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RE: Aged Care Act Rules – Stage 3 Consultation – Provider obligations

Thank you for the opportunity to comment on the Stage 3 consultation draft of the *Aged Care Act 2024* Rules.

Royal Freemasons' Benevolent Institution (RFBI) is a not for profit aged care provider that operates 22 aged care homes and six home care services across NSW and the ACT. Through our aged care services, we currently support approximately 2,500 clients each year. We also operate 20 retirement villages across NSW and the ACT that accommodate over 1500 older Australians.

RFBI supports the Governments aged care reform agenda, particularly the measures that ensure appropriate long term sustainable funding of service delivery and that individuals are at the heart of service delivery.

In considering the draft Rules we have considered how each proposed Rule might lead to better outcomes for individuals and then what information the Commonwealth needs to (a) ensure the protection of older Australians in our care, and (b) to plan for the future. We then considered the practicalities of implementation and any unintended consequences.

For many sections, the journey from requirement to individuals' benefit is long and the link to better outcomes, tenuous. We have also found these draft Rules to contain requirements for providers to collect significantly more information, for which there is no discernible benefit for any stakeholder (individuals, providers nor the Government).

Specifically, we submit that:

1. **Implementation Practicalities**: There are unintended consequences for stakeholders, particularly regarding the prohibition on pre-admission contracting for HELF services, which infringes on residents' rights to contract as they might have before admission.
2. **Information Collection**: The draft rules continue the trend of Commonwealth agencies collecting substantial information with unclear benefits to consumers or providers. The purpose and use of this information by government agencies are not well-defined.
3. **Public Policy Overreach**: Some rules appear to overreach the Objects of the Act, reflecting an excessive regulatory approach.
4. **Aged Care Workers**: The broad characterization of provider responsibilities for aged care workers, including casual and agency staff, creates impractical obligations, especially regarding training and recording personal details.

5. **Conditions on Registration**: Some sections are overly detailed, resembling procedures rather than conditions, which could place providers at regulatory risk. For example, incident management and complaints procedures require alignment with both registration conditions and Quality Standards.
6. **Vaccination Requirements**: The addition of vaccinations to the list of required offerings impose unnecessary costs on providers, as well as additional risk, as not all residents or workers are recommended for all vaccinations.
7. **Reporting Requirements**: Some reporting requirements are unnecessarily detailed and onerous, with unclear benefits to stakeholders.

In the following pages, we have outlined our concerns in more detail along with our recommended changes.

Please note that in making this submission we have not commented on those clauses which have been carried forward from the (current) Age Care Principles authorised by the *Aged Care Act 1997*.

If you wish to discuss or seek clarification of this submission, or any the concerns and recommended changes provided, please do not hesitate to contact me.

Yours faithfully

Frank Price
Chief Executive Officer

Section

Definition - individual's room, in an approved residential care home

Concern/recommendation

The definition would be improved by referring to shared spaces in the room. This recognises that there are spaces within the walls of the room that are in the 'resident's room' but are not exclusively theirs to access. Residents in shared rooms, regularly seek to determine their 'territory' within the room.

Section

Definition - representative, of a consumer: see section 6-10

Concern

The Act is clear regarding how supporters are identified and registered and their role.

Section 6-10 creates a (post 30 June 2025) category of 'representative'. This addition, particularly clause 6-10 (1) (b) subverts the role and empowerment of the individual by

(a) creating a role not envisaged in the Act and

(b) permitting the authority of a person to be (in practice) a supporter based on their assertions aided and abetted by the provider.

It is noteworthy that the role of representative was removed from the earlier versions of the proposed Act.

Recommendation

Delete the role of representative as set out in section 6-10.

Section

7-22 Serious injury or illness

For the purposes of the definition of serious injury or illness in section 7 of the Act, each of the following is a serious injury or illness:

(a) malnutrition;

(b) dehydration.

Concern

Both malnutrition and dehydration have levels of seriousness ranging from mild to very serious. Both diseases have tools that measure the seriousness of the condition. eg the MNA validated nutrition screening and assessment tool.

Recommendation

The definition be revised to reflect the appropriate level that would constitute 'serious.'

While the intent and purpose of the inclusion of malnutrition and dehydration is appropriate, it is worth noting that neither is an injury nor illness. (AIHW 2010)

Section

Code of Conduct

14-5 Requirements

When delivering funded aged care services to individuals, I must:

(a) act with respect for individuals' rights to freedom of expression, self-determination and decision making in accordance with applicable laws and conventions.

