

Response to Consultation on the draft of the new Aged Care Act (2024)

Submission to Department of Health and Aged Care

<https://www.health.gov.au/our-work/aged-care-act/consultation>

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1 Summary

Introduction

We describe our lengthy experience in confronting the failures of free market policies in health and aged care as well as our warnings and submissions pressing for change in aged care over the last twenty-five years. We describe our recent engagement with COTA and OPAN as well as a group of more critical advocates and the health department.

We look at the harsh criticisms of the department made by Stephen Duckett when he described this proposed act as Thatcherism and those writing it as ‘zombies’ serving 20th century ideology. But we agree that this proposed act is trapped in 20th century ideology and like Thatcherism ignores community. It perpetuates an unbalanced market system that is fatally flawed.

We note Professor Kathy Eager’s criticism of the way the Royal Commission failed to examine the *“underlying assumptions about aged care as a market”*. We then describe the way we challenged the Royal Commission into Aged Care’s failure to address issues surrounding this free-market in 2020, quoting from our submissions. Duckett’s 20th century *“zombies”* were there as well and the problem is far wider than his article suggests.

Other comment: The online survey format is not conducive to the inclusion of research and evidence to back up responses, essential for the development of well-informed policy. We believe that wide public discussion of the broad issues surrounding the new Aged Care Act are essential before changes are made. The format deliberately directs attention away from the failures in the current system and the changes actually needed to address the problems.

There is also no option to have responses to this consultation published. We intend to publish information on our website to stimulate and engage public discussion and invite comment and suggestions. In the spirit of transparency, we would like to have our submission published and available for public discussion.

Flaws in the present system

We criticise the minister for ignoring the Royal Commission’s finding of *“deep and entrenched systemic flaws”*, when talking about the government’s response to the Royal Commission in parliament. There seem to be more of Duckett’s ‘zombies’ there too.

Whatever they are called or think they are doing, they are all conniving to break the promise made in the interim report of the Royal Commission. This is a dastardly betrayal of Australia and its citizens and it is being done by those we trust. The new aged care act is the vehicle.

Wrong Way: There has been extensive international and local criticism of the failure of neoliberalism and free-market ideology over recent years. We have chosen extracts from political economists Cahill and Toner’s introduction to their 2018 Australian book *‘WRONG WAY - How privatisation and Economic reform backfired’* to concisely describe what has happened and the extensive consequences.

Chapter 5 by Bob Davidson describes what happened in aged care in Australia. He describes the adverse consequences, as this policy and this sort of market was used to provide care to vulnerable people. He struggles to find a way out of the mess.

Major Issues:

We focus this submission on five of the serious consequences of neoliberal policy and this market system for aged care. We describe what is happening and how restructuring aged care as a centrally supported and mentored but decentralised community-led system could rebalance this failed market and address each of these issues. We describe what should be done and included in the new act to make this market work.

These serious consequences are:

1. the power imbalance
2. the failure of neoliberal competition policy
3. the consequences of paradigm conflicts (patterns of thought)
4. the loss of Trust and Trustworthiness
5. Capture and the erosion of our regulator and our democracy

In commenting and drawing conclusions we describe the way all those involved are wilfully blind to all the evidence and many criticisms as they design this act. We give examples of how evidence from the Royal Commissions own commissioned research, supported and advised decentralisation and local funding. They found this was associated with better care. Some Australians including Aged Care Crisis had advised this for many years. Anything that challenges belief is ignored. As a consequence, this act is *'an appalling betrayal of Australia and its citizens'*.

Outsourcing to consultants: We address the evidence showing just how poorly resourced and incapable of running these many consultations and roundtables the department is and conclude that all of these processes and the evaluations of submissions are being contracted to deeply conflicted marketplace consultants. When asked at a departmental consultation they were conducting, if they were actually drafting the new act, a KPMG member emphatically denied this. These marketplace consultants are the groups with most to lose if the problems in this free-market are effectively addressed – yet they seem to be managing the whole process. We worry that analyses and criticisms of this market are simply buried.

Other issues:

- 1. The privatisation of aged care assessments**
- 2. Limiting on-site oversight by advocacy and visitor schemes**
- 3. Limits in the Act**
- 4. Regulatory complexity is driving good smaller providers out of business**

1. The privatisation of aged care assessments

We describe how this ideological and inappropriate recipe for doing assessments has been pursued by conservative governments since 2014 and how it has repeatedly been opposed and criticised each time it resurfaced since. But it is Labor that has seized the opportunity created by a distracted society and the holiday period. It has put the process out to tender.

