Submission to the Australian Government Department of Health and Aged Care

on the

A new model for regulating Aged Care: Consultation Paper No. 1

Prepared by

COTA Australia

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COTA Australia

COTA Australia is the national consumer peak body for older Australians, which through policy development, advocacy and representation seeks to achieve an equitable, just and inclusive society for Australia's more than eight million older Australians. COTAs have been identifying the needs of, and issues affecting, the welfare of older Australians since the first COTA was formed in 1951.

COTA Australia's members include the eight State and Territory COTAs (Councils on the Ageing). Through over 45,000 individual members and supporters of the COTAs, and the COTAs' wide range of ageing sector and seniors' organisation members COTA Australia directly represents over 500,000 older Australians.

COTA Australia is the leading voice for the rights and interests of older Australians. Its focus is on national policy issues from the perspective of older people as citizens and consumers and we seek to promote, improve, and protect the circumstances and wellbeing of older people in Australia. Information about, and the views of, our constituents and members are gathered through a wide variety of consultative and engagement mechanisms and processes. COTA's non-partisan advocacy, on issues identified in collaboration with older people, has advanced the national agenda for older people's wellbeing for over seven decades.

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Introduction

COTA Australia welcomes the opportunity to respond to "A new model for regulating Aged Care: Consultation Paper No. 1" as part of Stage 2 of consultations regarding the development of a new Aged Care regulatory model

COTA Australia has several concerns about the regulatory model proposed in the paper. Whilst this is an early stage in the formation of the new model, there is insufficient detail about both the elements of the model and how they would be applied to form a definitie opinion on the model.

We note that further papers will be produced focused on specific elements of the new regulatory model and look forward to providing responses to these documents.

General/Broad response

The consultation paper is overly repetitive. Details in the section on the overview of the new model could have been combined with the section on applying the new model. For example, how registration is described and applied could be in the one place.

There is little clarity or detail on what is new or different about the regulatory model. The challenges with the current legislative framework, identified in the Concept Paper, are listed but there is no real explanation of how the new regulatory model will address this. How will the new model shift from being:

- Provider centric **to** person centred and rights based
- Separate and fragmented **to** aligned with the broader care and support sector
- A uniform approach to service types **to** a sophisticated risk-based approach that incorporates different types of care and services
- A limited definition of approved providers **to** incorporating individuals, partnerships, and other business structures.
- Passive and functionary in assessing the requirements of providers **to** incentivising excellence, innovation, and continuous improvement.

The aim and objectives of the model require more detail and discussion. Consideration could be given to making the aim of the model more robust and less passive by changing it from "strengthening and enhancing protections, rights, and delivery of services" to "ensuring that older Australians receive rights-based services, are protected from harm, and achieve high quality life outcomes."

The objectives of the new model should better reflect the needs and service experience of older people. Consideration should be given to expand the objectives to:

- Strengthen and develop the capability of aged care services to improve health, wellbeing, and life outcomes for older people
- Safeguard older Australians against harm, neglect, poor, substandard and discriminatory practice

- Take preventative and corrective actions to eliminate poor, substandard, and discriminatory practice that harms older people receiving aged care services.
- Deliver effective, efficient, and contemporary regulation that is regularly improved through engagement with older people.

The paper quite rightly mentions the importance of the new Aged Care Act and the regulatory model. However, it provides no detail on the relationship between the development of the new Act and the new regulatory model.

According to the paper, a foundation of the regulatory model is a rights-based approach, and the model will complement any new 'rights-based' provisions in the new Act. The rights of older people will underpin all aspects of the model. However, there is little detail or explanation in the paper of how rights are addressed in the description of the elements and regulatory tools of the new model.

Undertaking a person-centred approach is an important foundation of the new model and the paper describes, in general terms, its importance and the outcomes for older people. However, it does detail mechanisms that achieve a person-centred approach. It is not clear how the approach will help older people to be engaged and informed or shape care to be based on individual need rather than compliance requirements. The process of the co-design of the model with older people is not articulated. The relationship between the elements of the new model and the foundation of delivering a person-centred approach is not described.

