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

## 1. About OPAN

Formed in March 2017, the Older Persons Advocacy Network (OPAN) is a national network comprised of nine state and territory organisations that have been successfully delivering advocacy, information and education services to older people across Australia for over 25 years. Our members are also known as State Delivery Organisations (SDOs). The OPAN SDOs are:

ACT	ACT Disability, Aged and Carer Advocacy Services (ADACAS)	SA	Aged Rights Advocacy Service (ARAS)
NSW	Seniors Rights Service (SRS)	TAS	Advocacy Tasmania
NT	Darwin Community Legal Service	VIC	Elder Rights Advocacy (ERA)
NT	CatholicCareNT (Central Australia)	WA	Advocare
QLD	Aged and Disability Advocacy Australia (ADA Australia)		

OPAN's free services support older people and their representatives to address issues related to Commonwealth funded aged care services. OPAN is funded by the Australian Government to deliver the National Aged Care Advocacy Program (NACAP). OPAN aims to provide a national voice for aged care advocacy and promote excellence and national consistency in the delivery of advocacy services under the NACAP.

OPAN is always on the side of the older person we are supporting. It is an independent body with no membership beyond the nine SDOs. This independence is a key strength both for individual advocacy and for our systemic advocacy.

The role of formal aged care advocates is to listen to, support, and represent the perspectives and decisions of older persons – therefore the perspective offered here is independent of the interests of service providers, and reflects the voices of older people and their varied experiences.

1800 700 600 [www.opan.com.au](http://www.opan.com.au)

OPAN service delivery organisation in your state or territory:



Funded by:



## 2. Schedule 1: Amendments relating to residential aged care funding

OPAN supports the AN-ACC system of funding, which has been designed to enable greater consumer choice by not being prescriptive in the specific care activities that are funded. The introduction of a funding model that supports a consumer directed approach within the residential setting is a much-needed improvement, though providers will need . However, we remain concerned that the AN-ACC model deals only with care and supports and does not encompass access to and engagement with social and leisure activities.

OPAN welcomes Subsection 29D-1(1) 18 enabling a care recipient to request a re-classification from “respite care” or “non respite care”. However, we are concerned that an application fee could be charged to the care recipient for this change. We note that amendments to paragraph 85-6(3)(b) with the effect that that the Classification Principles may also address the circumstances in which a person is exempt from paying the fee in relation to the reconsideration of a decision about the classification of a care recipient. We would argue that this must be included to protect socio-economically disadvantaged and vulnerable older people.

OPAN supports legislative changes that mean that a resident in a remote area may not be charged a higher maximum daily amount of resident fees than a resident in a metropolitan area. It is important that older people have equity of access to services regardless of where they live. Residential care providers in rural and remote areas have significant financial concerns, as evidenced by a report by accountants Stewart Brown Aged Care Financial Survey Report (2018)<sup>1</sup> but addressing financial sustainability through the AN-ACC, rather than through higher fees is welcomed by OPAN.

OPAN agrees with new paragraph 57-2(1)(a) in which a care recipient can be charged an accommodation bond if they enter a new service within 28 days after ceasing care being provided through another service and if they paid an accommodation bond for entry to the first service. We also welcome that the bond charged is the amount of the accommodation bond balance that was refunded or repayable to the care recipient by the first service, rather than a full bond amount.

## 3. Schedule 2: Amendments relating to screening of aged care workers, and governing persons, of approved providers

OPAN supports a centralised screening system, harmonisation and mutual recognition of screening checks across the aged care and disability support sectors.

OPAN welcomes the legislative changes proposed in Schedule 2 in particular:

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<sup>1</sup> Stewart Brown (2018), Aged Care Financial Survey Report, accessed from <http://www.stewartbrown.com.au/news-articles/26-aged-care/166-june-2018-aged-care-sector-reports-released> on 5 August 2019.

