

Code of Conduct for Aged Care Draft Legislation

Submission

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About ACCPA

Aged and Community Care Providers Association (ACCPA) is the national Industry Association for aged care providers offering retirement living, seniors housing, residential care, home care, community care and related services.

ACCPA exists to unite aged care providers under a shared vision to enhance the wellbeing of older Australians through a high performing, trusted and sustainable aged care sector. We support our members to provide high quality care and services while amplifying their views and opinions through an authoritative and comprehensive voice to the government, community and media.

Our sector serves to make better lives for older Australians, and so do we.

Background

The Department of Health and Aged Care (Department) has released an exposure draft of the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 (Draft Rules).

This includes the draft Code of Conduct for Aged Care (Code) which is said to be based on the National Disability Insurance Scheme (NDIS) Code of Conduct. The Code comes into effect on 1 December 2022 and will apply to approved providers, aged care workers of approved providers, and governing bodies of approved providers.

The Aged Care Quality and Safety Commission (Commission) will be responsible for the enforcement of the Code.

This consultation follows public consultation on a draft Care and Support Sector Code of Conduct in late 2021, which ACCPA participated in.

The Code is a measure said to address Recommendations 77 and 103 of the Royal Commission into Aged Care Quality and Safety.

ACCPA is pleased to respond to the exposure draft and provide our response below.

Response

Key points

- ACCPA is supportive of the introduction of a Code of Conduct for aged care.
- We acknowledge the intention of the Code to extend regulatory protections to individual workers.
- Any provider that is compliant with the standards should expect that they will also be compliant with the Code. This appears consistent with the current wording but if there are intended to be different expectations these need to be made explicit.
- The use of the word 'must' in relation to the code has caused concern among providers as many of the provisions relate to outcomes that cannot be guaranteed – we would prefer the wording all reasonable steps.
- Provision (g) of the Code is not in the NDIS code. No provider can guarantee that serious incidents will not occur within their service. Do they all fail provision (g)? It is not clear in what situation a provider/person would comply with provision (h) but fail provision (g). It should either be further explained or removed.
- r 23BD(3) giving the Commission the power to provide detailed directions to providers to conduct investigations is significant regulatory overreach – providers already have obligations to conduct reasonable investigations of incidents, and the Commission has the power to conduct its own investigations if it chooses. Allowing the Commission to direct providers to conduct investigations on the Commission's behalf is not an appropriate or transparent use of public funds. It is also arguably contrary to natural justice.
- On banning orders, we reiterate the recommendation made in a previous Australian Aged Care Collaboration submission¹ for an explicit requirement to afford procedural fairness, including that a person or entity potentially subject to a banning order must be given access to all the information used by a delegate in making their decision to issue a banning order.

Comments on the Code

ACCPA is supportive of the introduction of a Code of Conduct for aged care. We consider it an important part of the reforms following the Royal Commission into Aged Care Quality and Safety - contributing to building an aged care system that all Australians can have confidence in, particularly those receiving care. A Code of Conduct that is designed to be consistent in its approach and application - for all those involved in its implementation – will be welcomed.

We note the intention to base the Code on the NDIS Code of Conduct and acknowledge the benefit to workers who may work across both disability and aged care sectors experiencing harmonised regulation.

¹ To the Senate Community Affairs Legislation Committee Inquiry on the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021.

We have previously expressed concern about duplication for health professionals. It is important that clear guidance is provided for these staff to reduce any administrative burden or confusion.

Turning to the provisions of the Code, we note the use of the term “must”, particularly its application to provision (g). Wording to account for taking reasonable steps to comply (as is the case for provision (h)) is absent from this provision. We are concerned about the potential implications that may arise from the phrasing as it stands, particularly how it may be interpreted by the Commission in their enforcement activities.

We query whether provision (g) should be included in the Code. It is not clear how it meaningfully differs from provision (h). There is also no equivalent to provision (g) in the NDIS Code of Conduct. What is a circumstance where a person would be compliant with provision (h) but not provision (g)? Should the provision remain, we encourage consideration for circumstances where individuals and providers have taken reasonable steps to meet this requirement, as well as other provisions in the Code.

We also query the following:

- What is meant by “act on concerns” in provision (f) of the Code? Does this refer to an individual or provider bound by the Code acting on concerns they identify themselves, in addition to those raised by residents, clients, family members etc.? Does it refer to a provider’s complaints management system?
- How will provision (h) work in relation to violence, discrimination, etc. perpetrated by family members of home care recipients? What are the expectations of providers in these circumstances, particularly in a home care environment?
- Why is “sexual misconduct” separate from “violence, discrimination, exploitation, neglect and abuse” in provisions (g) and (f)? Does sexual misconduct not fall within these categories? [We do note however that this is consistent with the NDIS Code of Conduct].

With reference to the application of the Code to approved providers as a body, the use of the term “must”, without reference to taking account of all ‘reasonable steps’ in each clause of the Code, is incongruous with the nature of the care sector whereby an organisation as an entity cannot control an individual undertaking the required care work, in an absolutist sense. We expect that there will be the appropriate and proportionate assessment of this by the Commission in its consideration of enforcement of the Code.