We describe the reasons why this is flawed and why the way computers and artificial intelligence is to be used are not appropriate. The act should be adjusted to change this.

2. Limiting on-site oversight by advocacy and visitor schemes

We trace the controversies surrounding the government funded and limited advocacy services in aged care and also the problems of advocacy more widely. There have been many criticisms of the way government has targeted advocacy. It has been relatively ineffective in exposing failures in aged care to public scrutiny. An approach that involves communities and makes advocacy services more directly accountable to them is suggested.

3. Limits in the Act

Only government funded aged care is protected and regulated by the act. In a system in which the wealthy will be expected to pay more, AN-ACC funding may well see providers target this potential market and create a parallel privately funded system. Those who pay their own way will not be protected by this act and they should be.

4. Regulatory complexity is driving good smaller providers out of business

We describe how more and more providers are responding to the complexity of the new regulations and this act.

Appendix:

We summarise and quote from five of our recent submissions to department consultations.

2 Introduction

Aged Care Crisis members have a long experience with failed social systems. The department and government were supplied with data from the USA and warned in 1999 that free market policies would not work in aged care. In 2007 the senate rejected our warnings about the problems with private equity¹. Within weeks the *New York Times* exposed the consequences of their involvement in aged care. They have become a huge problem in both the USA and the UK, and not performed well in Australia. We have supplied that data.

Over the years we have made multiple extensively referenced submissions² to inquiries that were a response to the ongoing failures and repeated scandals in aged care. We have described the problems and provided figures showing exactly what was happening and explaining why. We have analysed the processes at work, the reasons for system failure and the relevant literature then explained what needed to be done to address the huge imbalance of knowledge and power that lies behind these failures.

Like others we have repeatedly drawn attention to the problems in staffing and the reasons for this – something repeatedly denied and ignored by the industry, the department, the regulators and politicians. We have challenged the politicians responsible on multiple occasions.

As we discovered there is nothing as destructive for one's reputation and credibility as being right about the failures of a dominant ideology. As Canadian Critic John Ralston Saul indicated in his Massey lectures in 1997 *"in a society of ideological believers, nothing is more ridiculous than the individual who doubts and does not conform"*. Like so many others who warned, Saul's warnings about 'corporatism' twenty-six years ago, explaining what was happening in society. were simply ignored. We are now experiencing the consequences but those in power are still in denial.

Cooperative debate with COTA and OPAN: Over the last year we have participated in workshops and consultations with COTA and OPAN, both major designers of and participants in the previous system that failed so badly. They have identified multiple problems in the wording of the draft regulations and are proposing changes. They have understandably been reluctant to advise the sort of major structural changes needed to the system they have designed and supported. We argue that these structural changes are essential for successful reform and need to be in the act but we have been unable to steer them far enough in this direction. We do not have any issues with most of their suggested changes.

It is the major omissions that concern us.

COTA played a central role in further developing the free market aged care system created by the Howard government in 1997, when in 2011/12, their CEO, Ian Yates and their (then) Aged Care Reform Director, Pat Sparrow worked with the National Aged Care Alliance (NACA) in persuading Labor to adopt the even more marketized *Living Longer Living Better* (LLL) reforms³.

¹ Private equity investment in Australia Report Standing Committee on Economics Aug 2007
https://www.agedcarecrisis.com/images/subs/report_on_pr_equity_senate.pdf
Submissions: Wynne JM <https://www.agedcarecrisis.com/images/subs/sub03.pdf>
dela Rama M https://www.agedcarecrisis.com/images/subs/sub05_private-equity.pdf

² Aged Care Crisis Publications <https://www.agedcarecrisis.com/publications>

³ Why the appointment of Mark Butler as Shadow Minister for Health and Ageing is significant, Aged Care Crisis, Feb 2021
<https://www.agedcarecrisis.com/opinion/articles/453-why-appt-of-mark-butler-is-significant>

COTA were funded to carry out the community consultations for this, something other senior's groups were critical of⁴ as it seemed to create a conflict of interest. COTA's CEO Ian Yates urged politicians in parliament to pass the bill and then promoted the changes to the public.

National Seniors Australia (NSA) had been critical of the Productivity Commissions report in 2011 including questioning the market focus in its submission⁵:

“NSA is cautious about the belief that freer competition and market forces will drive standards and enhance quality in the area of aged care services and would like to see the empirical evidence to support this notion”.