- The obligation on providers to screen aged care workers including employees, volunteers or others engaged by providers or a contractor or subcontractor of a provider
- The obligation to screen “governing persons”
- That the screening is in accordance with the Accountability Principles; and
- Providers that are corporations may also be subject to a civil penalty if they fail to comply with the new screening responsibilities.

In its submission to the Aged Care Worker Regulation Scheme OPAN argued that CEOs/Managers etc. are held to the same level of accountability as aged care workers within a registration scheme. The inclusion of senior positions within the screening requirements is a step in the right direction.

OPAN acknowledges that the screening will not prevent every form of abuse but it will make it more difficult for someone to commit abuse and will add a layer of accountability. This will mean that a person who abuses cannot just leave one employer and transfer to another. OPAN also acknowledges that the screening will only be as effective as the information that it collects.

OPAN supports the expansion of the powers of the Aged Care Quality and Safety Commissioner to establish, run and maintain an Aged Care Screening Database, including cleared and excluded individuals. We also agree that information must be shared with NDIS providers, the NDIS Quality and Safeguards Commission and Worker Screening Units. We welcome the sharing of information in the NDIS Worker Screening Database with approved providers or their contractors or subcontractors.

OPAN also supports new paragraph 61A(a) which permits the Commissioner to disclose protected information contained in the Aged Care Screening Database *“to an approved provider, or contractor or subcontractor of an approved provider, for purposes relating to the screening of an individual who is or is seeking to become an aged care worker”*.

However, OPAN argues that a process must be included in the legislation for those people who self-manage their home care package and directly employ/sub-contract their own workers to be able to access the Database. There are a number of ways this could happen. The preferred method would be for the person who is self-managing to be able to request information from the database about a potential worker. Alternatively, the person could give the potential worker’s name to the provider and have the provider check the Database. Those that self-manage should also be able to refer a potential worker to a Worker Screening Unit prior to contracting that person.

#### 4. [Schedule 3: Amendments relating to code of conduct and banning orders](#)

OPAN argues that a Code of Conduct will only have relevance if it is linked to the Charter of Aged Care Rights and the Aged Care Quality Standards. The code must reinforce the expectations and requirements of these documents rather than creating potentially different expectations. It must also be relevant to those working in aged care. In addition, the Code must

embed cultural safety and inclusive practices. If this could be achieved with an adapted NDIS Code of Conduct (say, with additional clauses regarding Aged Care Rights) it may be achievable without a completely separate code. This would also support workforce mobility and the core issue of workers who are providing supports across sectors.

If the NDIS Code of Conduct is adopted there must be consultation with workers, older people and relevant industry and peak consumer bodies. Changes would need to be made to language anyway, as the NDIS Code only refers to people with disability, and this provides an opportunity to ensure the Code reflects what people working in, or receiving services from, the aged care sector want.

OPAN would also support a Code of Conduct and banning orders being applied to those working with veterans as part of the alignment of regulation. The workforce across disability, aged care and veterans is similar.

OPAN welcomes the application of the Code to workers and governing persons. Governing persons set the culture of an organisation and therefore should be held to the same, if not higher, level of accountability in their behaviour as those that work directly with older people.

We support the additional powers given to the Commissioner in relation to failure to comply with the code, responding to alleged breaches of the code and enforcing compliance with the code.

It is noted that Schedule 3 introduces the ability for the Commissioner to impose banning orders on aged care workers and governing persons. The Commissioner must establish a register in which information about those against whom a banning order is or was made is held. It is unclear, and not spelt out in the legislation, how the banning register will be cross-referenced or linked to the Aged Care Screening Database and how a ban will be notified to the NDIS and vice versa. It is also unclear if the register will be public. The legislation says it can be made public not that it will. OPAN understands there can be sensitivities around information such as banning being made public however this could be of benefit to organisations outside aged care or disability, who support vulnerable persons, such as Veterans.

## 5. [Schedule 4: Amendments relating to the extension of incident management and reporting](#)

OPAN welcomes the inclusion of home care and flexible care delivered in the home or community setting being included in the Serious Incident Response Scheme.