Safeguarding

The paper does not provide a definition of and/or discussion that frames safeguarding.

At a high level, this discussion should involve the balancing of two principles:

1. Dignity and autonomy
2. Protection and safeguarding.

These principles are not mutually inconsistent as safeguarding responses can also act to support and promote the autonomy of older people.

Poor, substandard, and neglectful service practice in aged care undermines the dignity and autonomy of older people. Harmful behaviour by providers has a big impact on the older person's ability to make choices about their life. Therefore, protecting older people from abuse supports them to live autonomous and dignified lives.

Like most adults, older people highly value their freedom and independence and do not want to be paternalized or patronised or sheltered from all risk. The autonomy of older people should not be afforded less respect than the autonomy of others. Sometimes, where there is particularly serious risk of abuse of vulnerable people, protection should be given additional weight.

Adult safeguarding laws in Australia are provided by state and territory governments and refer to at-risk adults. The definition of at-risk adults refers to those who need care and support, are being abused or neglected, or are at risk of abuse or neglect and cannot protect themselves.

Most older people do not meet this definition of at-risk adults. The 'functional' approach to vulnerability is preferable to providing safeguarding services to all people over a certain age. Most people over 65 are not particularly vulnerable and will not need safeguarding services, while some people under 65 will need these services.

The regulatory framework would be greatly enhanced by providing a definition of safeguarding and some principles and guiding text outlining how the framework understands and applies safeguarding responses. This text should explore issues related to vulnerability, risk and balance between protection and dignity and autonomy.

The South Australian *Ageing and Adult Safeguarding Act 1995* in shaping its safeguarding regulatory measure and protections provides valuable definitions of important terms such as vulnerable adult, abuse, and decision-making capacity. It also includes some important and relevant principles including:

- vulnerable adults are entitled to be treated with respect for their dignity, autonomy and right to self-determination.
- vulnerable adults are presumed to have decision-making capacity, unless there is evidence to the contrary.
- the vulnerable adult's autonomy is respected and maintained, except in cases involving serious and imminent harm.
- vulnerable adults are allowed to make their own decisions about health care, accommodation, financial matters, and personal matters to the extent that they can and should be supported in that decision making for as long as possible.
- dignity in risk must be observed.
- a vulnerable adult with decision-making capacity has the right to decline services or supports.
- vulnerable adults must be involved in decisions or actions taken to support and safeguard them.
- the will, preferences, cultural and heritage beliefs, religious beliefs, racial origin, ethnicity, background, and other beliefs of the vulnerable adult must be respected.
- any safeguarding measures should be the least interventionist and least intrusive.

This should be examined in the development of the aged care regulatory framework.

Registration

COTA Australia could not support the proposed registration process and requirements without more detail and clarification on the approach to lower level or low risk services.

It is our understanding that what is being proposed is that all service providers and services, from lawn mowing to nursing care, will be covered by registration. Once registered, a graduated risk classification will be applied, potentially placing less regulatory administrative requirements on low-risk providers. However, the details of this risk-proportionate approach are not provided.

This contrasts with the NDIS registration approach which applies clear categories of registered and unregistered providers or services.

The paper notes that an intended outcome of the registration approach is to increase service availability of lower risk services to enter the aged care market. It is unclear how the approach would do this. As presented, there is a risk that this would act as a disincentive for low level services (e.g., lawn mowing or house cleaning only).

COTA Australia would argue for an aged care registration process and requirements that are in line with the NDIS approach and therefore consistent with alignment across the care sectors. The protection of older people and addressing of risk would come through robust worker registration and the Code of Conduct.

Code of Conduct

As previously argued, COTA Australia supports a consistent national Care and Support Sector Code of Conduct that has a clearly defined scope and consistent process that establishes the behaviours, practice and culture of aged care services including management, governing persons, and workers. This will provide a greater degree of assurance to consumers, their families, and the wider community that the people working in and/or across the three sectors are members of a competent workforce who have demonstrated their commitment, fitness, and suitability to deliver consumer-centred, rights-based care and support.