Concern

It is doubtful that many people in Australia can articulate the applicable laws and conventions. Creating such a requirement adds confusion and provides no guide to providers or workers. It also creates no benefit to individuals. Its continued existence in the Code creates an unnecessary regulatory risk.

The other requirements in the Code are understandable and are reinforced throughout the Act and draft Rules.

Recommendation

Delete *'in accordance with applicable laws and conventions.'*

Section

Chapter 1, Part 6, Division 2 – The Standards

Concern

The supporting document (page 11) says

- *Please note: The Actions are not included in the Rules, as they are examples of how the provider can demonstrate conformance with the legally enforceable Outcomes of the Strengthened Quality Standards contained in the Rules*.

This note reflects the appropriate and universally accepted stance that standards should be about outcomes and leave the 'how' to the provider of the service.

However, this stance is not carried forward into some conditions on registration eg incidents and complaints, where the 'how' is frequently made a requirement and in doing so creates the risk of leaving the reader with the impression that one size fits all and inhibiting process improvement in the face of a condition on registration that requires the provider to have a continuous improvement plan.

Recommendation

The wording of the Quality Standards remains as drafted and any required actions that address process be deleted from the Condition on Registration.

This topic is explored later in this submission.

Section

153-15 Other vaccinations

For the purposes of paragraph 153(2)(c) of the Act, the following vaccinations are prescribed:

(a) a pneumococcal vaccination;

(b) a shingles vaccination.

Concern

These vaccinations are in addition to those set out in the Act. They must be provided at the providers cost to individuals and staff and the provider is required to promote the benefits of the vaccination.

The reference to the Australian Immunisation Handbook in s153-10 is appropriate. However, it should be clear in any material and reporting of vaccination rates that not all individuals and 'service staff' are members of a cohort for whom vaccination is recommended.

In fact, promoting the benefits of a specific vaccine to a person who is not part of the clinically recommended cohort creates a risk for the provider and the person.

Recommendation

This section should include a clause that the vaccination must be offered free of charge where the vaccination of the individual or worker meets the clinical guidelines for vaccination under the National Immunisation Program.

Section

154-10 Records about service staff—influenza vaccinations

154-15 Records about service staff—COVID-19 vaccinations

Concern

The description of a category of a person engaged in an approved residential care home (home) as 'service staff' appears exclusively in relation to vaccinations. There is no definition.

The total number of service staff in relation to the approved residential care home lacks clarity and utility as a concept. During a year, the number of staff, in all categories, who are engaged in the home may well be 150% + of the base number of workers in all categories given staff turnover and the high utilisation of casual staff. This situation has been exacerbated recently as providers strive to meet care minute targets.

The staffing of a RACF at any point in time will include workers (in all work types) who are casual employees engaged directly or through a labour hire arrangement (agency staff). These engagements may be once off or intermittent. Many of these workers will be engaged by multiple employers in any month. Seeking and recording vaccination status (where vaccination is not required by law) is onerous. Any aggregation of the numbers will overcount due to multiple employers.

Recording the 'raw' number and providing such information to the system governor or ACQSC is of no utility because it pays no heed to identifying the characteristics of the workforce. It is a crude measure.

The reference to 'if any' regarding 'the registered provider's influenza vaccination scheme' (s154-10 (b)) is confusing given that s153 of the Act requires the provider to offer the vaccination and for free.

Recommendation

(a) 'Service staff' should be defined
(b) The section should be clear that while the provider is required to record the number of staff who informed the provider, they have received a vaccination, it is not mandatory for staff to inform the provider. This is relevant because not infrequently, the take up rate of vaccinations reported by the Department is seen to reflect on the provider performance
(c) The recording of the number of staff who informed the provider about their vaccination status should be about permanent employees
(d) Delete: 'if any' in s 154-10 (b)

Section

154-20 Records about individuals receiving residential care—influenza vaccinations

154-25 Records about individuals receiving residential care—COVID 19 vaccinations

Concern

The requirement to record and report along the lines proposed (individuals during a year), provides no useful information regarding the sector as a group or a single home. This is because of the 30%+ exit rate in any year and is influenced by the (decreasing) length of stay and variable case-mix between homes.

The count of 'individuals **who informed** the registered provider' is unnecessary regarding vaccinations organised by the provider. In this case providers will know and not be required to be informed by the individual. While this may seem a nuance, the increasing regulatory requirements enforced by the potential use of civil penalties demands precision in the requirements.

