2 October 2024

Senator Marielle Smith
Chair, Legislation Committee
Inquiry on the provisions of the Aged Care Bill 2024
Senate Standing Committee on Community Affairs

Via email community.affairs.sen@aph.gov.au

Dear Senator Smith

Inquiry on the provisions of the Aged Care Bill 2024

The Aged & Community Care Providers Association (ACCPA) thanks the Community Affairs Legislation Committee for the opportunity to make a submission to the *Aged Care Bill 2024 [Provisions]* inquiry.

ACCPA is the national organisation representing all providers of aged care to older Australians, delivering retirement living, seniors housing, residential care, home care, community care and related services.

In February 2024 ACCPA made a submission on the exposure draft of the new Aged Care Act, where we provided feedback and recommendations on the proposed provisions, aimed at strengthening the legislation to ensure optimal outcomes for older Australians now and into the future.

The new, rights-based, Aged Care Act will introduce and support landmark reforms for older Australians and the aged care sector. The reforms include an increased focus on financial sustainability and the Support at Home Program. ACCPA endorses this legislation, and recommends that the Bill be passed.

Australia's aged care needs are increasing. The aged care sector is not currently in a financial position to meet expected demand, deliver on the required quality improvements contained in the Bill, or invest to meet future needs. We therefore welcome the introduction of Chapter 4, which responds to the recommendations of the Aged Care Taskforce – including a greater role for consumer co-contributions for those who can afford it, and a strong safety net for those who cannot.

It is imperative that reforms are well-designed so they can be successfully implemented by providers to achieve the outcomes the Australian community seeks.

1. Provisions to retain

We acknowledge a number of positive changes made in response to feedback on the exposure draft, that we would like to see retained, including:

Statutory Duties

- that criminal penalties have been removed from the statutory duties under clauses 179 and 180. It is important that criminal penalties are not reinstated for these statutory duties, as it could worsen the already critical workforce shortages. The change also ensures aged care is in alignment with other health and care sectors.
- the intent, as set out in the explanatory memorandum, for the duty on certain responsible persons to only apply to "those who hold critical roles and have the

potential to influence the culture and accountability of a registered provider to uphold their duty through their decisions and behaviours" (page 197).

- that a party bringing an action for a breach of duty bears the burden of proving that the conduct was engaged in without reasonable excuse.

Competing Rights

- specific recognition in clause 24 (Effect of Statement of Rights) that references a balance between the rights of an aged care recipient and the competing rights of other aged care recipients and aged care workers (along with recognition of the Work Health and Safety Act).
- that providers are required to take "reasonable and proportionate steps" to act compatibly with the Statement of Rights. This change appropriately recognises that there may be circumstances reasonably outside of a provider's control, which may limit their ability to act compatibly with the Statement of Rights.

Complaints Commissioner

- that the Complaints Commissioner is independent from the Aged Care Quality and Safety Commissioner. It is important that the Complaints Commissioner's focus is on restoration that builds relationships between parties, and that regulatory compliance powers do not undermine this.

First Nations Aged Care Commissioner

- that a statutory permanent First Nations Aged Care Commissioner is expected to be legislated (pending outcomes of consultations), as indicated in the explanatory memorandum (page 4).

The remainder of this submission will highlight our priorities for change and accompanying recommendations. Given the time available, and the fact the full suite of rules are not yet released, we have limited our response to priority issues arising from the information that has been released to date.

2. List of recommendations

R1 New requirements for providers under the new Aged Care Act should commence, depending on the reform, at least 6 to 12 months from the time at which all information is available (finalised Act, rules, guidance and education materials). Transition timeframes are particularly important for reforms related to system changes, ICT, pricing frameworks, and changes to Support at Home (including care management).

R2 A staged approach to implementation should be adopted.

R3 The proposed higher everyday living fee requirements on residential care providers should be removed. A review should be undertaken on the impact of the proposed requirements, to ensure there are no unintended consequences.

R4 To avoid confusion, the whistleblower provisions should be amended so that registered providers are able to identify specific person/s who are authorised to receive a qualifying disclosure.

R5 The supporter provisions should not start before, at least, 1 July 2027 to enable further work to be done to ensure processes are in place to support good outcomes for individuals, their families and their supporters.

R6 The definition of high quality care and the references to high quality care throughout the Aged Care Bill should be removed until such time as the

Independent Health and Aged Care Pricing Authority can appropriately cost and price the definition, and the requisite funding be allocated by Government.

