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Exposure draft Aged Care Bill 2023

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Thank you for the opportunity to comment on the Exposure Draft of the Aged Care Bill 2023 (new Act). Our comments, detailed below, do not directly align with the consultation paper but rather aim to highlight identified issues from the perspective of our members, who provide care and support services to older Australians.

For the sake of expediency, we only focus on areas where we believe the new Act requires improvement or revision to prevent potential market failure or other unintended consequences. However, we commend the significant effort involved in developing the draft legislation and fully support the objectives of the new Act to keep those receiving funded services at the heart of the Aged Care system in Australia.

About us

Founded in 1978, the Aged Care Industry Association is a member-based organisation committed to promoting the interests of aged care providers within the care economy. Focused on the financial and operational viability of providers, our objective is to secure a future in which everyone receiving aged care has access to a diverse array of choices that respect and accommodate our rich cultural heritage, while ensuring that all services consistently uphold the highest standards of excellence.

At the heart of our Association is a spirit of collaboration, along with a strong commitment to acknowledging and elevating the challenges our members face, many of whom are small to medium-sized organisations. We actively utilise various channels, including public platforms, to highlight the issues that are raised with us. Many aged care providers, both within and outside our membership, feel sidelined by the rapid pace of reforms. It is their voices we seek to have heard and considered as part of this submission and in the broader conversation on the future of aged care.

Section 120 Registered provider duty

Define what constitutes 'reasonable and practicable' efforts in aged care settings

Under this section, a registered provider must ensure, to the extent reasonably practicable, that their actions do not negatively impact the health and safety of individuals receiving funded aged care services. 'Reasonably practicable' is defined as actions that are feasible and appropriate, considering factors such as the likelihood and potential severity of adverse effects, the provider's knowledge or what they should reasonably know about preventing such effects, the availability and suitability of prevention methods, and the rights of individuals as outlined in the Statement of Rights.

Although this duty largely reflects the current regulatory environment, there is concern about how this section will be interpreted in legal proceedings. While "reasonably practicable" has been subject to judicial interpretation, particularly in occupational health and safety legislation, it does introduce a degree of vagueness and subjectivity where providers facing similar situations may end up receiving significantly different penalties.

For many providers, the question in the back of their mind would be around their culpability under this section should circumstances such as the COVID-19 pandemic recur, where they were often subject to the mandates of external decision-makers during the pandemic response yet left to bear the responsibility for any adverse outcomes for the people in their care.

Recommendation 1: Consult with aged care providers to clearly define 'reasonable and practicable' efforts in a care setting, aiming to establish specific assessment criteria in subordinate legislation that considers the nature of the service, characteristics of care recipients, and the size and resources of the provider.

Proposed penalties are oppressive

There is also significant concern regarding the penalties for breaches of this duty, which vary widely and are significantly high, contrasting sharply with similar regulatory systems, such as the National Disability Insurance Scheme (NDIS), which relies on jurisdictional powers of prosecution in criminal cases of alleged egregious harm.

Fines range from 150 penalty units ($46,950) to 9,500 units ($2,973,500) and or 5 years in prison for fault-based offenses.

It is difficult to perceive the penalties at the upper end of this range, including the prospect of imprisonment, as anything but oppressive. While we accept that penalties will only apply if someone is convicted of an offence, our concern is that the mere inclusion of such a harsh regime will prompt some providers to exit the sector and lead others to become far more risk-averse, denying services to people who may be perceived as constituting a regulatory risk due to underlying health or behavioural issues.

Recommendation 2: The new Act should avoid incorporating criminal penalties. Additionally, a comparative analysis of penalties across similar legislative frameworks should be conducted and published for further consultation.

Strict liability Offences

In this section and others, the draft legislation introduces several offences categorised as strict liability, where the prosecution is not required to prove the accused's intent to commit an offence; it merely needs to demonstrate that the offence took place.

From our perspective, imposing penalties on an organisation or individual without establishing misconduct, whether intentional or through omission, in a care setting is contentious and unfair.

Our understanding is that, as it is currently drafted, the legislation would expose anyone providing funded care or support under this Act to the risk of prosecution for any harm that occurs, regardless of whether it is their fault. This approach gives little consideration to external factors beyond the

provider's control, such as instances where an individual has multiple interactions within the Health and Aged Care system, or situations where the actions of the individuals themselves pose a risk to their own well-being.

Recommendation 3: The new Act should exclude Strict Liability offences.

Section 121 Responsible Person Duty

Section 11 outlines who qualifies as a 'responsible person' within a registered provider, covering key roles from executive decision-makers to registered nurses overseeing nursing services, as well as anyone managing day-to-day operations. It also explicitly includes members of the governing body.

The broad scope of this definition raises concerns, especially for those whose influence is confined to specific areas of operation. The current draft mandates that all responsible persons meet a comprehensive due diligence requirement, covering the entirety of the provider's responsibilities. This extensive obligation could potentially drive away essential nursing staff and other sector workers.

