

Queensland Government Submission to Community Affairs Legislation Committee

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

8 November 2021

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About this Submission

On 21 October 2021, the Senate referred the Aged Care and Other Legislation (Royal Commission Response No 2.) Bill 2021 (the Bill) to the Senate Community Affairs Legislation Committee (the Committee) for inquiry and report.

This document was prepared in response to the call for submissions by the Committee and includes input from the following Queensland Government departments:

Queensland Health

Queensland Health is an approved provider under the *Aged Care Act 1997* (Cth) for State-operated public residential aged care services. It is responsible for the delivery of:

- Almost 1,000 operational places in 16 public residential aged care facilities (RACFs);
- Around 300 operational places in 35 multi-purpose health services (MPHSs) that deliver integrated public hospital and aged care services in regional and remote Queensland;
- The Aged Care Assessment Program, which is delivered by approximately 200 full-time equivalent (FTE) staff across 14 Hospital and Health Services; and
- 753 transition care places, which provide short term assistance to help older Queenslanders transition back into the community following discharge from hospital.

In 2019-20, Queensland Health's expenditure on residential aged care was approximately \$160 million, including a Commonwealth Government contribution of approximately \$56 million.

The Queensland Department of Health also plays a role as a system steward, providing policy support for the Queensland's aged care sector, focused currently on responding and preparing to COVID-19.

As a provider of public health services, Queensland Health is interested in and impacted by Commonwealth Government reforms to aged care and public health systems, in particular the hospital interface.

Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships

The Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships is responsible for administration in Queensland of the National Disability Insurance Scheme (NDIS) and State-based disability worker screening systems. The Department previously administered Queensland's 'yellow card' disability worker screening system, prior to commencement of NDIS worker screening.

The Department has supported Queensland's transition to the NDIS since the conception of scheme. During this time, the role of the Department has shifted significantly, reflecting the transition to the NDIS of many of the Department's previous functions in relation to the funding and delivery of disability services. While the NDIS Quality and Safeguards Commission is now responsible for the regulation of registered NDIS providers, States and Territories remain responsible for several quality and safeguarding functions, including operating a worker screening system under the NDIS.

Nationally consistent worker screening under the NDIS commenced in Queensland on 1 February 2021. The new screening framework implements the Intergovernmental Agreement on Nationally Consistent Worker Screening for the NDIS (IGA), signed by the Premier of Queensland on 3 May 2018. In reaching the 1 February 2021 milestone, the Department has been responsible for resolving policy and legislative issues to achieve national consistency in implementing the IGA and developing and implementing operational systems and processes to support the new worker screening system, including building an interface with the NDIS Worker Screening Database and developing transitional arrangements for existing yellow card and yellow card exemption holders.

Overview

While Queensland Government is committed to reforms related to the Royal Commission into Aged Care Quality and Safety, it is important that implementation is well planned, adequately resourced and has realistic timeframes to deliver sustainable improvements.

In the Aged Care Royal Commission's final report, sixteen recommendations were directed at State and Territory Governments and the Commonwealth Government. A need for communication and collaboration on these matters was acknowledged in the Commonwealth Government's response. However, this is yet to occur.

Given the significance of the reform package, transparency and collaboration are key factors in ensuring a fair and equitable aged care system. However, interjurisdictional consultation mechanisms that were agreed to are not yet functioning, eroding the ability of jurisdictions to have meaningful input into the reform process.

While many of the proposed aged care reforms will have benefits for aged care residents, it is important to understand that implementation costs both for providers and for jurisdictions, are generally inadequately covered by the funding provided by the Commonwealth Government. For example, for many aged care providers, the reforms, including those enacted in this legislation, will create a significant administrative and reporting burden that will require additional resources.

Jurisdictions will be responsible for implementation of aspects of the reforms within timeframes unilaterally decided by the Commonwealth and with no recognition of the additional costs, legislative or policy constraints faced by States and Territories.

Specific issues identified in the Bill are considered in further detail below.

Comments on Schedule 1 – Residential Aged Care Funding

The Queensland Government notes the Australian National Aged Care Classification (AN-ACC) is proposed to replace the Aged Care Funding Instrument (ACFI) (which has been in place since 2008) as the funding model paid to residential aged care facilities for the care of residents.