R7 Government decision-makers (e.g. the System Governor and Commissioner(s)) should both make and communicate the outcomes of decisions in a timely way. To ensure procedural fairness, affected parties (including registered providers) should have sufficient time to respond to proposed decisions.

R8 Penalties on aged care workers and responsible persons for breaches of the Aged Care Code of Conduct should be removed. If penalties are included, a civil penalty appropriate to the breach should be implemented.

R9 For financial and prudential matters, there should be a separation between the standard setter and the regulator, consistent with other industries.

R10 The Minister should be required to make place allocation determinations for a financial year before the start of the financial year, combined with the power to vary the determination, if needed, during the course of a financial year.

R11 A provider should not be penalised for not having a registered nurse on site and on duty at all times in an approved residential care home, in circumstances beyond the control of the provider.

R12 The definition of aged care worker should exclude individuals who are not engaged in the delivery of funded aged care services.

R13 The role of the Independent Health and Aged Care Pricing Authority should be expanded to include determining aged care pricing.

R14 The Department of Health and Aged Care and the Aged Care Quality and Safety Commission should put in place processes focused on quality improvement, to support an environment of open discussion regarding challenges with the regulators – without fear of punishment. To support this, regulatory powers should only be used proportionately and where necessary.

R15 The regulation and accreditation of registered providers and disability providers should be harmonised.

3. Reform timeline and transition

R1 New requirements for providers under the new Aged Care Act should commence, depending on the reform, at least 6 to 12 months from the time at which all information is available (finalised Act, rules, guidance and education materials). Transition timeframes are particularly important for reforms related to system changes, ICT, pricing frameworks, and changes to Support at Home (including care management).

R2 A staged approach to implementation should be adopted.

While the Consequential Amendments and Transitional Arrangements Bill has not yet been made publicly available, clause 2 of the Aged Care Bill provides that the whole of the Aged Care Act is to commence on a single day to be fixed by Proclamation. If no day is fixed by Proclamation before 1 July 2025, then the Act will commence on 1 July 2025.

ACCPA does not recommend that all reforms commence on the same date, given the known challenges with (for example) the supporter provisions (see recommendation 5). For reform to be successful, it is critical that providers are afforded the time needed to implement change. Rushing the introduction of new reforms could risk the sector's ability to achieve the outcomes we seek.

The slated reforms are significant, including ICT changes and conditions on registration (e.g. compliance with the new Aged Care Quality Standards (clause 146), as well as implementation of practices designed to ensure the delivery of services compatible with the Statement of Rights (paragraph 144(1)(b)). Implementation of new registered provider requirements will also require a substantial change management process for entire organisations, including training the workforce in new reform and changed practices. Adopting changes to ICT will be a particular pressure point, along with the increased cost, obligations and compliance burden expected to result from the reforms that will impact all providers and – in particular – smaller and regional, rural and remote providers.

Further, much of the detail of the reforms is still outstanding (including the rules to accompany the new Aged Care Act), meaning providers are limited in how much they can prepare for at this point in time.

As such, transition timeframes must provide certainty and allow sufficient time for providers to prepare, after all details of the reforms are finalised and available. This is particularly relevant for Support at Home, a reform of significant magnitude for which all of the detail is not yet available, resulting in an inability to assess implications for changes to models of service delivery.

Additionally, given the inaugural pricing recommendations by the Independent Health and Aged Care Pricing Authority (IHACPA) will not be finalised for Support at Home until February 2025, we recommend IHACPA conduct a mid-cycle pricing review within 6 months of commencement. A mid-cycle review will allow for pricing adjustments in Support at Home (if required), and address service volatility (if any) as a result of the reforms.

4. Higher everyday living fees in residential care

R3 The proposed higher everyday living fee requirements on residential care providers should be removed. A review should be undertaken on the impact of the proposed requirements, to ensure there are no unintended consequences.

Clause 284 introduces a new higher everyday living fee, replacing the additional service fee and extra service fee arrangements with the aim, as noted in the explanatory memorandum, of protecting individuals who live in a residential care home from unfair pricing practices or pressure to pay for services they may not need or are already entitled to. We support this aim.

The challenge with clause 284, as currently drafted, is that it limits the ability of residential care providers and individuals to freely enter into an agreement, including deciding the indexation arrangements that will apply to agreed fees.

Of particular concern is the new requirement in paragraph 284(5)(b) which prevents a provider from offering to enter into a higher everyday living agreement with an individual before the individual's start day. This is unnecessary to achieve the aim of clause 284 and will discourage registered providers offering higher everyday living services leading to reduced choices to consumers to enhance their residential care experience.

