



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

[AACC submission to Senate Community Affairs Legislation Committee
Inquiry](#)

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About the AACC

The Australian Aged Care Collaboration (AACC) is a group of six aged care peak bodies: Aged & Community Services Australia (ACSA), Anglicare Australia, Baptist Care Australia, Catholic Health Australia, Leading Age Services Australia (LASA) and UnitingCare Australia.

Together, we represent more than 1,000 organisations that are responsible for about 70 percent of the services delivered to the 1.3 million Australians receiving aged care, either at home or in communal residential settings.

We understand the needs of an ageing Australian population because collectively, our members support older people in cities as well as regional and remote localities, across all states and territories. In addition, we are major employers and users of local goods and services.

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Summary

- The AACC is committed to the reform of the aged care sector. We support in principle, most of the reforms contained within this bill.
- However, there are a number of areas where we believe that Government should make further commitments or provide further information regarding its policy intent before the enabling provisions contained within this bill are passed.
- We also believe that amendments to the Bill are required in relation to the proposed code of conduct and governance changes. These changes are needed to protect low paid employees against miscarriages of justice, and to ensure that new legislative obligations promote meaningful improvement in the quality of care.
- More generally, we would like to express our concern, and the concern of our Members, about the limited consultation with the sector on the development of this legislation – many of our concerns could have been addressed through the publication of an exposure draft to provide an opportunity for the sector to comment prior to the introduction of the Bill to Parliament.
- Our concerns about process and consultation also apply to the broader reform agenda. In particular, we are yet to see a detailed roadmap for consultation on the various reforms that have been proposed, and the proposed governance mechanisms for the reform agenda have not yet been established.
- Workforce supply is becoming a critical issue for the sector and there is a real risk that a punitive top-down approach to reform will undermine quality by driving experienced staff to leave the sector – particularly in the absence of a clear commitment from government on funding for higher pay.

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Schedule 1 – Residential care funding

This schedule provides the framework for replacing the current system of care subsidies for residential aged care – the Aged Care Funding Instrument (ACFI) – with a new system – the Australian National Aged Care Classification (AN-ACC).

Position: Support, subject to additional commitments from Government.

We support in principle the replacement of ACFI with AN-ACC as research suggests that the AN-ACC classification structure more closely aligns with provider costs. However, the Committee should ask Government to address the issues below before supporting passage of the Bill:

- **lack of stop-loss** – AN-ACC author Kathy Eager’s recommendation for the introduction of AN-ACC to be accompanied by a 5% stop-loss is not being adopted. While Government has argued that it will not be needed, it is important to ensure that the changes to funding do not lead to providers being left with fewer resources than they currently have to care for residents. The discretionary transition fund proposed by Government is not an adequate substitute for capping the potential funding (and therefore resourcing for care) lost by providers.
- **release of assessment data:** the AN-ACC shadow assessment outcomes are not being made available to people who have been assessed or their providers. Providers need this information as soon as possible to plan and budget.
- **lack of independent assessment governance:** Historically government has argued that providers manipulated ACFI by over-classifying resident needs. With assessment under AN-ACC assessments controlled by Government, independent assessment governance is required to ensure that people are not under-classified. No provision has been made for this.

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Schedule 2 – Worker screening

This schedule will align aged care worker screening arrangements with NDIS arrangements.

Position: Support subject to additional commitments from government.

We support the alignment of NDIS and aged care worker screening arrangements, however under current workforce circumstances there is a risk that changes will create further restrictions on the supply of aged care workers. The Committee should ask Government to address the issues below before supporting passage of the Bill to avoid:

- **cost impact on workers:** NDIS screening checks cost much more than current police checks (e.g., in WA police checks cost \$57 whereas an NDIS checks cost \$145). Government should cover the difference in costs to avoid reducing the income of workers and creating a further disincentive for new staff (who are already low paid).
- **screening delays:** Many providers report significant delays in the processing of NDIS checks. Some states have interim arrangements that allow staff to temporarily commence work while processing is underway, but in other states the scope to work under an interim arrangement is very limited. Proceeding with NDIS-style screening for aged care workers without addressing these delays will exacerbate workforce problems.

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Schedule 3 - Code of Conduct and banning orders

Schedule 3 creates an enforceable code of conduct for aged care workers and allows the regulator to issue banning orders and apply penalties of up to \$55,000 for breaches of the code. Similar rules are already in place for NDIS workers but NDIS regulation should not be adopted for aged care without critical adjustments – particularly given the NDIS is itself subject to a Royal Commission.

Position: Support, subject to amendments proposed below.

We support a code of conduct for aged care workers, but have some concerns with the model set out in the bill.

The bill will assist in ensuring that staff who engage in clear misconduct cannot continue to work in the industry (e.g., finding re-employment with another provider after being dismissed for misconduct).

Removing staff who engage in misconduct is important. It is useful to note that in the NDIS context about 50 banning orders are currently in place.

The approach outlined in the bill unfortunately does little to advance the more fundamental issue for quality of care, which is the need to upskill and professionalise the personal care workforce.

For health care professionals, the code duplicates their existing professional obligations and associated disciplinary processes.

Disciplinary procedures for health professionals also provide much clearer processes for affording procedural fairness to a person accused of misconduct than would be afforded under the bill.

As it stands the bill creates serious risks for miscarriages of justice, particularly for front line employees with limited resources to defend themselves.

