due neglect and mismanagement of existing medical condition, and lack of response to family continual complaints about care issues. . No proper post -hospital care management resulting in permanent injury. . General neglect and disrespect for personal care decisions. HC . Unreliable paid carers, that impact the family carer, who must provide the care. . Package excludes necessities, to enable person to stay at home. HC and RF . Misuse of EPA resulting in family conflict and accusations that decisions are not in the best interest of the aged care recipient. . Handling of complaint by ACQSC was unfair, as there was no recognition of the long-term injury caused to the aged care recipient.

Table continues on next page

2023	**Complainants: 70** Victoria: 32% WA: 14% Queensland: 24% Tasmania: 3% NSW: 10% SA: 17 % ACT 0	18% HC 72% RF	**Alleged Issues** . Wrongful death due to repeated falls. . Medical negligence, medication issues and lack of infection control. . Chemical restraint. . Additional fees – excessive, no proper review of services received. . Restricting visits to person receiving aged care services. . Misuse EPA by family members – role of facility? . Handling of complaint by ACQSC was unfair, as there was no recognition to the long-term injury caused to the aged care recipient.
2021- 2022	**Complainants: 68** Victoria: 43% WA: 9% Queensland: 18% Tasmania: 3% NSW: 18% SA: 6% ACT: 3%	100% RF HC complaints service started October 2023	**Alleged Issues** . Wrongful death, and not managing existing medical condition. . Poor Medical/Clinical care in treating serious health issues. . Chemical restraint without consent. . Neglect in dealing with injuries . Contractual issues bundled fees for limited services. . Banning or denied access to aged care recipient in residential care and Home Care. . Decision making by Public Trustee questioned due to lack of knowledge of person receiving care. . HC: non delivery of services and not allowed to allocate funds for necessity (mattress) . Ostracised after complaining to ACQSC. . Handling of complaint by ACQSC took too long, decision was unfair and sympathetic to the Provider.

Annexure 2.

The United Nations Principles for Older Persons

Below is a list of key principles to be referenced in the Draft.

- **Independence**

5. Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.

6. Older persons should be able to reside at home for as long as possible.

- **Participation**

7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

- **Care**

10. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.

11. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.

12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.

13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.

14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

- **Dignity**

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

18. Older persons should be treated fairly, regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

The organisations behind this submission would like to thank the Department of Health and Aged Care for considering our submission. The Aged Care Act presents the most significant opportunity to change the aged care system. We would therefore like to meet with the Department before the implementation of the Act to further discuss our reform proposals so we can work together in effecting real change.

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