The impact on providers currently offering, or intending to offer, additional services or extra services needs to be thoroughly explored before any new requirements are introduced. Providers have developed and implemented business models providing these services and these can be integral to almost every aspect of their operations, from building design to furnishings to services. Some additional services cannot be switched off, including the provision of gyms, pools, and more. Providers need to have a reasonable level of certainty that they will receive a return on these investments.

We are concerned that clause 284 will have a negative impact on what would otherwise be reasonable business decisions, reducing service offerings in the sector, and limiting

options for individuals to receive additional services they want and are prepared to pay for.

5. Whistleblower protections

R4 To avoid confusion, the whistleblower provisions should be amended so that registered providers are able to identify specific person/s who are authorised to receive a qualifying disclosure.

Registered providers, responsible persons, and aged care workers are listed in clause 547 as people who can receive a disclosure qualifying for protection – as was the case in the exposure draft.

It is unreasonable to expect that all aged care workers should be able to receive a qualifying disclosure. For example, part-time workers who only recently started work in the aged care sector may not be aware that a qualifying disclosure is being made to them.

To facilitate streamlined processes within provider organisations, providers should instead be able to identify specific person/s to receive disclosures. This would minimise confusion and support a more effective process for all involved.

6. Supporters

R5 The supporter provisions should not start before, at least, 1 July 2027 to enable further work to be done to ensure processes are in place to support good outcomes for individuals, their families and their supporters.

ACCPA supports the spirit of these changes. Supporters, and supported decision making, will help ensure consumers' rights and wishes are respected.

This section requires complex transition arrangements, both for government and providers. Process changes and ICT transitions will require long transition times – allowing for consumer and supporter education, staff training, ICT changes, and process changes. It may also allow for concerns regarding state-territory jurisdictional issues to be resolved, including time for further negotiation with states and territories.

Part 4, Chapter 1 of the Aged Care Bill (starting at clause 27) allows for supporters to be registered to assist individuals navigating the aged care system. Supporters can either act with the consent of the individual or are authorised to act on behalf of an individual (a decision making supporter). Supporters are required to act in accordance with principles that promote supported decision making.

Where the System Governor cancels a person's registration as a supporter, the System Governor must give written notice to the person whose registration was cancelled, as well as the individual, but not the registered provider. Notification requirements should be extended to ensure registered providers also receive timely notification. This will ensure providers are taking direction from the correct person.

7. High quality care

R6 The definition of high quality care and the references to high quality care throughout the Aged Care Bill should be removed until such time as the Independent Health and Aged Care Pricing Authority can appropriately cost and price the definition, and the requisite funding be allocated by Government.

The Aged Care Bill includes a definition of high quality care (clause 20), which is largely the same as the definition included in the exposure draft. The Bill also continues to include references to high quality care in other provisions, including the Statement of

Principles and the safeguarding functions of the Aged Care Quality and Safety Commissioner.

Consistent with our submission on the exposure draft, we do not support the inclusion of an unfunded, aspirational definition of high quality care in the Bill that includes subjective elements. This will create mismatched expectations and generate confusion for consumers and the broader community about care and service delivery across the nation.

It is important to note, as currently drafted, registered providers will not always be able to implement the elements included in the proposed definition of high quality care. For example, supporting individuals to remain connected with animals and pets if requested by the individual (subparagraph 20(c)(vii)) is problematic, particularly in residential care, or where it may be contrary to the rights of others, including other residents and aged care workers (e.g. due to allergies or fear). Also, bilingual aged care workers and interpreters (subparagraph 20(c)(x)) may not be available in all circumstances in all areas (e.g. in rural and remote regions) when requested by an individual through no fault of a registered provider.

The Government should take the requisite time to work closely with the Independent Health and Aged Care Pricing Authority on appropriate methodologies for costing and pricing the definition of high quality care, prior to it being introduced as law.

8. Timeframes for decisions

R7 Government decision-makers (e.g. the System Governor and Commissioner(s)) should both make and communicate the outcomes of decisions in a timely way. To ensure procedural fairness, affected parties (including registered providers) should have sufficient time to respond to proposed decisions.

The Aged Care Bill contains a number of provisions with and without timeframes for government decision makers to make and communicate a decision by. We are concerned that some of these timeframes are either overly lengthy, or not specified at all.

Some timeframes are unnecessarily long and should be shortened. For example, the System Governor has up to 14 days to provide notice of a classification decision to an individual after it is made (clause 79). While it is acknowledged that the timeframe in the exposure draft was 28 days, 14 days is still too long to provide notice and this should be shortened to 7 days.