National Seniors conducted its own consultations and we recollect that they had some reservations.

The extent of COTA's deep commitment to the free-market aged care system and denial of responsibility for its failures seems to be reflected in the recent appointment of Christopher Pyne as its new chairperson. Pyne was involved with the health and aged care portfolio, first as Parliamentary Secretary and then Minister for Aged Care from 2004 to December 2007 working with Tony Abbott who was the Minister for Health during that period. He was a cabinet member and leading member of the party from 2013 to 2019. He has been a strong supporter of free-market policies for at least 20 years and one of the architects of the system that has failed.

Pat Sparrow was appointed as aged care adviser to government during the 2013 to 2016 period when Abbott was Prime Minister. Ministers Morrison and Fifield introduced the increased market pressures that sent the system spiralling towards the Royal Commission at this time.

Sparrow and OPAN have expressed more moderate views at the recent meetings and the management of the discussions has been exemplary. They have listened and been receptive to criticism. But Pyne's appointment does not support a change in their views. We feel that as in 2012, there is a conflict of interest in selecting COTA and OPAN to lead the current consultations.

We realise that these people are genuine and believe strongly in what they are doing but this cannot credibly be overlooked. They are likely to find criticism of the policies they introduced very confronting and not credible. Those being consulted will instinctively avoid doing so.

Cooperative debate with the CARA group: We have also been a member of the CARA group. This includes several community groups including Aged Care Justice, Aged Care Reform Now, Older Woman's Network, Carers Australia as well as several other groups and individuals. Members of the group including Aged Care Crisis attended a roundtable meeting with the health department in Canberra. They have been more critical of this proposed act. Aged Care Justice has identified multiple additional important issues about the draft and is making a good submission on our behalf, which we support. Their concerns and suggestions are relevant and good. They also support a more decentralised system.

⁴ Speech to CPSA 2011 conference by Paul Versteeg Policy Coordinator

⁵ Response to the Productivity Commission Draft Report - Caring for Older Australians March 2011
<https://nationalseniors.com.au/uploads/110301-NationalSeniors-Caring-for-Older-Australians-Submission.pdf>

A longer experience: Unlike most, one of our members has had experience of ideologies globally and encountered problems in markets in human services since the 1960s. He studied this sort of behaviour at the time. He learned what was happening in the USA when visiting hospitals there on sabbatical in the mid-1980s. He visited the USA again in 1993 to investigate the major problems that had developed there and then closely studied what has been happening in the USA and Australia creating an internet resource⁶ of data.

He presented at meetings and wrote papers⁷ warning the medical profession and others of the problems.

He supplied extensive information to responsible authorities and like others⁸ tried to warn Australia and its politicians⁹ of the consequences of the policies they were now following.

⁶ **Corporate Medicine website 1996 – 2011 (over 500 pages)** <http://www.corpmedinfo.com/index.html>

⁷ **Supplying information about the conduct and warning about a US healthcare multinational** operating in Australia to breakfast session of Australian College of Surgeons meeting on Stradbroke Island 1994. They were informed about the business policies and conduct of this company. They were shown documents and reports collected from the USA in 1993.

The Impact Of Financial Pressures On Clinical Care Lessons From Corporate Medicine presentation published in Access to surgery: A National Symposium on the Planning and Management of Health Care Programs under Medicare. Townsville, May 23-24, 1996, editors Prof. P.K. Donnelly and Assoc. Prof. L. Wadhwa, published by the University of Queensland Press. pages 98-127. Also accessible at <http://www.corpmedinfo.com/corpmed.html>

Nay Corporate Medicine Wynne JM an invited opinion piece published in "Business in Practice" (Journal of the Private Practitioners Group of the Australian Physiotherapy Association) March 2003 page 10 Copy at http://www.corpmedinfo.com/nay_corporate.html

"Building on Values: The Future of Health Care in Canada" Wynne M & Armstrong W Health Issues Journal March 2003 (relevance of the Romanow Commission report into the commercialisation of healthcare in Canada for Australia copy w/ permission <https://bit.ly/3SZqFxx>)

Hazards in the Corporatisation of Health Care J Michael Wynne New Doctor 80, Autumn 2004 Copy with permission at <http://www.corpmedinfo.com/pp2-5.pdf>

