

COTA Tasmania Policy Council Submission on the Aged Care Act 2023 Consultation

About COTA Tasmania

COTA Tasmania is a not-for profit organisation operating as a peak body for a wide range of organisations and individuals who are committed to encouraging our community to think positively about ageing.

Our advocacy and education work promotes social inclusion, championing the rights and interests of Tasmanians as they age and promoting age friendly communities that reflect the diversity of older people who live, work and play in our state.

We have been the voice of older Tasmanians for 60 years and see ageing as a time of possibility, opportunity and influence.

Ageing Demographic

lutruwita, Tasmania, is the oldest, and its population structure is ageing the fastest, of all Australian states or territories. The 2021 census saw Tasmania reach a population of 557, 571 with 40.9% being over 50years of age. Of that, 116,642 are aged 65 years or over (20.92%).

COTA plays a key role in supporting and advocating for the rights of older Tasmanians. We welcome the much needed changes to the current Aged Care Act and believe that at the core of these changes should be the emphasis on the empowerment of older people to have appropriate and timely access to the supports and services they need and choose as they age. At the heart of this is the importance of listening to the community and assisting those beyond the age that may currently need aged care support to understand how important these reforms are for the future of our country.

To do so effectively takes time. COTA Tasmania was disheartened to see the draft Reforms released in December with such a short time frame for accessible, inclusive and through consultation methods and processes in place.

COTA Tasmania Policy Council (TPC)

The COTA Policy Council was established early in 2010 to provide advice and policy direction on issues of concern for older Tasmanians. The COTA (Tas) Policy Council is a sub-committee of the COTA (Tas) Board.

The COTA TPC met on 11 January 2024 to discuss the proposed New Aged Care Act. Members in attendance had the opportunity to review the information provided by both the Commonwealth Government relating to the proposed new Act and information provided by COTA Australia/OPAN in both its webinar on 9 January 2024 and the related issues paper.

That discussion has been further informed by the COTA Australia/OPAN webinars presented on the 19 and 22 of January 2024.

This submission will be provided in 2 sections – overarching comments, and comments relating to the 23 issues raised in the COTA Australia/OPAN issues paper. The comments provided also incorporate our consideration of the webinars held on 19 and 22 January 2024.

**This submission follows and is made in conjunction to that made by our partner, COTA Australia.*

Overarching Reflections – Aged Care Act 2023

Members of TPC considered that their ability to comment on the proposed new Act were severely hampered by several critical factors:

- the lack of information on how the provisions of the new Act would be funded;
- the motherhood nature of many of the provisions within the proposed new Act; and
- the lack of detail in how the provisions of the proposed new Act would be implemented and enforced.

The members of TPC were concerned that consideration of the proposed new Act in the absence of its subordinate legislation which will necessarily outline how the new Act will work in practice is difficult. The Council were generally supportive of the approach taken in the proposed new Act but was also aware that there is a huge gap between making the policy statements outlined in the new Act and how these statements will deliver improved aged care for older Australians in a manner that the rights proposed are actually delivered.

As a minimum the members of the Council consider that the subordinate legislation and administrative guidelines, which will provide detail around implementation, need to be available contemporaneously with the tabling of the new Act in the Commonwealth Parliament. The Council expressed concern that the lack of detail within the Act itself could be detrimental to the provisions of the new Act delivering the outcomes sought.

The Council was particularly supportive of the rights-based language used within the new Act and the focus on individual choices. However, delivering upon this will require substantial change within the sector. The Council was particularly concerned about how this rights-based framework will be communicated and explained to older Australians. Many older Australians neither have the access or skills to view on-line content and explaining the new Act in the appropriate manner will be critical to achieving the desired outcomes. The multicultural and indigenous aspect must also not be overlooked in the process. We consider COTA has a strong role to play in communicating the principles of the new Act and what they mean in practice for older Australians.

It was considered that while implementation of the provisions of the new Act are somewhat based around a belief in markets, in a small jurisdiction like Tasmania, and particularly within rural and regional areas, the approach taken by the new Act is likely to not deliver the expected outcomes. We currently see large workforce shortages across the sector in Tasmania, which only increases in more rural areas.

The Council also expressed concern that the proposed new Act, despite its adoption of a rights-based approach, was still firmly grounded in language which treats ageing as either a disease and/or a disability. Ageing is neither, and the Council considers that any legislative base relating to ageing must recognise this and be framed in respect to the support older Australians require to age in a way which maximises their connection to their community.

The use of the term “System Governor” is of concern to the Council. Simple reference to the Secretary of the relevant agency is more than sufficient and conveys more clarity in respect of responsibility and accountability for implementing the provisions of the Act.