As a geographically dispersed state with an ageing population and increasing demand for services from older people with complex healthcare need, the potential benefits of the transition to the Australian National Aged Care Classification (AN-ACC) funding model are noted. The Queensland Government appreciates that the changes could help shape future rural and remote aged care models and deliver better access to services for rural populations. However, these outcomes are dependent on the funding/pricing models to be both adequate and sustainable, and it remains to be seen whether the proposed AN-ACC will adequately reflect the complexity of service delivery for high need individuals and in rural and remote areas.

The Queensland Government also notes that the proposed Independent Health and Aged Care Pricing Authority (IHACPA) will support implementation of the AN-ACC in residential aged care and advise on home care pricing issues.

It is critical that in pricing these services, IHACPA take account of issues such as access and quality and safety. It is also important that pricing models are sufficiently granular to take account of the key cost drivers, including issues such as the additional costs of providing services in rural and remote locations and to particular target groups such as Aboriginal and Torres Strait Islander people and people from non-English speaking backgrounds.

It is important to highlight that adjustments to funding calculations will not address the fundamental shortfall in the funding committed by the Commonwealth Government to implement the aged care reforms. The Royal Commission into Aged Care Quality and Safety identified the aged care sector was underfunded by approximately \$10 billion per year in 2018-19. However, as part of its response to the final report of the Royal Commission into Aged Care Quality and Safety, the Commonwealth Government announced \$17.7 billion in funding for aged care over five years.

The Queensland Government has reservations about the ability of the funding committed by the Commonwealth Government to build a sustainable aged care sector or deliver the improvements that were envisaged by the Royal Commission and expected by stakeholders.

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

1. Background and context

The Queensland Government notes that Schedule 2 of the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021 (the Bill) proposes to amend the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Act 2018* (ACQSC Act) to establish nationally consistent pre-employment screening for aged care workers of approved providers, to replace existing police check requirements.

The amendments will require aged care providers to comply with the Accountability Principles 2014 (Accountability Principles) relating to the screening of aged care workers and governing persons of approved providers, and increasing harmonisation by facilitating mutual recognition of screening checks across the aged care and disability support sectors.

The Queensland Government appreciates the positive intent of the worker screening amendments in the Bill, which will support the Commonwealth Government's performance of its regulatory responsibilities with respect to the aged care sector, and the amendments' potential to increase safeguards while reducing red tape, by streamlining regulation of worker screening across the aged care and disability support sectors. This includes reducing duplication in screening for providers across the aged care and disability support sector (under the National Disability Insurance Scheme (NDIS)) and increasing the portability of clearances. Queensland also acknowledges that the Bill is a partial response to recommendation 77 of the Royal Commission into Aged Care Quality and Safety, to establish a national registration scheme for the personal care workforce by 1 July 2022.

However, the Queensland Government is concerned by the lack of detail attached to the proposal to expand worker screening arrangements in the aged care sector, and the fact that only very preliminary consultation has been undertaken to date with States and Territories as the jurisdictions that are proposed to be responsible for administering the screening checks. This concern relates to both the proposed amendments under Schedule 2 of the Bill, as well as the future amendments to the Accountability Principles.

2. *Issues and risks for Queensland*

The Bill provides that Schedule 2 of the Bill will commence on a date to be fixed by proclamation, or within 12 months of Royal Assent (whichever date occurs first).

The Queensland Government considers the introduction and commencement of the proposed legislation within 12 months of Royal Assent is not practically feasible.

The preparation, introduction and potential commencement of legislation to create a streamlined and integrated screening system across two complex sectors supporting some of Australia's and Queensland's most vulnerable people inappropriately pre-empt the significant policy, operational and quality and safeguarding work required to develop a worker screening system which is commensurate to the level of risk involved. These considerations are heightened in light of the limited initial consultation with States and Territories, which will be required to implement and operate the new aged care worker screening check despite having no formal role in relation to the regulation of aged care.

The Queensland Government considers it imperative that, prior to legislating for any new worker screening system, the Commonwealth Government first engage States and Territories in developing and making appropriate preparations to implement the necessary nationally agreed policy, legislative, systems, and operational changes.