The benefit is found in recording an individual's vaccination status and support for vaccination where that is clinically recommended.

Recommendation

(a) If public benefit can be found in reporting vaccination rates there should be a census date.
(b) An individual's vaccinations must be recorded in their care documentation. We expect that now.

Section

154-205 Requirements for records of complaints and feedback

(1) For the purposes of paragraph 154(a) of the Act, each of the following kinds of records are prescribed kinds of records that the registered provider must keep and retain:

(a) complaints and feedback received each year;

(b) the nature of complaints and feedback;

(c) the action taken to resolve complaints and feedback;

(d) responses provided to individuals about their complaints and feedback

(e) any improvements made by a registered provider in relation to complaints and feedback;

(f) an evaluation of the effectiveness of the actions taken and their related outcome in relation to each complaint and feedback;

(g) a record of the number of days taken to resolve each complaint and feedback;

(h) the education and training that has been delivered to the staff of the registered provider in relation to each complaint and feedback.

Concern

This section is linked to the (later) section requiring detailed (line item) responding to complaints. The section paints a picture that reflects a thought that one size fits all when at an operational level some complaints are more serious than others, notwithstanding every complaint should treated seriously.

The recording requirements mix records about complaints as a collective and as individual complaints.

Most of the requirement are those one would expect to see in a complaints management system that complied with the Quality Standards and the internationally recognised ISO standard for complaints management. The Health Complaints Commissioner (Victoria) standard is a contemporary model following a complaint. The Commissioner's standard 'The health service provider regularly analyses complaint data to identify potential trends and uses analysis to inform actions to continuously improve the quality of their health service' provides an example of an easily understandable requirement.

The requirements must also recognise a decision that a comment or statement falls into the category of complaint or feedback is highly subjective.

It should also be noted that while complaints management approach typically accepts the complaint as made out, it does not follow that is always the case following review.

Recommendation

S154-205 (1) is redrafted to provide clarity and remove requirements that are germane to a complaints management system.

The requirements should reflect those of the Aged Care Quality Standards.

Section

154-705 Records about members of a governing body with clinical care provision experience

(1) (b)the details of those members' experience

Recommendation

Insert (after experience) 'that qualifies him/her for this category'

Section

154-1120 Records of aged care workers

A registered provider must keep, and keep up to date, a record for each aged care worker of the provider that includes the following information and documents:

(a) the worker's full name, date of birth and address;

(b) [to be drafted…;

(c) how the provider has ensured that the worker:

(i) has appropriate qualifications, skills, or experience to provide the funded aged care services that the registered provider delivers to individuals (see section 152 35 of this instrument); and

(ii) is given opportunities to develop their capability to provide those services (see paragraph 152(d) of the Act).

154-1140 Information to be recorded in the Government Provider Management System [transitional and full implementation periods]

(1) (a) the information mentioned in paragraphs 154 1110(a) and 154 1120(a);

Concern

This section links to a later section requiring the provider to report worker personal details through GPMS.

Aged care workers address – While no single law explicitly mandates an employer to record an employee's address, various regulatory obligations effectively make it a standard requirement in employment practice. Typically, there is a cogent reason. However, there is no reason why the aged care laws should require a provider to record an employee's address and in doing so create a regulatory obligation. An employee's address is not relevant. This is further confounded by the fact that employees routinely do not notify changes of address and the considerable effort to input to GPMS (see next paragraph).

The Rules further provide that the provider who has collected the address is required to provide that information to the System Governor through GPMS. There is no cogent reason why the Department should hold personal information provided without the consent of the worker.

The retention of this information is contrary to the spirit of the privacy laws in that the Commonwealth is collecting personal information for which it has no lawful use.

There would be considerable effort in updating these employee records on GPMS and in any event the dataset will be inaccurate because the typical employment contract does not require an employee to notify a change of address.

We suggest that this proposal regarding collect personal details and the role of GPMS is more appropriately discussed in the consultation 'A national registration scheme to support personal care workers employed in aged care.

It cannot be left unsaid that some employees who do not provide addresses do so because they fear for their safety.

Recommendation

(a) The requirement for the employer to record an employee's personal information is removed from the Rules because it is unrelated to the Objects of the *Aged Care Act 2024*.
(b) The requirement for an employee's personal information to be reported to the System Governor through GPMS be deleted except for information about responsible persons that is germane to their role.