The Code must be inclusive of all categories of permanent, casual and agency employed workers who have a direct care and support relationship with consumers and not covered by another comparable regulation scheme. Currently, only workers from approved providers can deliver aged care services.

Consumers should be able to choose individual workers to undertake low level, non-clinical services. Workers with intermittent and/or minimum face-to-face contact with consumers should not have to meet the Standards for an approved provider but should be subject to the Code of Conduct.

In the current aged care system, the control that approved providers have over the work of subcontractors reduces the capacity of consumers to determine who can deliver services to them. Older Australians who self-manage their home care services should have greater autonomy over who provides those services, particularly non-clinical services. Greater autonomy for older people in deciding who can provide their care should be a clear principle in the future Aged Care Act.

There are many examples of why older Australians may choose safe, unregistered providers to deliver non-clinical services. Older people may ask their neighbour to help get them into bed at 11pm because this is not offered by an approved provider. An older person may choose to continue to employ a trusted and experienced cleaner they have used for many years. Through their own social networks, an older person may engage a local teenager for garden maintenance.

Some workers in aged care are already members of professional registration processes such as nurses and physiotherapists. It is unclear to us whether such registration via AHPRA would negate the need to have additional requirements through the proposed Code of Conduct or if Code of Conduct should only apply to workers not covered by an alternative recognised AHPRA process.

We assume the Code will apply to Commonwealth Home Support Programme (CSHP) providers and non-government aged care services under the new Act. The transitional implementation process could include updating the CSHP manual to require CSHP providers to comply with the Code now.

There is no detailed process where consumers can complain about breaches of the Code of Conduct. This is provided under the NDIS Code of Conduct.

Individual civil penalties may apply to workers for non-compliance with the Code. Consideration should be given as to whether such penalties are proportionate for an individual on the salary of an aged care worker.

Complaints Process

Whilst noting that there will be a separate future discussion paper, there is a distinct lack of detail about complaints and the complaints process.

The paper states that complaints and feedback will remain an integral component of market oversight. It does not provide information on how the management of complaints and the complaints process will be improved.

References in the paper are made to complaints providing systemic data and information informing the registration and re-registration process with some general text on the importance of supporting consumers.

The lack of detail creates the impression the complaints process is passive in its intention and is a data repository to determine trends and risks over time. Therefore, it does not play an integral role in reforming the system and service culture.

Complaints should be viewed as an essential proactive mechanism that genuinely supports reform of aged care service practice and culture and enhances the public perception of aged care and well as give confidence to aged care consumers and their families. Skills in managing and utilising complaints should be valued and present in worker training, leadership and to address ageist assumptions

The effectiveness of complaints processes is important at the service level and system level and should have a positive impact on individual consumers and aged care system outcomes effectively and responsively addressing actual and potential harm and risk.

Some principles and themes missing from this paper include:

- Responsiveness, timeliness, and efficiency in addressing complaints and delivering better outcomes for complainants
- Ensuring transparency of complaints at all systemic and organisational levels to drive accountability
- Proactive identification and management to prevent vulnerable consumers from reaching a state of risk
- Using root cause analysis to drive continuous improvement, identifying and fixing complaint drivers.
- Emphasising the recruitment of complaints management staff, at all levels, with the right attitudes, with an aptitude for empathy, problem solving and a willingness to challenge the status quo.

- Encouraging innovation and adopting new technologies to improve consumer experience and life outcomes, drive efficiency and provide improvement focused analytics.

The paper does not cover some issues raised in the Royal Commission about complaints including:

- A Complaints Commissioner function or role
- The role of the Inspector General
- Expanding the scope of complaints

In resolving complaints where there has been poor care leading to harm, restorative justice practices should be considered that may, in serious cases, include orders for the payment of money.

Restorative justice practices emerged within the criminal justice system but have since been used in other contexts, including schools, workplaces, and residential facilities. They typically involve facilitated face-to-face meetings between people experiencing conflict and may include support persons and other affected individuals. These processes can engage affected parties in a dialogue about how harm can be repaired and how relationships can be restored.