There is also no prescribed time period for completion of needs assessments and reassessments. A requirement should be added that these must occur within a period prescribed by the rules (e.g. 14 days).

There are also examples where, in respect of a decision, the time required for providers to do something compared to the time for the decision maker to do something is unbalanced, particularly when considering what is being required within the timeframe. For example, if the Commissioner is considering suspending or revoking the registration of a registered provider, providers can make written submissions within 14 days of receiving a notice (or such longer period as is specified in the notice) in relation to the matter (paragraph 132(2)(b)). However, the Commissioner has up to 14 days to notify a provider of a decision to suspend or revoke their registration after the decision is made (subclause 134(1)). It is inequitable that providers may only have 14 days to prepare written submissions – while the Commissioner can take 14 days to simply communicate a decision once it has been made.

ACCPA supports the following principles in relation to decisions made by government decision-makers (e.g. the System Governor and Commissioner(s)), which should be upheld throughout the new Aged Care Act where applicable:

- decisions should be made by government decision makers in a timely way;

- the outcomes of decisions should be communicated by government decision makers in a timely way; and
- to ensure procedural fairness, affected parties (including registered providers) should have sufficient time to make submissions (particularly for complex matters), respond to and seek review of decisions, as applicable.

9. Code of Conduct

R8 Penalties on aged care workers and responsible persons for breaches of the Aged Care Code of Conduct should be removed. If penalties are included, a civil penalty appropriate to the breach should be implemented.

Consistent with our submission on the exposure draft, we recommend penalties for breaches of the Aged Care Code of Conduct (the Code) should not be included in the Aged Care Bill and proposed clauses 173 and 174 should be removed.

Aged care workers and responsible persons are already subject to consequences if they do not meet, for example, relevant professional standards – including the possibility of banning orders under the Aged Care Act.

A maximum civil penalty of 250 penalty units (currently $82,500) is completely unreasonable for what might be a minor breach of the Code, particularly for aged care workers whose annual salaries may well be less than the maximum penalty. In addition, some elements of the Code are open to interpretation, resulting in uncertainty for the workforce.

If penalties are included, civil penalties should be proportionate to the breach and developed with consideration of existing standards and requirements already in place for aged care workers.

10. Financial and Prudential Standards

R9 For financial and prudential matters, there should be a separation between the standard setter and the regulator, consistent with other industries.

Clause 376 of the Aged Care Bill allows for the Aged Care Quality and Safety Commissioner to make standards in relation to financial and prudential matters. This is new, moving the power from the Minister to the Commissioner.

Consistent with our submission on the exposure draft, we do not support the Commissioner setting Financial and Prudential Standards as there is a conflict of interest in having the Commissioner both making and regulating standards.

Consideration should be given to having these standards set out in the rules or made by the System Governor.

11. Place allocation

R10 The Minister should be required to make place allocation determinations for a financial year before the start of the financial year, combined with the power to vary the determination, if needed, during the course of a financial year.

Clause 91 requires the Minister to determine in writing, for a financial year, a process and method by which the number of places available for allocation to individuals is to be worked out.

Clause 94 allows the Minister to determine, for a financial year, the number of places for the transition care program and for the multi-purpose service program.

However, subclause 91(3) and subclause 94(4) state that such determinations for a financial year "must be made before the end of the financial year and may be made before the start of the financial year".

It is unclear why the Minister would make a determination before the end of a financial year, rather than before the start of the financial year. This should be changed to require a determination before the start of the relevant year to give the community and the sector certainty. There should also be an ability for the Minister to vary the determination during the financial year should circumstances change.

12. Registered nurses

R11 A provider should not be penalised for not having a registered nurse on site and on duty at all times in an approved residential care home, in circumstances beyond the control of the provider.

Clause 175 is problematic as there are circumstances beyond the control of a registered provider, where a registered nurse is not available to be on site and on duty at all times at an approved residential care home.

We believe it is unreasonable for registered providers to be held to account in legislation for requirements they cannot reasonably meet, particularly given the known and systemic workforce shortages in aged care. The Department of Health and Aged Care recently released figures which estimate that Australia is 4,043 registered nurses short in aged care during 2024-25. This means that some providers will simply not be able to meet the requirements as currently set out in the legislation. Paragraph 175(2)(a) does not provide sufficient flexibility to deal with providers in these circumstances.