Additionally, we fully endorse the viewpoint of the Australian Institute of Company Directors (AICD) as expressed in their February 19, 2024, submission[1]. They highlight that responsible persons are already bound by duties under the Corporations Act 2001 or ACNC Governance Standards, necessitating actions in the organisation's best interest with care and diligence. Directors also face workplace health and safety obligations that include personal and criminal liability for violations. The Aged Care Code of Conduct further establishes behaviour standards and penalties for aged care responsible persons, including civil penalties and possible banning orders. Despite recent governance reforms aiming to boost accountability without adding new duties, the AICD views the proposed duty as creating an unprecedented personal liability regime for aged care directors, unmatched in other human service sectors. This, they argue, renders the new duty superfluous and excessively burdensome due to the comprehensive existing regulatory frameworks.

Recommendation 4: Remove or refine the section concerning the responsible person's duty to better align with section 120, focusing on the provider's duty fulfillment, wherein a responsible person is held accountable solely for their specific role in any failure to meet this duty.

The new Act should be delayed and include the new support at home program

Incomplete Information

The exposure draft of the Act is currently incomplete, missing sections and lacking detailed information on the rules providers will need to successfully implement and operationalise the new legislation. The longer it takes for this information to become available, the more challenging, if not impossible, it becomes for providers to fully prepare and ensure compliance with an Act which is proposed to start on 1 July 2024.

1 AICD submission on Aged Care Bill 2023 Exposure Draft, available here.

Throughout the reform process, we have observed legislative changes being described as 'aspirational,' especially when providers find it challenging to comply with new requirements due to uncontrollable factors, such as the tight labour market. While we accept and appreciate the Commission's commonsense regulatory approach in such situations, for the public to trust that the new Act represents a paradigm shift in aged care, it is essential that there is confidence that providers will be able to comply with the new Act and all it entails as soon as it is enacted.

Recommendation 5: Delay the proposed 1 July 2024 start date to ensure sector readiness.

Need for Further Changes Following Consultation

The consultation process is expected to identify numerous issues that may require further consideration and testing.

A frequent criticism of the current consultation process is its one-sided nature, characterised by a flow of information to the Department of Health and Aged Care, with little discussion or new information coming back. To ensure the development of the new Act is robust and meets the needs of older Australians, we believe it is crucial to have a further process once feedback has been received and a complete draft of the new Act and its subordinate legislation is available. This should occur before the Bill is introduced into Parliament.

Recommendation 6: Conduct a further consultation process after feedback is received and a complete draft of the new Act and its subordinate legislation is prepared.

Recent Reforms Need to be Evaluated

In a similar vein, the past 18 months have seen numerous reforms, including the introduction of AN-ACC, Care Minute Targets, mandatory 24/7 Registered Nurse coverage, the expansion of the Serious Incident Response Scheme, a new code of conduct, a star ratings system, new board governance requirements, and consumer advisory boards, all of which are expected to be incorporated into the subordinate legislation of the new Act unamended. Yet, many of these initiatives are still maturing and require further analysis to evaluate their effectiveness in meeting their objectives. For example, although the Care Minute Targets amongst other things have led to a reshaping of the aged care workforce, with a reduction in Enrolled Nurses and Allied Health professionals, the impact of this on the quality of care remains inadequately understood. Therefore, these settled pieces of legislation should also be included in the overall consultation process.

Recommendation 7: Conduct a comprehensive assessment of recent aged care reforms to verify their effectiveness before incorporating them unamended into the new Act.

The new Act will affect HCP and CHSP providers

The launch of the Support at Home program has been deferred to 2025. Nonetheless, current Home Care Package (HCP) and Commonwealth Home Support Programme (CHSP) providers are still impacted by the proposed legislation, including provider obligations, duties, and the introduction of a single-entry pathway for care recipients. While the new Act as currently drafted significantly raises the risk profile for all providers, the new duties and obligations are likely to have a more adverse effect on CHSP providers, who are already exiting the sector in large numbers. Until the transitional

arrangements are clarified and the potential impacts assessed, there is a risk of significant service disruption to a program that supports over one million people.

Recommendation 8: Delay the introduction of the new Act to align with the launch of the Support at Home Program, allowing for a smooth transition for HCP and CHSP consumers.

Risks of Rushing the Legislation Process

Successive governments have, in our view, taken a practical approach by implementing the Aged Care Royal Commission's recommendations in stages. This strategy has facilitated immediate improvements for care recipients while granting the necessary time for the development of more complex changes. As we approach what could be seen as the culmination of the Royal Commission into Aged Care Quality and Safety (Royal Commission) efforts, we argue that the risks associated with rushing to meet the 1 July 2024 commencement deadline far outweigh the benefits of taking the necessary time to ensure that the legislation and its rules are fully developed.

This includes reaching a broad consensus on the sector's readiness to adhere to the legislation's intent and substance from the start.

Recommendation 9: Ensure the new Act, including subordinate legislation, is fully developed prior to its introduction into Parliament.