Comments on the 23 Issues raised in the COTA Australia/OPAN Key Issues Paper:

1. *The new Aged Care Act must commence on 1 July 2024 and be reviewed every 3 years.*

TPC supports the possible solutions provided in the Issues Paper, subject to the following comments.

While supporting the view that the new Act should commence on 1 July 2024, the members of the Council were very concerned that while the underlying policy statements contained in the Act were positive, the lack of subordinate legislation detail around these statements is a significant concern. As such the Council considered that it is critical that consultation on implementation and enforcement as will be provided via that subordinate legislation is as important as consultation on the new Act itself, and in many ways more important.

In particular, the Council expressed concerns in relation to how the transition to the new Act will be managed, particularly how existing providers will be supported to implement the rights-based approach.

2. *The Act must take a human rights-based approach with a focus on wellbeing, reablement and quality of life.*

TPC supports the possible solutions proposed and is particularly supportive of the view that the objectives of the legislation are to be read in a 'positive' not deficit approach. In particular, when considering this aspect of support for ageing, consideration should be given to ensuring direct access to sunlight and fresh air. Access to services should also be considered as part of this element of support for ageing.

3. *Providers must have a positive duty to uphold rights, with pathways for older people to complain if they do not.*

The TPC strongly support the comments from the Key Issues Paper in respect to this issue. In particular, the Council considers the proposed new Act should more strongly implement a chain of responsibility approach which encompasses the role of not just providers, but also that of managers and Board members in ensuring that the rights-based approach is implemented. Clear penalties to individual managers and Board members and not just providers will be an essential element of implementation and enforcement. Such penalties as may apply to individuals should not be insurable.

Members, while supporting strongly the concept of clear complaints pathways, also recognized the many impediments and implications for older persons, or their representatives, such as family members, making complaints. The new Act is very unclear on how these recognized problems of making complaints will be addressed.

The Council also expressed concern at the relationship between the Complaints Commissioner and the ACQSC. This relationship is problematic, especially where an older person may be raising a complaint which either directly or indirectly reflects upon the duties of the ACQSC. In this respect the Council is not convinced that the Complaints Commissioner can be truly independent while related to the ACQSC as proposed by the new Act.

The Council considers that for the Complaints Commissioner to be truly independent they should be an officer of the Parliament and report directly to the Parliament and not either a government agency or the Minister.

The Council particularly supports the elevation of the Code of Conduct into the primary legislation to improve its prominence and entrench its importance to the operation of the new Act.

4. *Ensure principles of choice and control, consumer-directed care and self-management are embedded in the Act.*

The Council is strongly supportive of the possible solutions proposed in the issues paper. In particular, the members strongly support the need for co-design principles to be more adequately embedded into the operation of the new Act.

One area of concern the Council has in relation to this aspect of the new Act is its similarity to the way the NDIS has been implemented and the gaming of those provisions which are now coming to light. It is important that the implementation process of the new Act is undertaken in a manner which limits the gaming or 'care washing' of the Act's provisions for individual benefit, or where those provisions are gamed a socially desirable outcome is achieved.

The use of computer aided decision-making raises concern. Such processes are widely recognized as embedding a range of discriminatory practices. If computer aided decision making is adopted it MUST be clear how that decision process occurs and as a minimum a parallel paper-based process must be available to enable an applicant to clearly see how a decision has been arrived at.

In relation to the last dot point raised in the Key Issues Paper, members highlighted the need for any enforcement process to minimize the need for breaches to be resolved in Court based forums.

5. *Older people can make decisions and receive the support they require to make decisions when they need it.*

The Council provided a particular focus to this aspect of the new Act. It strongly supports the point raised regarding having a Supporter and a Representative. It furthermore strongly supports the need for older people having unreserved access to an advocate.

The Council considers that the supported decision-making framework proposed is a critical element of the proposed legislation and an older person **MUST** have full and unencumbered access to their full support network to ensure that the supported decision-making framework can work appropriately.

The members raised strong concerns in relation to how this element of the Act relates to State based guardian and administration arrangements. It is well recognized that where Commonwealth legislation relates to the actions of corporations it may be interpreted as over-riding state and territory law. Many elements of this part of the new Act parallel state laws around guardianship and administration and the new Act must clearly state that where there is conflict with state/territory law the state/territory law is paramount.

6. *The Complaints Commissioner should have direct independent statutory authority and functions.*

In considering this key issue the Council were again supportive of the possible solutions put in the key issues paper. We would, however, stress the importance of this role being quite separate in the Act and have some concerns when the Commissioner may be investigating actions of the ACQSC if their function is supported by staffing from that agency.

