COMMONWEALTH OMBUDSMAN

Inquiry into the Aged Care Bill 2024

Senate Standing Committee on Community Affairs

Submission by the Acting Commonwealth Ombudsman, Penny McKay

3 October 2024

Introduction and summary

I welcome the opportunity to provide a submission to the Senate Standing Committee on Community Affairs' inquiry into the Aged Care Bill 2024 [Provisions] (the **Bill**).

The Bill has been promoted as putting the rights and needs of older people at the centre of Australia's future aged care system. The system will comprise of multiple bodies, including the Department of Health and Aged Care, the Inspector-General of Aged Care (**IGAC**), the Aged Care Quality and Safety Commission (**ACQSC**) and the Aged Care Complaints Commissioner. The system must be implemented in a way that makes it clear to the public who is responsible for what, and how they can raise issues with the appropriate entity. I note that I will continue to be able to take complaints about matters of administration about these entities under the *Ombudsman Act 1976*.[1]

Background

The purpose of the Office of the Commonwealth Ombudsman (the **Office**) is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly, and
- influence systemic improvement in government administration.

We aim to achieve our purpose by:

- independently and impartially reviewing complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive
- assisting people to resolve complaints about government administrative action, and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

[1] More detail on the 'ecosystem' of agencies that oversee the aged care sector was provided to the Senate Community Affairs Legislation Committee in our submission to the Committee's Inquiry into the Inspector-General of Aged Care Bill 2023.

Restrictive practices

Following Australia's ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**), Australian governments are required to establish bodies to perform regular visits to places where people are deprived of their liberty, to prevent torture and other cruel, inhuman or degrading treatment or punishment.[2]

The role of Commonwealth National Preventive Mechanism (**NPM**) lies within my Office and is responsible for visiting places under the control of the Commonwealth where people may be deprived of their liberty. I am currently considering the extent to which my responsibilities under OPCAT, with respect to aged care, intersect with States and Territory responsibilities.

I accept the position that restrictive practice includes *any practice or intervention that has the effect of restricting the rights or freedom of movement* of an individual, noting that this may include *chemical, environmental, mechanical*, or *physical* forms of restraint, as well as *seclusion* practices.

This is in line with the definition included in the Bill and accepted by the National Disability Insurance Scheme (NDIS)[3] and the ACSQC.[4]

I support the requirements set out in the Bill which will require restrictive practices to be:

- used only as a last resort, and after all other de-escalation techniques have been attempted
- reasonable and proportionate to the situation at hand
- applied only for the minimum time and extent necessary to achieve safe outcomes, and
- used only once appropriate informed consent has been received from the person or substitute decision-maker as prescribed by the rules made under clause 162 of the Bill.

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[2] Article 1, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 2002.
[3] Section 9, NDIS Act 2013.
[4] Overview of restrictive practices (agedcarequality.gov.au)

In addition to these requirements, I suggest that restrictive practices should only be:

- applied by those who have been appropriately trained and accredited to do so
- used only once appropriate authorisation has been received, and
- based on independent expert assessment.

I note clause 18(3) of the Bill states the rules governing the use of restrictive practices do not apply if they are 'necessary in an emergency'. Without an accompanying legal definition, the interpretation of what constitutes an 'emergency' may be subjective. I propose that an 'emergency' should be clearly defined, including a timeframe for cessation (when there is no immediate risk to the person or others).

Furthermore, even during an emergency, providers must still seek to ensure the least restrictive form of a restrictive practice is being applied, it is applied for the shortest period possible, and only after exploring and applying all evidence-based, person-centred, and proactive strategies.

Documentation of the use of restrictive practices in an emergency should be regulated and include:

- the person's behaviours that were relevant to the need for the restrictive practice
- the alternatives to the restrictive practice that were considered or used
- the reasons the restrictive practice was necessary
- the care to be provided to the person in relation to their behaviour
- a record of having informed the restrictive practices substitute decision-maker about the use of the restrictive practice
- all assessments, information and decisions relevant to the use of the restrictive practice, and
- any additional advice or support to be sought.

Star ratings

Clause 25 of the Bill proposes a Statement of Principles that would underpin the aged care system. I note clause 25(8):

> *The Commonwealth aged care system is transparent and provides publicly available information, about funded aged care services, that is understandable, accessible and communicated through a variety of methods and languages.*

Clause 541(2) would require the 'System Governor' (Secretary of the Department) to publish information about the quality of funded aged care services delivered by registered providers in approved residential care homes and the performance of registered providers of such services in relation to obligations and requirements under the Bill.

Clause 541(3) would permit, but not require, the System Governor to publish information under clause 541(2) in the form of one or more star ratings for a residential care home.

Clause 544 would require the System Governor to publish, in accordance with the rules, information about funded aged care services generally.

I note the star ratings system was developed in response to the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) which recommended a system of ratings, to support older people and their families make meaningful comparisons of the quality and safety performance of aged care services and providers.[5]

While I understand the view that the current system of star ratings is an advance on not having any information publicly available at all, I am concerned the current star ratings system is not sufficiently meaningful to help people make decisions about their aged care – and may in fact mislead or misinform people.

I understand that non-compliance by a provider only impacts the provider's star rating if the ACQSC issues a formal compliance regulatory notice. This means that the ACQSC may find a provider is not meeting the required standards, but its star ratings do not change. The non-compliance may also be extensive and over an extended period, but again unless a formal regulatory notice is issued the general public will not be informed through the ratings system that the provider is in fact non-compliant.

My Office has looked at publicly available information on star ratings including the *Find a Provider Tool*[6] and considers that understanding a provider's overall star rating is complex and requires a person to navigate multiple websites to locate and interpret somewhat technical information.

[5] Recommendation 24, Aged Care Royal Commission Final Report: Recommendations
[6] https://www.myagedcare.gov.au/find-a-provider/

The data used to calculate star ratings is sourced from third parties, including self-reported data from aged care providers themselves, as well as the ACQSC and external survey providers.

The department advised my Office that it conducts a range of checks on the data reported by aged care providers before it is used to calculate star ratings. However, it is unclear what checks are currently undertaken on the data provided by the ACQSC and external survey providers. Transparency about how the data is validated or verified would provide further assurance to the community about the reliability of the star ratings.

The department has advised my Office that the proposed legislative changes, particularly the establishment of the Secretary of the Department as 'System Governor' (clauses 7 and 339) will strengthen its ability to undertake assurance checks on data used for star ratings.

Given the importance of transparency and clear information about the aged care system, as reflected in clause 25 of the Bill and the intent of the Royal Commission's recommendation regarding star ratings, I suggest the Committee consider the current efficacy of star ratings and the proposed role of the 'System Governor'.

Whistleblower scheme

Part 5 of Chapter 7 of the Bill would improve the whistleblower protections currently provided by the *Aged Care Act 1997*. Unlike the current Act, the Bill clearly sets out the whistleblower protections in a separate part which makes the mechanics of the scheme easier to identify. However, the arrangements in the Bill would still appear to overlap with existing Commonwealth, State and Territory whistleblower protection schemes, for the public and private sector (such as the *Public Interest Disclosure Act 2013* (Cth) and the *Corporations Act 2001* (Cth)).

Whistleblowers and prospective whistleblowers already experience challenges in navigating multiple whistleblower regimes. This can deter people from making disclosures. Ensuring there is sufficient and accessible guidance for whistleblowers and prospective whistleblowers would assist people to navigate the scheme. Guidance should help potential whistleblowers understand which system they can report under and the implications of choosing one regime over another.