(a) Legislation and policy impacts

The proposed Bill will require Queensland to prepare new legislation

The Bill proposes an aged care screening check assessment will be made under a state or territory aged care screening law. Currently, the Queensland Government administers the NDIS and State disability worker screening check under the *Disability Services Act 2006* (DSA). Queensland would need to develop a substantial new legislative framework if the Bill proceeds, noting that aged care worker screening is outside the scope and current purpose of the DSA, and State or Territory responsibility.

The proposed Bill, in isolation, does not provide sufficient detail for Queensland to understand and prepare for the imposed requirements

As stated in the explanatory memorandum to the Bill, the Commonwealth Government intends to separately amend the Accountability Principles, made under the Aged Care Act, to specify categories of aged care workers who will need to be screened; provide further detail regarding the screening requirements; and provide for transitional arrangements, while States and Territories enact relevant legislation to be determined by the Commonwealth Minister as an aged care screening law.

Queensland notes that, in addition to the limited consultation by the Commonwealth Government prior to the preparation and introduction of legislation, the detail required for jurisdictions to support implementation of the proposed aged care worker screening requirements is not currently available to jurisdictions, having been deferred to future amendments to the Accountability Principles. The Queensland Government is concerned about the potential for future amendment to the Accountability Principles to be progressed without sufficient negotiation with jurisdictions, despite their relevance to States and Territories.

The proposed Bill will require urgent and complex interjurisdictional policy development

Jurisdictions will need to consider and agree on a wide range of outstanding legislative policy issues before the Bill's measures can be reflected in consistent and complementary legislative amendments at the State and Territory level. These outstanding policy issues include, but are not limited to:

- scope of screening;
- application process;
- risk assessment framework;
- disqualifying offences framework;
- information sharing powers with relevant State and Commonwealth entities;
- show cause notice process; offences and penalties;
- review and appeals processes;
- interface with other screening systems for vulnerable persons (such as working with children checks); and
- transitional provisions.

Appropriate measures should be designed having regard to the nature, requirements and vulnerabilities of the aged care sector, which although potentially similar, may not align in all respects with those relevant to the NDIS worker screening framework. Jurisdictions will need to agree on the extent of alignment that is possible and desirable for worker screening across the aged care and disability support sectors, including the appropriateness of the same risk assessment thresholds and same types of assessable information being used for both checks. An additional, critical consideration is that, while there are nationally consistent worker screening systems in place across States and Territories, these systems are not identical, and unique jurisdictional policies and procedures remain and must be taken into account as part of the reform process proposed under the Bill.

While the Bill introduces increased information sharing powers for the Aged Care Quality and Safety Commissioner to share information contained in the Aged Care Screening Database to specified persons/bodies (such as registered NDIS providers and worker screening units), jurisdictions are yet to consider and agree on the categories of information which will inform a risk assessment, how that information will be obtained and who it can be shared with, as part of the screening process. Queensland legislation will need to reflect nationally agreed information sharing arrangements to ensure that state and territory-based worker screening units can access the assessable information they require to discharge their screening functions.

(b) Operational and financial impacts

The proposed Bill does not allow sufficient timeframes for system design and implementation

Queensland considers the maximum time frame of 12 months from Royal Assent of the Bill will not allow sufficient time for States and Territories to design and implement system and operational changes to support an expanded screening system.

Queensland is not currently resourced to assume a Commonwealth responsibility to deliver an aged care screening check assessment

A critical issue for Queensland, and potentially for all States and Territories, is the lack of consideration by the Commonwealth Government as to the additional resourcing that may be required for States and Territories to expand the scope of their NDIS worker screening systems on behalf of the Commonwealth Government. This additional impost on States and Territories, absent of additional resources to expand the scope of existing NDIS worker screening systems, is especially critical due to the need to ensure there are no adverse impacts on existing screening operations via newly implemented systems.

Nationally consistent NDIS worker screening has only recently commenced in Queensland and most jurisdictions (1 February 2021). Since commencement of the system, the volume of worker screening applications has greatly exceeded initial projections, potentially driven in part by recent changes to Commonwealth legislation to recognise NDIS worker screening checks for aged care workers.