This highlights the importance for the Complaints Commissioner to not only be independent but be seen to be independent and this is considered a critical aspect of the legislation. Members noted that the Commissioner would report annually to the Minister under the proposed new Act. TPC would suggest that the Complaints Commissioner make their annual report to the Parliament.

7. *The new Complaints Framework must be included in the Act.*

The possible solutions presented are fully supported.

8. *Equitable and timely access to aged care services must be guaranteed within 30 days of application.*

TPC expressed considerable concerns in relation to this aspect of the proposed new Act. While the sentiments expressed in the drafting may be achieved in high population urban areas, the Council considered that once in rural and regional Australia and also in smaller population centres, this aspect of the legislation will fail. Within these parts of Australia, the access to resources, and/or alternative service providers will mean that as drafted the new Act is unlikely to deliver equitable and timely access to aged care services. **However, we believe that the standard of 30days is something the Act should not only aspire to - but be able to meet so that older Australians are not left waiting with assessed needs unmet.** To do so requires a closer look at (and investment in) the accompanying issues related to workforce shortages.

We consider that the possible solutions outlined in the key issues paper may address part of the problems face outside major urban areas, but there is concern that providers will simply be unable to meet these elements of the new Act unless significant additional resources are provided to delivering aged care services in rural and regional Australia and the smaller population centres.

In particular, in the absence of any detail around the funding for the new Act, we consider that it will be difficult to meet the timelines currently specified in the new Act. This is an area of the new Act where the Commonwealth government must engage more fully with older Australians living outside the major population centres.

9. *Eligibility for early access to aged care services must be expanded.*

Again, the proposed solutions are fully supported. Providing greater access to reablement, low level equipment needs and social connection programs can be seen as a proactive and preventative measure that can serve not only older Australians and their confidence and understanding of the system, but also serve to support their carers and families.

10. Aged care residents must have an absolute right to visitors in all situations.

The Council supports the comments provided and the possible solutions proposed in the key issues paper. It further considers that this element of the new Act should be incorporated into the section of the new Act where rights are directly specified. Visitation must be a right for older Australians and in future we should no longer isolate older Australians as we have seen happening during the COVID pandemic and other infectious disease outbreaks.

While the possible solution refers to a named visitor, TPC considers that there should be the capacity for multiple named visitors. In the case of people at the end of their life there is a clear need to further relax any constraints on visitation.

The Council considers that the provision of care and support for older Australians must specifically recognize the potential for disease outbreaks and that providers MUST have provisions in place to better manage these and ensure that, except in the most exceptional of cases, older persons in aged care are not isolated in virtual solitary confinement. The covid experience has surely highlight how detrimental such practices have been.

There is a need to ensure that all residential aged care facilities have improved air flow management and filtering to minimize the potential for disease transmission and also that consideration be given to installing positive air flow arrangements to further minimize disease transmission risk.

11. The role of Independent Professional Advocates must be recognised in the Act.

TPC considers this a very important element for the new Act. Aged care is characterized by information asymmetry and as such knowledgeable advocates are a critical element of the system going forward. This element must be specifically included in the Act and adequate funding provided to support an independent and professional advocacy function for those in, and also those seeking, aged care.

The possible solutions are strongly supported by TPC.

12. Diversity must be further strengthened within the Act.

The members of the Council strongly support the strengthening of diversity provisions of the new Act. While the concept of a list is raised as a possible solution, the Council has some concerns that any list will necessarily never be fully inclusive of all diversity considerations. As such we consider that the new Act must have strong and positive language around diversity and operate in a manner that respects and supports the diversity of any individual seeking aged care/support. It should not be confined to some pre-determined list of diversity elements, which will always be lacking.

13. Disability supports must be explicitly referenced in the Act.

TPC fully supports the possible solutions presented in the issues paper.

14. Carers must be included within the Act.

TPC fully supports the possible solutions presented in the issues paper. Carers play a vital role in supporting Australians to age well and ensure their emotional and psychological needs and views are taken into consideration when interacting with and entering the aged care system. We must ensure that carers roles are included and protected within the Act.

15. Providers that state their services are 'high-quality care' must comply and opt-in to an audit against the definition.

The Council supports in principle the possible solutions provided. We consider that the definition of “high quality care” is really the definition that should be applied to standard care. While recognizing the current definition is aspirational, members of the Council could see nothing within the definition which should not be an expectation of the standard level of care a provider should be seeking to deliver. Defining such care as high quality simply conveys the impression to providers that there is some lower quality of care which is somehow acceptable.

It seems quite strange, given the definition, that a provider would be considered acceptable to deliver care against some lower standard.

16. Providers need to demonstrate an ongoing commitment to service improvement.

TPC support the possible solution in respect to this key issue.