Restorative justice is not a replacement for responding to a crime but provides a valuable option which can be used prior to, alongside, or at the end of other justice responses, and promote choice and control. Restorative justice processes would be evidence of the aged care regulatory system undertaking a human rights approach.

Enforcement

There is insufficient detail on how the regulation model will approach and implement enforcement measures. We note that there will also be a separate discussion paper on this subject. However, this paper could have briefly outlined some of the key challenges, themes, and a framework for a potential approach.

The Royal Commission succinctly states that “enforcement must be credible and effective”. The Royal Commission also heard evidence that the delivery of poor and substandard care has rarely had serious consequences for aged care providers or for individuals in positions of leadership within providers.

The paper indicates that the regulatory model will be risk-based and emphasises improving provider capacity and capability building, with the regulator making judgements on potential enforcement powers. It does not detail an enforcement scheme, framework, or hierarchy. It provides no information related to circumstances of poor practice and harm and when and how enforcement measures will be applied.

The paper indicates that it may utilise powers derived from the Regulatory Powers (Standard Provisions) Act 2014, pursue criminal offences where conduct warrants it and utilise emergency powers in limited circumstances. It does not provide aged care specific examples of behaviour and conduct when these enforcement measures would be used.

The paper does not outline in what circumstances enforcement sanctions or measures will be placed on individuals, organisations, or both. Accountability of individuals in leadership positions is important. It is unclear in what circumstances proceedings against individual personnel would occur in addition to

action against the approved provider

Assuming a risk-based regulatory model is proposed, there is no risk-based schema linked to enforcement measures outlined. There is only reference to “proportionate regulatory enforcement actions” that are “reasonable and appropriate” to risk. This poses several questions:

- What are the risks the regulator is concerned to control?
- What is the risk appetite of the regulator? What risks is the regulator prepared to tolerate and at what level?
- What is the risk-based framework? How does the regulator assess hazards, adverse events and risk and the likelihood of it occurring?
- Will the regulator utilise a risk-based scoring tool to rank providers based on assessment of risk?
- How will supervisory, inspection and regulatory enforcement resources be linked to risk scores of individual providers or system-wide issues?

Without further information, there are several potential concerns related to a risk-based approach including:

- The tendency to focus on known risks, leaving new or developing risks undetected.
- Limited and locked into an established analytical framework
- Potential to ignore areas of lower risk that may result in considerable damage over time
- A focus on individual providers rather than how compliance across organisations could be improved.

The paper does not discuss the benefits and limitations of different regulatory approaches to enforcement such as the differences between risk-based regulation and responsive regulation. A responsive regulatory approach includes both punishment and persuasion in responding to poor practice and behaviour resulting in harm. Responsive regulation focuses not on 'whether to punish or persuade, but *when* to punish and *when* to persuade'. This is linked to a hierarchy or pyramid of credible sanctions of escalating severity that the regulator can threaten to utilise or pursue.

There is also no exploration of issues related to protecting and supporting older people impacted when a provider or facility is forced to exit the market due to sustained poor and substandard practice and the application of necessary enforcement measures. A strong and capable regulator is needed to implement robust enforcement measures where required but also provision needs to be made to protect consumers in the process.

The Royal Commission highlighted serious neglect, abuse and poor practice does occur regularly in the aged care system. To protect and safeguard consumers and to provide public confidence in the aged care system, a transparent and strong enforcement scheme should be established and implemented to respond to harmful service practice.

Information and support for consumers

Like other sections there is little detail provided about consumer information and support. We acknowledge that there will be a separate paper on consumer information.

This paper only restates the Government's commitment to timely, transparent, published information to consumers about provider performance.

There was an opportunity in this paper to provide some broad details on the scope of consumer information including examples of performance ratings. There could be a more expansive description on how the regulatory model will make information more meaningful and visible. There could also be reference on how the regulator will engage with older people to continuously improve published performance information.

Ends.