We recommend that the bill be amended to ensure that:

- registered health professionals are carved out of this code of conduct and the associated banning order provisions
- staff and organisations are given a minimum of two weeks to respond to a notice that the regulator is considering a banning order, with provision for interim suspensions orders that can be used if the regulator believes there is a serious risk of harm that justifies an urgent intervention
- there is an explicit requirement to afford procedural fairness, including that a person or entity potentially subject to a banning order must be given access to all the information used by a delegate in making their decision to issue a banning order
- the power for the regulator to abrogate the common law privilege against self-incrimination is constrained to circumstances where it is reasonably necessary to protect the safety of care recipients, and is subject to use or derivative use immunity as required by the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers.¹

¹ <https://www.ag.gov.au/legal-system/publications/guide-framing-commonwealth-offences-infringement-notices-and-enforcement-powers>

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Schedule 4 - Extension of SIRS into home and community setting

This schedule extends to home and community care providers the explicit incident management and expanded incident reporting obligations that were introduced to residential care in March 2021.

Position: Support, subject to amendments proposed below

We support the expansion of incident reporting and incident management to home care. We recommend that the bill be amended to ensure that related subordinate legislation meets the following requirements:

- there will not be required reporting of matters that fall outside the jurisdiction of the ACQSC, for example matters involving the conduct of family members; the provider should be required to report once to appropriate bodies that can address the matter such as Police, Adult Protection Units etc.;
- the legislative framework recognises that providers in a home setting are guests and therefore have more limited means (than residential care providers) of managing certain incidents (noting that staff to client incidents should of course be covered in a reporting scheme); and
- a proportionate reporting approach applies to services that have minimal engagement in the broader life of their clients (i.e., that cannot reasonably be expected to be aware of matters beyond the service relationship).

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Schedule 5 – Governance

This schedule creates new governance requirements for aged care providers, including: rules for board composition (majority independent directors and clinical experience) and subcommittees (clinical governance and consumer); new suitability requirements for board and key personnel (similar to rules that currently apply to NDIS providers) and additional annual reporting obligations.

Position: We support stronger governance for aged care providers, but we have significant concerns with elements of this schedule.

We recommend that the bill be amended to ensure that:

- **board composition requirements reflect principles for good governance and are adaptable for organisations in different circumstances:** Rather than setting out blunt requirements for board composition and a non-transparent exemptions process, the Government should establish principles for good governance. There is provision for a general exemption for providers with fewer than five board members and fewer than 40 residents however this is a very arbitrary cut-off and fails to consider the range of business models now and in the future. The need to meet board composition requirements will lead to decisions about board composition driven by compliance rather than good governance. It will be particularly problematic for small business owner-operators and standalone or community-led structures in rural, regional and remote contexts who find it challenging to attract qualified board members and who might sit just outside the exemption.
- **proposed board committees are effective:** the specific requirements for a clinical governance committee and consumer committee are to be included in subordinate legislation that has not been discussed with the sector.
- **requirements for annual statements are in primary legislation (in-line with reporting obligations for companies under the Corporations Act).** Care must be taken to avoid duplicative reporting. Data should need to be reported by providers only once (e.g., in a format that is suitable as an input to the star rating system or annualised reporting the Department wishes to collate). Care must also be taken to avoid the publication of potentially misleading data such as non-risk adjusted clinical indicator data or datapoints such as complaints or incident reports (which are not good quality indicators and would create incentives to underreport).

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Schedule 6 – Information sharing

This schedule allows enhanced information sharing between NDIS and aged care regulators to ensure increased quality and safety of care, and early investigation and action by regulators on provider compliance.

Position: Support.

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Schedule 7 – Oversight of RADs

This schedule provides for increased financial and prudential oversight to increase the Commonwealth's oversight of and ability to take action against misuse of funds under the Refundable Accommodation Deposit Scheme.

Position: Support.

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Schedule 8 - Independent Health and Aged Care Pricing Authority

This schedule provides for the creation of the Independent Health and Aged Care Pricing Authority by expanding the remit of the Independent Hospital Pricing Authority to include Health and Aged Care pricing advice and the aged care pricing functions currently undertaken by the Aged Care Pricing Commissioner, and making changes to the organisation's board structure and appointment processes.

Position: Support, subject to considerations proposed below.

- We believe the independence of the Authority would be stronger if existing appointment mechanisms to the Board and position of CEO are retained. The Committee should be aware that appointment of board members will no longer require the agreement of states and territories – we are not aware of whether they will support this change but it seems unlikely.
- We agree with the separation of hospital and aged care pricing functions through the governance structure proposed in the Bill
- Government should confirm its intentions regarding the Authority's remit. Currently, it appears the authority will focus on care subsidies for residential care, but it is not clear whether it would also consider pricing/subsidies for residential care daily living and accommodation costs or for home care. The capacity to consider pricing across all care types and related living costs is critical to ensuring consistency and a 'level playing field' across business models.
- The Bill should be amended so that:
 - reports prepared by the authority must be tabled in Parliament in a timely fashion
 - the authority must prepare and publish annually a report on funding and financing issues in the context of maintaining a viable and sustainable aged care sector which is accessible by all assessed as needing aged care irrespective of means and geography, including services in 'thin markets'.

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Schedule 9

The bill has been amended to add this schedule to provide a framework for making subordinate legislation in relation to the issue of consent for restrictive practices.

Position: Support, noting:

- this amendment is required to address perverse outcomes that arose from the first Royal Commission Response legislation. Most States and Territories did not have in place appropriate legislative and administrative arrangements to support the appointment of substitute decision makers for restrictive practices in aged care. The AACC and the broader sector have been raising concerns about this for some time and welcome the proposal.