



# Aged Care Bill 2024 – Senate Community Affairs Inquiry

Bolton Clarke Submission

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Author: Tim Hicks

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## Opening comments

Bolton Clarke is Australia's largest independent not-for-profit aged care provider, with 15,000+ employees and volunteers, 88 residential care services, 42 retirement villages and almost 11,000 daily home and community support clients.

We appreciate the opportunity to provide a submission and would be happy to appear to give evidence.

This is a historic package of reforms, and we would like to see it pass quickly. However, we also have to get it right.

Given timing constraints, we have limited ourselves to five key points.

## Key points

### 1. The increase in residential care funding provided by the Bill is vital to ensuring there are enough aged care beds

- Funding reform is important to combat growing residential care bed shortages. Given fiscal constraints and intergenerational equity considerations it is appropriate for this additional funding to come from service recipients.
- We endorse the focus on additional private contributions to everyday living and accommodation costs, with protections for pensioners whose only asset is their home – noting that we are still waiting on the release of the regulations so we can understand the proposed means testing in full.
- Changes to the Accommodation Supplement also need to be expedited to provide consistent funding for supported and non-supported residents.

### 2. Support at home reform is welcome but rushed price controls risk substantial disruption to services

- We support the creation of a single Support at Home (SAH) program – but price controls, including care management caps [see [Support at Home FAQ – September 2024: section 1.6](#)] need to be deferred pending a review, given the risk of major service disruption.
- The case for price controls seems weak, given almost every home care market has providers at various price points, with consumers typically choosing medium to higher cost providers.
  - Price controls will make providers focus on cost cutting rather than quality as the driver of viability – e.g. providers will be encouraged to employ the least qualified (and therefore cheapest) staff for every service and cut short service times wherever possible.
  - Restrictions on fixed monthly fees based on package levels will redistribute overheads to clients that are already fully utilising their package, meaning that they will be able to afford fewer services.
  - It is also hard to see how a price list can capture the variety of services that people may need (e.g. specialised nursing services like wound care advice from a clinical nurse consultant, or specialist trauma cleaning when there is major bleeding following an injury).
- As a practical matter, there is no time to set prices and have business models adjust prior to the commencement of the new program, so setting binding prices will lead to major service disruption.
  - Government's proposed timeline where initial prices will be published in November 2024 and detailed prices will be published in February 2025 is just unreasonable.

- The existing costing study has major limitations, and there is very little time for it to be updated. The proposed \$15,000 cap on home modifications funding suggests that the cost data that government is relying on is out of touch with current market conditions.
- Caps on care management are particularly perplexing as a large share of non-compliance in home care is related to low care management spending and poor care management practices.

### 3. A rights-based Act is welcome though the absence of a right to care is disappointing

- We support the creation of a new Act based on human rights principles.
- However, it is disappointing that the New Act makes a person's right to access aged care contingent on government fiscal priorities [see [clause 91 of the Bill](#); [ExMemo p131](#)] – in direct opposition to the Royal Commission [[rec 41](#)].
- We are also disappointed at the absence of rights for service providers and staff, noting that mutual respect is vital in human service delivery.

### 4. Penalties for severe wrongdoing are appropriate but people should be protected from being penalised for reasonable mistakes