## 6. Schedule 5: Amendments relating to governance of approved providers

### Membership of Governing Body

OPAN supports the proposed changes in subsection 63-1D(2), which states that an approved provider must ensure that the majority of the members of the governing body are independent non-executive members and that at least one member has experience in clinical care. As noted in the Explanatory Memorandum accompanying the legislation the governing body of a provider must have the right mix of skills, knowledge and expertise to successfully fulfill its role and ensure an appropriate culture within the service. Their independence enables them to monitor and hold management to account.

However, OPAN is concerned about these requirements, including clinical care experience, not applying to a provider that has less than five members of its governing body and the provider delivers care to fewer than 40 care recipients. While this exemption may support providers based in areas of low-density populations it would seem to imply that care recipients, in these circumstances, are not worthy of the same level of protections through their governing bodies as those with larger governing bodies or providing services to larger numbers of care recipients. It is noted that *“these providers will be strongly encouraged to implement other measures to ensure objective executive decision making as best corporate practice”*. However, if this is not legislated or enforced in some way it is unlikely to happen.

There have also been concerns raised that less scrupulous providers will reduce their governing bodies to five people to get around the new requirements. Legislation should incorporate requirements that providers over a certain size (41 care recipients or more) must have more than 5 members. However, we note the further amendment noted in the Supplementary Explanatory memorandum that states *“the responsibility of approved providers to ensure that at least one member of their governing body has experience in the provision of clinical care will only cease to apply where the governing body has fewer than five members and the approved provider provides care to fewer than 40 care recipients across their services”*.

OPAN also notes that providers may apply for exemption from these requirements and that the Commissioner can make a determination taking into consideration a range of factors. In these instances, the request and determination should be made publicly available in the interests of transparency and accountability to care recipients, who should know why their provider has sought an exemption and why a certain decision was made by the Commissioner. There should also be the ability for care recipients to seek a review of such a determination, especially where they experience a decrease in the quality of care and services they receive.

### Advisory Bodies

OPAN supports subsection 63-1D(5) that the provider must establish a Quality Care Advisory Body, which aligns with the Aged Care Royal Commission recommendation 90(b) *“have a care governance committee, chaired by a non-executive member with appropriate experience in care*

*provision, to monitor and ensure accountability for the quality of care provided, including clinical care, personal care and services, and supports for daily living.”* However, we would argue that this body should report monthly or bi-monthly on the quality of aged care being provided in a way that facilitates a commitment to ongoing quality improvement. For example, the report contains actions on improving the quality of care that are reported on and measured against. These can then be publicly reported on through the Annual Report or Annual Statement.

OPAN is disappointed that there is no legislated requirement for the establishment of a Consumer Advisory Body. The Royal Commission recommended in Recommendation 90(c) that providers, *“allocate resources and implement mechanisms to support regular feedback from, and engagement with, people receiving aged care, their representatives, and staff to obtain their views on the quality and safety of the services that are delivered and the way in which they are delivered or could be improved.”* A reformed provider governance system would support the meaningful and active inclusion of older people in their governance structures. Subsection 63-1D(7) only goes part way to achieving this by simply requiring providers to offer care recipients and their representatives *“the opportunity to establish a consumer advisory body to give the governing body of the provider feedback about the quality of the aged care that the provider provides to the care recipients through an aged care service.”* It is unclear how this ‘offering’ will be monitored, checked and reported on and how it will be confirmed that in fact, this opportunity has been offered and was not accepted. Who will have oversight to determine this?

It is likely, as with any significant change, that initially providers may struggle to find people willing to be involved in a consumer advisory body, however over time as this becomes the norm and people become aware of this body they are more likely to engage in it. Many residents within residential aged care, especially those living with dementia, would struggle to set up such an Advisory Body. The obligation should be on the provider to allocate the resources to create the advisory body as a requirement of its governance structures and then provide the support needed to enable participation.