The Commonwealth Government is yet to provide data, information or insights regarding the potential scope of the proposed nationally consistent and centralised screening system, and the anticipated additional demand as a result of the proposed expansion to screening obligations. As part of the policy development that has yet to occur, Queensland and other jurisdictions will require data on the number, categories and distribution of aged care providers and workers that are expected to be captured under the proposed amendments in the Bill, to be able to participate in the design process and ascertain resource impacts for the State. The Commonwealth Government will also need to provide further data regarding the crossover of aged care providers that are also registered NDIS providers and are subject to existing screening obligations, to be able to accurately estimate demand and ensure there is not inadvertent expansion of scope of the NDIS screening system.

The Bill proposes to insert new section 74AG into the ACQSC Act to require the Aged Care Quality and Safety Commissioner to establish, operate and maintain the Aged Care Screening Database. Under new section 74AI, an additional purpose of the NDIS Worker Screening Database (NWSD) will be to share information from that database with an approved provider, their contractor or subcontractors, for the purposes relating to the screening of an individual who is, or is seeking to become, an aged care worker or governing person of an approved provider. The NWSD is operated by the NDIS Quality and Safeguards Commission, with jurisdictions contributing 50 per cent of funding based on population share. Any proposed adjustments to the NWSD to enable it to support the expansion of screening to the aged care sector will need to include consideration of future funding responsibility for the NWSD.

The Bill, and lack of policy development and consultation, does not account for technical requirements of the proposed legislation

Expansion of NDIS worker screening arrangements to include aged care workers and governing persons of approved aged care providers will have significant operational and ICT/technical system impacts. These technical impacts, as well as the associated lead time and financial implications, cannot be underestimated, given the level of system integration and modification that will be required by multiple Queensland Government agencies, and the NWSD, to support the proposal.

Additional resourcing will be required to deliver the technical specifications, business requirements, design and development that would be required to support the proposal. This impact is likely to be exacerbated by the proposed short implementation timeframes and the fact activities are still underway to implement and refine ICT processes and enhancements to enable the commencement of nationally consistent NDIS worker screening system from 1 February 2021.

The Queensland Government notes the *Aged Care Legislation Amendment (Requirements for Staff Members and Volunteers) Instrument 2021*, which from 17 June 2021 recognised NDIS clearances for aged care workers in risk assessed roles, has already placed significant additional pressure on the operation of the NDIS worker screening system and associated entities. Insufficient implementation timeframes for the potential commencement of expanded screening obligations will only exacerbate the existing pressures on Queensland's recently established screening system.

The Queensland Government will require sufficient time and resources to accommodate the proposed substantial and ongoing increase in the volume of worker screening applications and clearances.

The Queensland Government also notes that, in order to implement NDIS worker screening, a transitional system is also in place for applicants and cardholders with a yellow card or yellow card exemption (the former Queensland-based disability worker screening clearance). This dual system will operate until 2024, by which time all former yellow card and yellow card exemptions will have expired. The proposal to implement an aged care screening check will create an additional transitional system for stakeholders to engage with, and will create added complexity for Queensland in managing existing screening systems.

Comments on Schedule 8 – Independent Health and Aged Care Pricing Authority

The Independent Hospital and Pricing Authority (IHPA) was established under the *National Health Reform Act 2011* as an independent Commonwealth statutory authority to promote improved efficiency in, and access to, Australian public hospital services. The Queensland Government considers that the independence of the IHPA is vital and should continue with as the body transitions to the Independent Health and Aged Care Pricing Authority (IHACPA).

Appointments

The Bill notes the IHACPA will focus on Commonwealth Government policy responsibilities. However, the body's decisions will still have significant impacts on the community and the aged care, hospital, and health systems. It is therefore vitally important that the advice provided by the IHACPA should be impartial and independent. Appropriate processes for appointment of members will help to ensure this.

Under current IHPA arrangements, decision-making for appointments is shared between the Commonwealth, States and Territories. Maintaining this approach for the proposed IHACPA will help ensure a broad representation and diversity of perspectives on its board.

There are no concerns with appointments being transferred from First Ministers to Health Ministers, provided the current distribution of decision-making between the Commonwealth, States and Territories is maintained.