- We welcome the removal of criminal penalties and strict liability in relation to duties.
- Government has stated that its intention is only to apply penalties to severe wrongdoing. However, delivering aged care is not a matter of simple black letter law. And even when the law is clear-cut, allowances need to be made for reasonable mistakes.
- Civil penalties are almost strict liability by default because they do not require proof of state of mind [[Regulatory Powers Act 2014 \(Reg Powers Act\) s94\(1\)](#)] and place the burden of proof for any excuse, exception, qualification or justification on the respondent [[Reg Powers Act s96](#)].
- This is concerning as civil penalties with substantial fines of up 250 penalty units (about \$80,000) apply to all workers and responsible persons against the Aged Care Code of Conduct [[clause 173-174 of the Bill](#)] and to any non-compliance with a provider's Conditions of Registration [[clause 142 of the Bill](#)].
  - Unlike offences against the duty of care [[Ch3 Part 5 Div 1](#)], offences against the Code of Conduct or Conditions of Registration do not require there to have been a significant failure [[subclause 19\(1\)](#)] or systematic pattern of conduct [[subclause 19\(2\)](#)].
  - There appear to have been almost 600 instances where a provider was found not to have complied with the standards in 2023/24 (based on the [ACQSC non-compliance log](#)). In most cases, these non-compliances were not considered serious and did not lead to further regulatory action, but under the Bill they could lead \$47 million in fines – potentially more if each non-compliance with each standard is considered as a separate offence. Some might argue that some of these non-compliances are serious and should attract stronger action. This still fails to justify civil penalties for the other non-compliances that are not serious.
- Penalties for breaching the Code of Conduct are unnecessary for individual workers and responsible persons given other penalties such as banning orders or loss of employment, penalties relating to the duty of care for responsible persons, and criminal sanctions in the most severe cases.
- Similarly, administrative notices, such as required action notices and compliance notices [[Ch6 Part Div 1 and Div 2 of the Bill](#)], obviate the need for civil penalties for minor breaches of registration conditions.
- Ultimately, Government needs to explain how people working in the sector can be sure that they will be protected from facing civil penalties for reasonable mistakes and problems that are beyond their control.

- The Commission's own advice states that, whilst ensuring the rights and safety of consumers is the primary goal, building a safety culture means staff and consumers must feel supported and encouraged to report incidents so that investigations can focus on systemic improvements and not who to blame. Blame should only come about if staff have deliberately deviated from expected practice, the code of conduct or organisational policies [[Building Safety Culture - Aged Care Quality and Safety Commission](#)].

## 5. Regulatory powers must avoid impinging basic legal rights

- The Bill gives the Commissioner an unlimited discretionary power to create a condition of registration for a provider [[clause 143](#)] with no justification required. The need for this power – which seems inconsistent with parliamentary sovereignty and the rule of law – is not clear.
  - *Prima facie*, this power seems unnecessary since the Commissioner is separately empowered to issue notices that specify that a provider comply with additional requirements if the provider is breaching one of the standard registration conditions [[Ch6, Part 10, Div 1 & Div 2 of the Bill](#)].
  - At minimum this power should be limited such that: it can only be used where the regulator has evidence that a provider will breach its standard Conditions of Registration without the additional condition(s); and only conditions that are reasonably necessary for ensuring that a provider does not breach the standard registration conditions can be applied.
- The Bill lets the Commissioner or System Governor issue Non-Compliance Notices where they are “aware of information that suggests the provider may not have complied, or may not be complying” with the Act [[clause 481\(a\)\(ii\), 482\(a\)\(ii\)](#)]. These notices create enforceable actions [[clause 483](#)] with contraventions giving rise to a strict liability penalty [[clause 487](#)]. There is no justification for this power – and no attempt to justify it is advanced. It is not needed to address poor processes or lacking capability as this would constitute a breach of the Standards and/or Conditions of Registration in its own right [see [draft Strengthened Standards - Standard 2: The Organisation](#)].
  - The clauses granting the power to take enforcement action for possible non-compliance should be removed.
- The Bill creates broad powers for the Commissioner, Complaints Commissioner, or System Governor to compel people (not just registered providers or aged care employees) to produce information or answer questions, including compelling them to take an oath or affirmation [[Ch6 Part 10 Div 3](#)]. The threshold for applying this power is very low; the Commissioner just needs to believe the person has information relevant to whether a provider is complying, not that there is non-compliance; the Complaints Commissioner and System Governor just need to believe the person has information relevant to their functions [[clause 488-489](#)]. Standard legal protections are narrowed in relation to this power to exclude protection from a person making themselves liable for a penalty and legal professional privilege [compare [s17](#) & [s47](#) of the Reg Powers Act with [clause 496](#) of the Bill].
  - The Bill already provides substantial monitoring and investigation powers under [Ch 6 Part 2 – Part 5](#), which are broadly consistent with the Reg Powers Act but also allow warrantless entry where the Commissioner believes there is immediate and severe risk of harm to an older person [[Ch6 Part 5](#)].
  - The powers created under Ch6 Part 10 Div therefore represent an extreme impingement on individual rights by the state without explanation or precedent being given.