17. Act protections should apply to all aged care services – government funded and private.

TPC considers this to be a critical element of any provider who seeks to provide aged care services and support under this proposed legislation. Furthermore, where a provider is providing some aspect of an aged care service or support, which does not come within the coverage of this new Act, perhaps consumer law needs an amendment to require that such a provider specifically states the services/support are not covered by the proposed new Act.

We further consider that a “standardized” contract/s templates for the provision of aged care services and/or support be incorporated into the Act. This will ensure an older Australians seeking care/support have the opportunity to enter into arrangements which fully reflect the provisions of the Act.

Moving from these legislated templates would then require a provider to demonstrate a good reason for so doing. The use of standardized templates is considered to enable improved compliance assessment where there are concerns with how services are being provided.

18. The Act must ensure consistent transparency of information.

This key issue is considered a critical element of the new Act. We would suggest that the word “all” be replaced with “full and total” access. There should be no personal information held by a provider which is not available to that person or their representative (however so determined).

TPC members have noted some recent concerns in relation to the application of star ratings. We consider that where star ratings are applied the mechanism for compiling any such star rating should be totally transparent. We further consider that there should be no ability to trade off one element of a star rating against another and thereby gain, perhaps, a higher rating.

19. Fees, contributions and government funding must be fully transparent, fair, equitable and provide quality services –Responding to the Aged Care Taskforce Recommendations.

TPC members have noted that the new Act is quite aspirational when compared to the current Act. We have concerns that at this stage in the process the provisions of the legislation relating to funding are blank. It is clear to TPC members that the current funding will not be sufficient to meet the requirements of the new Act.

We do, however, fully agree with the possible solutions raised in the key issues paper and in particular the statements relating to dot point 3. However, as stated above we have significant concerns that consultation is being undertaken within a funding void.

20. Language needs to be consistent and easy to understand.

TPC has, for some time, been concerned that the language used in relation to aged care services medicalizes ageing, or places ageing within the context of a disability. The new Act continues to use such language and expressions.

Ageing is not an illness. Ageing is not a disability. It is a normal process of living.

The new Act must recognize this. Older Australians will fall ill. Older Australians may face a disability. But so do all other Australians. Illness and disability are not restricted to ageing.

We feel the new Act should be reflective of support provided to older Australians as they age to ensure they are able to age with dignity and agency. This should be the over-riding basis for any legislation addressing ageing. We consider the language of the new Act should be amended to ensure a more holistic view of ageing is considered.

21. Better protections for older people on the use of Restrictive Practices.

TPC have significant concerns in relation to the way restrictive practices are used presently within the aged care sector. We strongly support the proposition that the starting point be that there are no restrictive practices. Furthermore, we strongly support the possible solutions offered in the key issues paper.

We consider that maintaining a person's agency and dignity as they age is of paramount importance and as such restrictive practices must only be used in exceptional circumstances. Any person or organization providing a service to ageing Australians must be cognizant of some of the difficulties faced in this space and rather than simply looking to restrictive practices as the solution seek solutions which do not involve such practices.

22. New security of tenure provisions must be included in the legislation.

TPC agrees with the importance of tenure security. The possible solutions presented provided a way forward in better ensuring a person's security of tenure. We note in the second dot point that there may be exceptional circumstances where a person's security of tenure may be terminated.

We consider that where such circumstances are considered to apply that any person losing their security of tenure **MUST** not face any corresponding financial penalty. As such any monies held by a provider **MUST** be returned in full and any provisions which would apply to a voluntary arrangement to suspend tenure should not apply. Such arrangements may include withholding some proportion of a person's RAD of levying additional charges for rehabilitating a person's accommodation. Additionally, a provider should be required to return a full capital appreciation of a person's RAD where such exceptional circumstances are sought and applied.

We consider that without such provisions of a financial nature a provider will seek to apply for exceptional circumstances rather than address the problem faced fully.

23. Clearer consultation timelines for the Support at Home amendments to the new Act.

We fully support the comments made in respect to this key issue. Further-more we consider this element of the new Act to be a critical element of any arrangements moving forward highlighting the need for clear and comprehensive consultation on how and when this element of the new Act will be progressed.

We welcome the ongoing discussions and debates about the Aged Care Act 2023. We feel adequate time is needed to more fully understand the more detailed provisions of the reforms and we cannot do so without more detail and information to guide these reforms.

To move this legislation without that process is to state that Aged Care reforms are not important, not given the same level of consideration and respect and in effect then, that older Australians are not important.

All Australians deserve an aged care system that supports both their physical, social and emotional needs and their individual wishes in a setting of their choice. **To do anything less is ageist policy.**