Australia's Experience with Health Reform. Are there lessons for Canadians? Wynne JM Invited Lecture to Consumers' Association of Canada (Alberta Chapter) Edmonton, Alberta October, 2004 Transcript at <http://www.corpmedinfo.com/WYNNELP2710.pdf>

Belief versus Reality in Reforming Health Care J Michael Wynne Health Issues 2005, Number 83, pp. 9-13. copy with permission at <http://www.corpmedinfo.com/jmwynne83.pdf>

Aged Care: corporate conflicts run deep (J Michael Wynne) in Michael West Media 16 Jul 2016. <https://bit.ly/48DQOYg>

Is aged care a failed system and what can we do about it. Invited Lecture to Combined Pensioners & Superannuants Association (CPSA) meeting 2018 <https://www.insideagedcare.com/a-failed-system-what-next.pdf>

Spin trumps evidence in driving aged care policy (J Michael Wynne) in Michael West Media 1 Aug 2018 <https://bit.ly/3uVYykm>

Policies Influencing Aged Care in Australia: Past Present and Future Wynne JM, Saltarelli L and Winkler D. Chapter 2 in "Healthy Ageing and Aged Care" 2nd Edition edited by Bernoth M and Winkler D. Oxford University Press 2022

⁸ **Remission Impossible** Williams R (1992) relevant extracts at <http://www.corpmedinfo.com/williams.html>

AMA FEDERAL PRESIDENT introduces Minister of Health and warns him at AMA Summit Proceedings :::: Competition in Health: "A Brave New World" 1996 <http://www.corpmedinfo.com/weedon.html> The AMA president tells the minister for Health that the governments new health policy "is a sign of our intellectual and moral bankruptcy as a society" and he explains why.

Price competition, professional cooperation and standards MJA Vol 165 2 Sept 1996 page 272 Arnold P, The chairman of the AMA Federal Council then wrote an article in which he explained why "Such competition is lethal for standards; it is not in the public interest"

⁹ **Example letter to multiple politicians 2 June 1997 re Sun Healthcare** http://www.corpmedinfo.com/senators_29_5_97.html A US aged care company which planned to also enter aged care in Australia

Letter to Chairman, Senate Community Affairs Reference Committee written early 1998. Criticising The FIRB and supplying large amounts of information http://www.corpmedinfo.com/senat_com_2_3_98.html (Note: FIRB released information under FOI in late 1998 showing that this time it had been very critical of Sun Healthcare but its recommendation was deleted in the FOI documents. The content suggested it advised rejecting the application and it seems likely the Howard Government rejected that advice. The material confirmed the company planned to enter aged care.

Correspondence about Aged Care 1998/9 http://www.corpmedinfo.com/agedcorresp_1999.html Correspondence with Ministers and department in 1999 when Sun Healthcare's plans to enter aged care were revealed. This never happened because the scandal surrounding its conduct in the USA bankrupted it and it fired its charismatic chairman who had so impressed ministers.

Australian Aged Care Regulations to be changed OR ARE THEY? July 2007 http://www.corpmedinfo.com/dca_min_coresp_7_07.html Replies from Ministers Abbott and Pyne and a response to the department

Open Letter to Government: Probity 28 June 2008 <https://bit.ly/2UBGDPg>

In 1999 the Department of Health was warned about a US company planning to enter aged care and supplied with a large amount of material showing what was happening in the USA. It was warned of the consequences of the new policies adopted in the sector.

We recognise the complex problems these ideological changes have created for our society and have written about the complexity of this. Human services have been most affected and aged care more than others. Many are now writing about this around the world and looking for solutions.

In this submission we specifically address the root causes of failure by looking at the free-market policies we warned about in 1999 and their consequences. We indicate what needs to be done to fix this market.

We are not alone in our deep concern about this draft aged care act and its betrayal of Australians. In January 2024 Stephen Duckett who was in charge of the federal department of health in the 1990s is scathing likening this act to Thatcherism in its denial of community¹⁰ – a relic of *“the zombies that stalk the aged care policy corridors”* - - - - the *“draft Act is still riddled with the old ideology”*. He indicates that *“The draft Act has a Thatcherian individualistic emphasis, founded on a naïve belief in markets which can fix everything, and that government’s role is to sit back and weed out the occasional bad apple. This is not good enough”*.

That is the issue that we have with this act too but while apt, ‘zombies’ is harsh criticism of dedicated people who simply cannot accept the flaws in their free-market vision.