OPAN is also concerned that the offer to establish a consumer advisory body must be in writing. We agree that the offer must be made directly to care recipients and their representatives, and there must be evidence of the offer, however the offer should be communicated in a way that is appropriate to the care recipient or their representative. This means plain English, in another language, visually for those with cognitive decline etc. It may also need to be verbally for those with low literacy levels. There must also be a commitment by residential aged care providers to include people living with dementia in their service in the advisory body.

In addition, and these are things that may not be included in legislation but should be included in any guidance materials:

- For some care recipients there may need to be a commitment to building relationships of trust before they will accept involvement in an advisory body; and
- Demonstration by the provider of commitment to the consumer advisory body will be essential to encourage engagement



OPAN would also argue that at a minimum, providers should offer to create the consumer advisory body every 3 months.

OPAN supports subsection 63-1D(7) that requires where a consumer advisory body is established the governing body must consider feedback from the consumer body when making decisions and advise the consumer body, in writing, how their feedback was considered. Again, this should be reported on and made publicly available.

## Other Comments

OPAN also welcomes the following changes:

- Subsection 63-1D (9) the governing body must ensure staff have the appropriate qualifications, skills or experience and given opportunities to develop these
- Section 63-1G providers being required to provide an annual statement that will be made publicly available on My Aged Care (our only concern with this is how this will be accessed by those that are unable to read English, those with low literacy levels and those with limited access to the internet or the technology to access the internet). The Accountability Principles will specify what information is included in the Annual Statement but we would argue it should include
  - the number of education and information sessions the provider has sought from OPAN and its members for staff and consumers on rights and advocacy
  - the provider's commitment to diversity and delivering inclusive services
  - if the provider has a consumer advisory body
- Section 63-1H that prohibits a provider, where the provider has a constitution, from authorising a director to act in the best interests of a holding company (where the provider is a subsidiary of that company).

## 7. Schedule 6 – Information sharing

OPAN supports these legislative amendments and sees this as a first step in improving quality and safety across the care and support sector.

## 8. Schedule 7: Amendments relating to the use of refundable accommodation deposits and bonds

OPAN supports these amendments

## 9. Schedule 8: Amendments relating to the Independent Health and Aged Care Pricing Authority

OPAN supports the move to have the Independent Hospital Authority expanded to include aged care pricing. Transparency of pricing and decisions is essential to older people and the general Community and to restoring trust in the aged care system.

## 10. Schedule 9: Registered Nurses, Amendment Independent, Senator Rex Patrick

OPAN supports the amendment proposed by Senator Patrick.

While we acknowledge that the Royal Commission into Aged Care Quality and Safety recommended one registered nurse be on staff for both morning and afternoon shifts (16 hours per day) we believe a registered nurse should be available 24 hours per day. The increasing health complexity and comorbidities of older people entering residential aged care requires a corresponding need for staff with the right health and medical skills to provide support. We know that health related incidents don't just happen in the day time.

## 11. Schedule 9: Restrictive Practices, Amendment Government

OPAN is supportive of the broader amendments made around Restrictive Practices and acknowledges that the proposed amendment is to introduce an interim arrangement to address issues around consent, until State and Territory laws can be amended to recognise the "restrictive practices substitute decision-maker." Some State and Territory laws do not clearly allow for a person to consent to the use of restrictive practices and this would enable an "restrictive practices substitute decision-maker" to give consent and protect providers who have relied on the consent given by the restrictive practices substitute decision maker. In this instance it would be reasonable to assume that a sunset clause is also established so that these exemptions do not continue beyond amendments of State and Territory laws or into the new proposed Aged Care Act. It would also be appropriate to include a clause to enable a person to appeal and/or contest a decision by the "restrictive practices substitute decision-maker". For example, where one family member is approached and agrees to the use of restrictive practices and another disagrees with the decision or how the decision maker was determined. This would provide further protections if appropriate processes are not followed and further reduce the risk of abuse.