Section

156-5 Access to individuals

(2) … a requirement is that a registered provider must allow and facilitate access (whether physically, by visual link or other reasonable means requested by the individual) by a supporter of an individual … at any time requested, or consented to, by the individual.

Concern

We support the change introduced in the draft Rules that references 'requested by the individual.' However, the requirement that access by a supporter must be permitted at any time creates several risks including the safety of other individuals and workers at particular times. This is specifically true in evenings when most residents are 'settled in for the night' and worker/resident ratios are lower.

In the general narrative, government agencies refer to the care home as the resident's home as if that confers property rights such as consenting to entry. This is not the correct proposition and the laws relating to trespass and the obligations of a property owner remain in situ.

Clause 24 of the Act (recognising the rights and freedoms of other individuals, including aged care workers of the registered provider and other individuals accessing funded aged care services) is relevant in the context of whether entry will be granted albeit our starting proposition is that while entry is not a right it should not be unreasonably refused.

Recommendations

Insert – 'a provider must not refuse to facilitate access such as visual link without reasonable cause'. Note: there is no statutory requirement for a provider to have systems that support visual links.

Insert – 'A provider may refuse physical access to the home at any time between 7.00 pm and 7.00 am with reasonable cause.'

Insert – 'a provider may not impede contact other than physical access between 7.00 pm and 7.00 am without reasonable cause.'

Section

Part 10—Management of incidents and complaints
Division 1—Incident management
Division 2—Complaints, feedback

The Act provides that the provider must implement and maintain an incident management and complaints management systems in accordance with any requirements prescribed by the Rules.

The Act sets out which aspects are to be covered by Rules.

Concern

The Rules about each system are quite detailed and can be characterised as procedural in construct to the extent that they have the potential to inhibit process improvement. We note that having a commitment to continuous improvement and having a continuous improvement plan is a Condition of Registration in the Act (s147).

The level of detail is unnecessary given the requirements of the Aged Care Quality Standards which focus on outcomes for individuals and similar requirements that are internationally recognised through International Standards Organisation standards. Characteristics of complaints and incident management systems are well established in health and aged care around the world. There is no value created by 'reinventing the wheel' in the Australian aged care sector by importing procedural content into the Rules.

Some of the narrative leading into the introduction of the Bill pointed to including topics that are in the Aged Care Standards and the Aged Care Principles into the Act for the purpose of creating a penalty regime for failure to meet specific requirements. At no time was it suggested that a provider be subject to two (different) sets of requirements regarding the same topic.

We note with concern page 5 of the supporting document which says;

'*Some conditions of registration complement the requirements of the Quality Standards. For example, the condition of registration on complaints, feedback and whistleblowers applies to all registered providers, and prescribes further details than what is in the Quality Standards.* ***A provider should reflect both requirements in a single complaints and feedback procedure to meet conditions of registration.***'

The suggestion that the Conditions prescribe 'further details' is misleading. In fact, the Conditions impose additional requirements.

It seems incongruous that there are two sets of requirements for the same topic and those requirements are enforced by the one body.

The logical conclusion is that a provider could be found compliant with the Quality Standard and non-compliant with the Condition because there is a lower test for compliance with the Standards. We note that the Standards have been subject to rigorous review over the past two years by experts and all stakeholder groups. The same cannot be said regarding the additional process requirements set out in the draft Rules.

Recommendation

(a) The Rules are redrafted to require headline characteristics only
(b) The provider requirement for compliance with the Condition on Registration should be compliance with the Aged Care Quality Standards or an internationally recognised complaints or incident management standard
(c) The Rules should be drafted as performance-based regulation that prescribes the outcomes to be achieved rather than focusing on the step-by-step processes to which providers must comply. This allows providers the flexibility to take different (and optimal) approaches to achieving outcomes or performance targets[1]

[1] https://www.industry.gov.au/sites/default/files/2019-01/industry-officers-guide-to-regulation-reform.pdf

Section

166- 210 Requirements for reporting information relating to complaints and feedback management…

…a registered provider must give a report about the management of complaints and feedback (the complaints and feedback management report) to the System Governor and the Commissioner within 4 months after the end of the reporting period for the registered provider.

The subsequent sections require the provider to provide detailed information about each complaint and feedback received.

Concern

The provision of the detailed information in the form required will created considerable work in system redesign and data capture.

There is no compelling reason why the regulatory authorities should routinely receive information about each complaint or piece of feedback.

Recommendation

Remove requirement for providers to provide detailed information about each complaint and feedback received.