The Queensland Government is also broadly supportive of the proposed appointment process for the Deputy Chair (Hospital Pricing), which requires agreement from each State and Territory Health Minister. However, Queensland considers that, given the significant interface issues between the aged care and hospital systems, the appointment of the Deputy Chair (Aged Care Pricing) should also be subject to agreement with States and Territories.

The Queensland Government notes IHACPA members are proposed to be appointed by the Commonwealth Minister with only a requirement to 'consult' with each State and Territory Health Minister. Queensland proposes that the appointment of ordinary members should also require agreement from each state and territory Health Minister, consistent with the approach to the appointment of Deputy Chairs. This would help to ensure meaningful engagement of States and Territories and the independence of appointees.

The proposal for the Commonwealth Minister to appoint the IHACPA Chief Executive Officer (CEO) and determine CEO acting arrangements (including approval of outside employment and disclosure of interests) is of concern. This approach does not appear to be consistent with clause B36 of the National Health Reform Agreement, which provides that the IHPA Board is responsible for appointing the IHPA CEO in consultation with the parties to the Agreement.

The Queensland Government considers that the IHACPA Board should maintain responsibility for appointing the CEO and related decisions on employment matters. This will help to ensure appropriate levels of independence across the national bodies responsible for healthcare, hospital and aged care pricing, costing, and payment/funding functions.

Interface Issues and Interdependencies

Under the proposed amendments, States and Territories are not formally part of processes relating to the new IHACPA functions for healthcare pricing and costing and aged care pricing. The Bill justifies these amendments on the basis that the IHACPA's expanded role and functions relate to Commonwealth-only program responsibilities which are not shared with States and Territories, (for example aged care programs and the Prostheses List).

However, the IHACPA's new functions for health care pricing and costing and aged care pricing will impact Queensland Health due to the interface with the public hospital system. For example, adjustments to the pricing for primary care and private health insurance have flow-on demand impacts for public hospitals. IHACPA activities that impact public hospital funding, whether directly or indirectly, should be shared between the Commonwealth and States and Territories.

At a minimum, the proposed amendments should include mechanisms for consultation, including with state and territory governments, in recognition of the strong interdependencies across different levels and parts of the health and aged care system.

The Queensland Government notes that clause 84 of the Bill includes provisions which would prevent the disclosure of protected pricing and costing information and is concerned that this would limit the ability for jurisdictions to verify pricing and costing data. The Queensland Government is therefore concerned about the potentially lack of transparency in relation to decisions made by the independent pricing authority and the lack of process for jurisdictions to validate the information and assumptions being used in making those decisions.

Funding Complexities

The proposed reforms to the IHPA also fail to take account of the role of public aged providers, including Queensland Health, which operates around ten percent of the aged care facilities in the state.

As many States and Territories provide both aged care and health services, there is potential for overlap between the National Efficient Price and National Weighted Activity Unit costing and pricing frameworks. The Queensland Government notes that crossover already occurs within multi-purpose health services (which provide both aged care and health services) and further instances may arise as a result of these changes.

Consultation and Engagement

The Queensland Government considers that the Commonwealth Government has failed to adhere to the processes set out in the National Health Reform Agreement (2011) (NHRA) and Addendum (2020-2025) for undertaking proposed legislation amendments regarding the functions of national bodies such as IHPA. There was a lack of consultation with jurisdictions prior to introducing the Bill to Parliament which is inconsistent with Clause B4 of the Addendum, which requires consultation with States and Territories on any proposed amendments to legislation establishing the position and functions of the national bodies.

Clause 20 of the National Health Reform Agreement 2011 (still current) requires the Commonwealth to provide three months' notice of proposed variations to all governments (for amending the agreement) prior to consideration by the Council of Australian Governments (now the National Cabinet). The role and functions of IHPA are set out in both the legislation and agreement.

Earlier consultation with jurisdictions would have assisted in identifying implementation issues that could have been resolved prior to the passing of legislation.

Conclusion

While the Queensland Government notes the intended benefits of many of the proposed amendments, concerns remain, in particular regarding the worker screening program and the new Independent Hospital and Aged Care Pricing Authority.

The Queensland Government seeks further genuine engagement with the Commonwealth Government on implementation issues and the proposed timeframes to help ensure that aged care reforms can be rolled out successfully.