The Royal Commission definition for aged care should be included

Royal Commission recommendation 1, 2a suggests: "The new Act should define aged care as support and care for people to maintain their independence as they age, including support and care to ameliorate age-related deterioration in their social, mental, and physical capacities to function independently."[2]

This recommendation ought to be incorporated into the new Act, as doing so will recognise the importance of the supply side of aged care service delivery. It underscores the necessity for care and support services to be in place to achieve the desired outcomes of our aged care system, such as preserving independence, mitigating age-related decline, and ensuring people can function independently as they age.

While the new rights-based Act sets a quality benchmark for care, without a focused and simultaneous emphasis on the supply side of service delivery, there is a risk that the objectives of the new Act become more aspirational than achievable.

Recommendation 10: Include a definition of aged care in the new Act.

The principles of the Act should include reference to Market Stewardship

The Royal Commission identified shortcomings in the government's approach to managing the aged care services market, characterised by a lack of active management, ineffective control over market entry and exit, and insufficient response to changes in demand and market conditions.

2 Royal Commission into Aged Care Quality and Safety Final report Volume 1, page 205

3 Ibid. Volume 2, page 20

Although there were no specific recommendations regarding Market Stewardship in the final report, the principles of the new Act should recognise the government's crucial role as the aged care funder and regulator in ensuring that the aged care services market can achieve legislative and policy objectives.

The principle should be drafted in a way to clearly articulate the government's market stewardship responsibility, including a positive duty to address thin markets and support vulnerable and marginalised users of Aged Care Services. Additionally, it should acknowledge that proactive market stewardship in these circumstances involves co-design processes with providers and other stakeholders to ensure the existence of adequate funding, referral processes, and a supportive regulatory environment. This is essential to mitigate the perceived risk of providing care to people with complex needs and behaviours.

Recommendation 11: The principles of the new Act should explicitly recognise the government's market stewardship role.

Interest Should be Paid on Grant Reimbursements

While details on Chapter 4—Fees, Payments, and Subsidies have not yet been released, consideration should be given to including a requirement in this chapter to mandate the payment of interest on grant applications where a grant is used to reimburse providers for expenses that have already occurred.

Recent examples where there have been significant delays in either the processing time of grant applications or the time between when an expense was incurred, and the grant round opening include the COVID-19 Aged Care Support Program Extension Grant and the Fair Work Commission Commonwealth Home Support Programme Base Funding Grant.

This initiative would incentivise timely processing of grants and mitigate the financial strain many providers experience when waiting many months to be reimbursed for expenses they have already incurred.

This approach would also ensure fairness by compensating for the time value of money and acknowledging the economic impact of administrative delays.

While the Commonwealth Supplier Pay On-Time or Pay Interest Policy (RMG 417)[4] excludes grant payments we note it operates with similar principles in mind.

Recommendation 12: Interest should be paid on grant applications when grants are used to reimburse providers for already incurred expenses.

Section 172 Appointment of Advisory Council members

Providers and Responsible Persons excluded from membership

This section gives the Minister considerable flexibility to appoint individuals deemed most suitably qualified to the Aged Care Quality and Safety Advisory Council. Thus, it appears inconsistent for the legislation to explicitly exclude a provider or a responsible person of a provider from council membership.

At present, there is no such exclusion, and historically, providers have served as council members. This restriction contradicts the findings in the Report of the Independent Capability Review of the Aged Care Quality and Safety Commission by David Tune AO PSM. Tune noted, " Similarly, I have heard and agree that the Advisory Council would benefit from more members with provider experience to ensure that its advice is well informed about the issues that impact providers. In addition, as outlined below, it is important that Advisory Council members have direct access to stakeholders' views including providers."[5]

Recommendation 13: We strongly advocate for the removal of Section 172(4).

A Sector Transition Fund should be established

If the new legislation is enacted in 2024, we believe there should be a transition period of at least twenty-four months and would welcome the opportunity to be involved in further discussions on the timing of commencement for various elements of the new Act as foreshadowed in the consultation paper.

We also believe a Sector Transition Fund, modelled after the $149 million NDIS Sector Development Fund[6], should be established. The NDIS Fund successfully supported the disability sector's move towards the NDIS by educating people with disabilities and their families about new support options, enhancing the capacity of service providers, expanding the workforce, funding innovative approaches to service delivery, and supporting research to gain deeper insights into the NDIS market.

Recommendation 14: Create a Sector Transition Fund to aid in organisational transformation, thereby enhancing the quality and accessibility of aged care services. Focus on education, capacity building, workforce expansion, and the adoption of innovative service delivery models.

We trust this submission proves helpful and look forward to collaborating on future versions of the new Act and associated legislation.

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4 Commonwealth Supplier Pay On-Time or Pay Interest Policy (RMG 417) can be found here.

5 Final report independent capability review of the aged care quality and safety commission, page 80

6 Information about the NDIS Sector Development Fund can be found here