Broad assurances from the System Governor or the Commissioner that they will take a reasonable approach will not allay concerns of providers regarding the application of this legislative requirement, nor can they bind the behaviour of a future System Governor or Commissioner.

13. Aged care workers

R12 The definition of aged care worker should exclude individuals who are not engaged in the delivery of funded aged care services.

The definition of an aged care worker of a registered provider includes an individual employed or otherwise engaged (including as a volunteer) by the registered provider (paragraph 11(4)(a)).

This definition needs to be amended so that it only includes individuals employed or engaged in the delivery of funded aged care services. Otherwise, individuals working for a registered provider but not in the delivery of funded aged care services would, inappropriately, need to comply with aged care obligations (for example, if a registered provider also delivers hospital, childcare or disability services).

14. Other matters

R13 The role of the Independent Health and Aged Care Pricing Authority should be expanded to include determining aged care pricing.

R14 The Department of Health and Aged Care and the Aged Care Quality and Safety Commission should put in place processes focused on quality improvement, to support an environment of open discussion regarding challenges with the regulators – without fear of punishment. To support

this, regulatory powers should only be used proportionately and where necessary.

R15 The regulation and accreditation of registered providers and disability providers should be harmonised.

14.1 Independent pricing determinations for aged care

While not directly relevant to the Aged Care Bill, ACCPA continues to call for the expansion of the role of the Independent Health and Aged Care Pricing Authority (IHACPA) to determining aged care pricing (as it currently does for the health sector). In our *2024-25 Pre-Budget Submission*, we recommended implementing independent pricing determinations for aged care to ensure pricing is transparent and evidence-based, and not impacted by changes in the government. This would require an amendment to section 131A of the *National Health Reform Act 2011* (Cth), which concerns Functions of the Pricing Authority—aged care.

Such a step will act as a structural means of supporting trust and transparency in the aged care system. This is particularly relevant to the progression of possible future funding arrangements as it might relate to consumer contributions. It would also serve to provide a key layer of assurance to the Australian taxpayer and consumer that an independent body has an evidence-based role to consider, determine and publish prices in aged care (as a longitudinal 'check and balance' across annual budget and electoral cycles).

14.2 Approach to regulation

In relation to regulation, we would like to see an improvement focused environment established in the Aged Care Act (operationalised by the Department of Health and Aged Care and the Aged Care Quality and Safety Commission), rather than a punitive environment that increases risk aversion, thereby reducing or eliminating innovation and quality improvement. A partnership approach between registered providers and the Department and the Commission is desirable and represents best practice in other sectors, such as health. Critically, this more open environment should incorporate ways for registered providers to openly discuss challenges with regulators, focusing on improvement rather than on punishment.

Further, the Aged Care Bill provides the Aged Care Quality and Safety Commissioner and System Governor with significant regulatory powers, some of which have grounds with low thresholds. For example:

- the Commissioner or System Governor can issue a compliance notice for possible non-compliance on the basis that they are "aware of information that suggests that the provider may not have complied, or may not be complying, with [the] Act" (subparagraphs 481(a)(ii) and 482(a)(ii)).
- if the Commissioner reasonably believes a person has information or documents relevant to whether a registered provider is complying with the Act (i.e. not actual non-compliance), they can issue a notice compelling the person to attend before an authorised Commission officer to answer questions or give information or documents (subparagraph 488(1)(a)(i), subclause 488(2)).

We are concerned that these powers could be overused and/or misused, resulting in providers and aged care workers exiting the sector. To uphold an improvement focused approach, it is imperative that regulatory powers are only used proportionately and where necessary.

14.3 Harmonisation

It is acknowledged that the Aged Care Bill provides for recognition of an NDIS worker screening clearance decision for the purposes of an aged care worker screening clearance

(clause 380), along with recognition for an NDIS exclusion decision for the purposes of aged care worker screening (clause 381).

We also support arrangements being put in place, either in primary legislation, subordinate legislation, or in practices and procedures implemented by the Department of Health and Aged Care and the Aged Care Quality and Safety Commission, to harmonise the regulation of registered providers and disability providers. For example, the extent to which audits under the NDIS should be acceptable for aged care and vice versa.

Such an approach should have significant benefits for all participants in both sectors, including the relevant departments and regulators.

Thank you for the opportunity to make a submission to the Inquiry on the provisions of the Aged Care Bill 2024. These historic reforms are essential to achieving quality aged care services, in a sustainable aged care sector, for older Australians now and for decades to come. We look forward to seeing the progression of this Bill and the implementation of reforms.

Yours sincerely

Tom Symondson
Chief Executive Officer