



3 November 2021

Committee Secretariat
Senate Standing Committees on Community Affairs
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Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Committee Secretariat

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

Thank you for the opportunity to provide feedback on the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (the Bill). Aged and Disability Advocacy Australia (ADA) appreciates being consulted on the potential introduction of this framework.

About ADA Australia

ADA is a not for profit, independent, community-based advocacy and education service with nearly 30 years' experience in informing, supporting, representing and advocating in the interests of older people, and persons with disability in Queensland.

ADA also provides legal advocacy through ADA Law, a community legal centre and a division of ADA. ADA Law provides specialized legal advice to older people and people with disability, including those living with cognitive impairments or questioned capacity, on issues associated with human rights, elder abuse, and health and disability legal issues related to decision-making.

Review of the Bill

ADA has reviewed the Bill and provides the following for the Secretariat's consideration.

Threshold issue: a replacement Act that embeds a human rights framework

The findings of the Royal Commission into Aged Care Quality and Safety (the **Royal Commission**) were unequivocal: *"A new Act is needed as a foundation of a new aged care system."*¹

The Royal Commission determined that in order to achieve the broad systemic reform necessary to provide a high-quality system of care, support individual choice and human rights, and to comply with Australia's obligation pursuant to the International Covenant on Economic, Social and Cultural Rights ratified by Australia in 1972,² legislative overhaul including full replacement of the *Aged Care Act 1997* (the **Act**) is required.

¹ Aged Care Royal Commission, Final Report Volume 1: Summary, pg 78 section 1.3.1, <<https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>>.

² Ibid, 79.

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A new act enshrining a human-rights centric framework is needed to provide a foundation for an aged care system which provides high-quality care standards that meet community expectations.

With respect to the current Act the Royal Commission stated in its final report *“we are convinced that a new Act is needed...The Aged Care Act 1997 (Cth) focuses on service providers and the allocation to them of rationed subsidies to fund certain services for limited numbers of people. The new Act must focus on the safety, health and wellbeing of older people and put their needs and preferences first.”*³

ADA strongly supports the Royal Commission’s recommendations. With respect to the Bill, whilst we are pleased to see the introduction of legislation that seeks to implement some of the Royal Commission’s recommendations, we question why a full replacement act centring a human-rights framework has not been introduced. The new act should set out the legislation’s objectives and guiding principles, which would inform facilitative arms of the act developed in alignment with these principles, such as the system of funding. Doing so would ensure that each function of the act ensured practices that are in keeping with the objectives and guiding principles.

Adoption of a piecemeal approach to legislative reform is inefficient and will not achieve the outcomes or fundamental reforms identified by the Royal Commission. It does not allow the reader the opportunity to consider the proposed changes in conjunction with human-rights centred principles set out in the legislation. This issue is compounded by the limited period of public consultation permitted by the Committee to receive feedback for this inquiry.

Schedule 1 – Residential aged care funding

ADA supports the introduction of the Australian National Care Classification (**AN-ACC**) funding model, which will replace the current Aged Care Funding Instrument as the residential aged care subsidy calculation model from 1 October 2022.

The introduction of the AN-ACC is supported by recommendation 120 made by the Royal Commission. However, the drafting indicates that the AN-ACC model is centred around service needs for care and supports, and does not provide for other necessary supports associated with a person having access to social and leisure activities.

The Royal Commission found that the current model of care often did not meet community expectations in providing for a person’s social, emotional, diversity and cultural needs.⁴ The report states:

*“Aged care is much more than the sum of tasks that meet an older person’s biomedical and basic daily living needs. The system of aged care that we propose will support people to live well into old age. People receiving aged care must be encouraged and supported to continue to enjoy the rights of social participation which are available to members of society generally.”*⁵

ADA has concerns that these critical elements which contribute to high-standard care are not

³ Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3A, pg 5 [1.1] <https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf>.

⁴ Aged Care Royal Commission Final Report: Summary, 69, <<https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-executive-summary.pdf>>.

⁵ Ibid, 5.

adequately considered by the funding model.

ADA supports the proposal to ensure that a resident located in a regional or remote area cannot be subjected to a higher maximum daily amount of resident fees than a resident based in a metropolitan area. This amendment aligns with the principle of equitable access to care and services, regardless of location, a key objective of reform recognised by the Royal Commission.

We note amendments to the *Aged Care (Transitional Provisions) Act 1997*, particularly clause 71A of the Bill which introduces changes to section 44-21 regarding calculation of the **subsidy related amount** for a care recipient and the **adjusted basic subsidy amount**.

Subsection (5) states that the **adjusted basic subsidy amount** is an amount:

- (a) determined by the Minister by legislative instrument; or
- (b) worked out in accordance with a method determined by the Minister by legislative instrument.

Further information is required in order to assess if the discretion given to the Minister to determine the adjusted basic subsidy amount is reasonable or excessive.

We note that in addition to the introduction of the AN-ACC funding model, recommendation 120 advised the implementation of a funding review process, to ensure that the model was iteratively refined and that the classification and funding model continued to meet assessed needs. We strongly submit that a review of this nature should be included in the legislation.