Expectations under the Code

ACCPA’s view is that the provisions of the Code (and any guidance materials published to support implementation of the Code) should be consistent with the Aged Care Quality Standards (Standards).

A provider that complies with the Standards (and other obligations such as the Charter of Aged Care Rights) should reasonably expect that they will not face additional requirements under the Code (other than in relation to supporting and educating staff, and even this should be largely consistent with their existing practice).

If there are additional obligations (and again our view is that there should not be) these need to be explicitly identified, and incorporated into guidance regarding the relevant Standards. This will avoid providers needing to undertake costly mapping and gap analysis to determine

whether there are any changes in expectations, and also ensure if there are changes in expectations that these are the focus for changes in practice.

In any event, there must be clear expectations for providers in relation to supporting the Code. Providers need enough time to incorporate the Code into their existing employee training and onboarding programs for optimal efficiency and uniformity in implementation.

Commission's Code functions

The Commission's Code of Conduct functions set out in r 23BD of the Draft Rules need to be communicated to the sector, particularly in relation to expectations of individuals and providers. Indications of thresholds for broad terms such as "specified period" (eg. approximate time frames), "specified action" and "appropriate action" (eg examples of actions that may be deemed "specified" or "appropriate") would be useful, noting that the exact time periods and actions required will depend on the circumstances of the case.

Power to direct provider to undertake investigations

ACCPA is particularly concerned about the actions the Commissioner may require providers to do under r 23BD(3) and the resulting administrative burdens and costs that may be incurred.

This gives the regulator unreasonable and relatively unchecked discretion to make use of the resources of an approved provider to conduct an investigation.

It should be expected that where there is a credible allegation that the code has been breached the provider conducts an investigation. This is consistent with a provider's broader incident management requirements, and their broader obligations under the Standards, including in relation to Governance and processes.

If the ACQSC believes that this investigation has been inadequate they have access to remedies against the provider.

However, this provision effectively allows the Commission to outsource the execution of its regulatory responsibilities to providers. This is not a transparent and appropriate use of the public funds allocated to providers.

- What are the expectations for an "internal investigation" and the written report which must follow? Will there be resources such as guidelines, a checklist etc to carry out investigations to the standard required by the Commission?
- How will "appropriately qualified expert" be defined? Will the "specified manner" in which the investigation is to take place be made clear to the provider? Engaging experts "at the approved provider's expense" may especially create challenges for providers, in light of funding constraints faced by the sector.
- What are the approximate timeframes for the "specified periods" required to undertake these actions? What happens if providers are unable to complete these in time, particularly if they have taken reasonable steps to do so?
- What kinds of circumstances would warrant these sorts of actions? Will there be case studies or other resources to illustrate this to providers?
- How might this impact on the industrial relationship between providers and workers?

- If providers are also expected to comply with the Code, does this then not introduce a potential conflict of interest for providers to then be possibly made to undertake an investigation?

We query what the purpose of these provisions are, given the Commission has powers to carry out investigations under r 23BD(1)(d).

If r 23BD(3) is introduced, providers must be given as much support as possible from the Commission to understand and navigate their obligations.

We also seek additional information about what rights providers have if they do not agree with these actions if asked to undertake them, i.e. is there an appeals process providers can undertake with the Commission?

It is important that the regulatory approach for the Code should be consistent to that for the Standards. However, these rules seem to give scope to the Commission to put the onus onto providers to be involved in investigatory processes instead of a clear delineation that the Commission is responsible for Code enforcement. While this may offer some flexibility for handling matters as they arise, there needs to be clear and transparent thresholds established as to what circumstances this path is the most appropriate one for handling a Code-related matter. The Commission should also be appropriately resourced to enforce the Code rather than imposing additional costs onto providers.

Enforcement of the Code and banning orders

It is important that staff are afforded natural justice in relation to the enforcement of the Code by the Commission.

There is a lack of clarity in the subordinate legislation regarding the process for Code enforcement, the process by which complaints may be made, and how they will be managed, including the thresholds to be applied. It is critical for a fair and just process that this be made transparent to workers, providers and the sector, or it will have the capacity to confuse and overwhelm the sector and the Commission in its implementation.

On banning orders, we reiterate the recommendation made in a previous Australian Aged Care Collaboration submission² for an explicit requirement to afford procedural fairness, including that a person or entity potentially subject to a banning order must be given access to all the information used by a delegate in making their decision to issue a banning order.

While provisions supporting procedural fairness were strengthened in the Bill that passed Parliament, the Commission will need to ensure that aged care workers and providers have the guidance necessary to understand the operation of banning orders, including how quickly they will be imposed, the appeal/review processes, as well as the potential imposition of penalties.

As to publication of the register of banning orders (r 23CG), we strongly recommend clarity for the sector and workers that this will only take place once any appeals processes have been settled.

² To the Senate Community Affairs Legislation Committee Inquiry on the Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021.