Schedule 2 – Screening of aged care workers and governing persons of approved providers

ADA supports the intention of Schedule 2 of the Bill, which proposes amendments to the Act and the *Aged Care Quality and Safety Commission Act 2018* to establish a nationally consistent pre-employment screening for aged care workers. This will replace the current system of relying on police checks.

A centralised screening system across the aged care and disability sectors is supported. The proposed screening system and obligations set out in the schedule should improve protective measures associated with ensuring a suitable and safe workforce. This includes in relation to persons holding senior positions. ADA supports the proposal to screen 'governing persons', and to implement a penalty system for providers that are corporations and who fail to comply with screening obligations.

We note that these additional measures will apply to approved providers, contractors and approved contractors of approved providers. The Bill does not provide for a similar level of protection around worker screening and information sharing to be accessible to persons who self-manage their care supports. A process should be implemented by which a person who is self-managing their home care package is able to request information about a worker, having first agreed to treat and manage any information received from the database in accordance with communicated privacy principles and obligations. The protocol should include a process requiring the person requesting the information to verify their identity to allow the Database to establish that the requesting party is the correct person to receive the information.

There should also be a mechanism which allows a person who self-manages their care to refer an applicant to a screening unit, to verify that the potential worker meets the requirements and understands the code of conduct.

Schedule 3 – Code of conduct and banning orders

ADA acknowledges the intention to introduce a code of conduct (a **Code**), in accordance with recommendation 77(1)(e) by the Royal Commission, and implementation of ‘banning orders’ in response to recommendation 103.

It is critical that the Code is clearly linked to and supports the obligations set out in the Charter of Aged Care Rights and the Aged Care Quality Standards. Failure to do so risks creating confusion about the role of each of these instruments, and misconception regarding compliance obligations of operating in accordance with each of these.

Development of the Code must be informed by comprehensive consultation with aged care workers, older persons, and key stakeholders. The NDIS Code provides a useful template which can be relied on as a basis to develop either a separate Code, or which could be appropriately adapted to insert sections and clauses specific to aged care and references to the Charter of Aged Care Rights and Aged Care Quality Standards.

We endorse the powers proposed to be given to the Commissioner to compel a person to attend before an authorised officer to answer questions and give information relevant to whether an aged care worker is complying with the Code. The proposed enforcement actions, including use of banning orders, is supported. However, further information is needed to assess the utility of banning orders and if the register of these orders will integrate with other screening databases, such as the proposed Aged Care Screening database and the NDIS worker screening system.

Schedule 4 – Extension of the Serious Incident Response Scheme

The proposed extension of the Serious Incident Response Scheme to home care and flexible settings is an important and necessary step to improve incident management and protection.

Schedule 5 – Governance of approved providers

ADA supports the proposed changes to composition requirements of the governing body of an approved provider, including that at least one member has experience in clinical care. However, we are concerned that these requirements will not apply to smaller providers who deliver care to less than 40 recipients and have less than five members comprising the governing body. This exposes a gap in governance requisites which may be exploited by operators who intend to circumvent the new requirements, and reduces the opportunity of some governing bodies to provide adequate oversight of the cultural and safety practices of the operating provider.

The proposal to establish a Quality Care Advisory Body is supported, however, regular publishing of reports by this body will be necessary to build community confidence in its ability to measure and communicate about the quality of aged care provision generally and degree of improvement.

A legislative framework requiring the establishment of a consumer advisory body is currently missing from the Bill. This is a critical component to ensure co-design of processes and mechanisms affecting people receiving aged care, based on the direct feedback received from those affected persons, their families and support persons as well as aged care representatives and staff. Without a robust legislative framework, providers may be reluctant to allocate resources to appropriately develop and maintain the advisory body and its functions.

Schedule 8 – Independent Health and Aged Care Pricing Authority

ADA supports the amendment to expand the Independent Health and Aged Care Pricing Authority to include pricing of aged care services.

Schedule 9 – Registered nurses

The proposed amendment by Senator Rex Patrick is strongly supported. ADA considers the presence of at least one registered nurse on staff and available 24 hours per day to be a minimum care standard.

Schedule 9 – Restrictive practices

ADA is uncomfortable with the proposal to implement an interim arrangement to address significant concerns held relating to lack of consent and appropriate use and oversight of restrictive practices in aged care. This is a critical and complex issue which requires comprehensive, holistic, and evidence-based reform which will result in outcomes that uphold individual rights and safety for persons receiving aged care.

ADA acknowledges that this will continue to be a difficult issue for providers to navigate until such time that all State and Territory laws have been amended to ensure that consent for restrictive practices is appropriately obtained. However, the interim arrangement proposed in the Bill suggests what appears to be a broad immunity for the use of restrictive practices.

If such an immunity is to be offered, it must be accompanied by an appropriately rigorous and independent oversight function. Further, a reliance on any interim consent arrangement should also legislate a requirement for the process to be supported by adequately qualified clinicians.

Thank you again for the opportunity to comment. ADA would be pleased to further assist the Committee with its inquiry. Should you wish to discuss this submission, please do not hesitate to contact Vanessa Krulin, Solicitor and Senior Policy and Research Officer on _____ or via _____

Yours faithfully

Geoff Rowe
Chief Executive Officer