Duckett describes *‘rights washing’* in an act that promises much and makes much of individual rights but then does nothing to create a system that will do that. Instead, it rebuilds a system and a market that does the opposite. He claimed the new act *“literally provides government and industry with a ‘get out of jail free’ card”*.

Duckett is echoing Prof Cathy Eager and Anita Westera who said exactly the same¹¹ about the Royal Commission in 2021. They also said of the Royal Commission that *“there has been no questioning of the underlying assumptions about aged care as a market”*.

This is something that we had noticed during the Royal Commission inquiry. There was a change after Commissioner Tracey died. After promising *“In the months ahead, the Royal Commission will further explore the need for measures to manage a fragmented market for the delivery of aged care, along with consideration of alternatives”* (Interim Report V1 page 80), they carefully avoided doing this.

We suspect that this is what was intended all along and that the Interim Report ‘Neglect’ was not what government expected! We directly challenged the Commission with this issue in our 2020 submissions.

¹⁰ **Proposed new Aged Care Act leaves gaps in rights** Stephen Duckett in Pearls and Irritations 12 Jan 2024 <https://johnmenadue.com/proposed-new-aged-care-act-leaves-gaps-in-rights/>

¹¹ **Fundamental failure: Aged care a public good or competitive market? RC fails to address role of private providers** Kathy Eagar and Anita Westera in Pearls and Irritations 2 May 2021 <https://bit.ly/3oBWc8W>

Challenging the Royal Commission: We challenged the Commission about this free-market many times in our submissions. We quote briefly from two of our submissions.

In our **January 2020** submission to the Royal Commission, which responded to the consultation paper on program design, our first heading was *“Is something missing?”*. We accused the Royal Commission of *“Addressing the symptoms but not the cause”* and of not asking *“Why is it going on?”*. We asked *“Ultimately, how would the proposals to redesign the program eradicate the power imbalance”*.

We indicated *“There is a stark choice facing this Royal Commission. Will it allow the free market thinking and the policies based on it to continue to dominate the sector or will it restore humanitarian community thinking as the dominant pattern of thinking within the sector? These two patterns of thinking are contradictory and incompatible”*.

We responded to the questions in the consultation paper trying to focus on the market problem and on the community focussed solution that we had explained in earlier submissions. We indicated *“The Program Redesign consultation paper does not suggest a restructured new aged care system of the sort promised in the interim report and we find it very disappointing”*.

We explored the paradigm conflicts and described the development of neoliberal beliefs. We quoted Gregory’s warnings to Paul Keating that were ignored by the Howard government. We described the failures caused by these policies indicating *“This analysis identifies the major problem in our market driven aged care system, not only as the intrinsically predatory nature of a competitive market, but as the exclusion of, and the failure to develop an effective civil society to control its predatory nature”*.

We pressed them to open the debate more widely writing:

If the Royal Commission could be persuaded to specifically address the questions "What is going on here?", then "Why is it happening?", and finally "How do we stop this from continuing to happen?" it would bring the real issues and the changes we need to make to address root causes into the debate. It would make them credible and an issue that government and industry cannot avoid.

The Royal Commission did not address these issues in its hearings nor in Counsels proposed program redesign which was made available for comment.

In our **18 March 2020 response** to the Royal Commission commenting on Counsels recommendations for program redesign, we were critical of what it was doing and accused it of being captured. Some examples below:

“we think that designing a new system by isolating the discussion from the context within which it will operate is unrealistic”. And then “at this stage we are not persuaded that the objectives are attainable with the proposals that have been put forward by counsel. We are concerned at the way in which the Commission is proceeding”.

The Commission was *“not challenging many of those responsible for what has happened to aged care with the data and the important issues that need to be confronted - - - - confronting conventional dogma and belief is very challenging, but when those beliefs are the likely cause of the problems it is essential that this be done and addressed as a first step. - - - As a result, the Commission has become selective in the data it chooses to use and is ignoring that which challenges its proposals or questions the validity of the views of those whose advice it accepts.”*

“In our January submission about program redesign we expressed our concern that the Royal Commission had failed to critically analyse its own findings and the data available to it in order to look at the root causes responsible for the failure of the system. It still seems to be avoiding this”.

We gave examples and wrote about revolving doors, capture, conflicts of interest and a policy silo. We indicated that *“Like previous reviews and inquiries, the Commission has focussed narrowly on aged care and has ignored the society within which it operates and the belief systems that dominate society. Aged care is not an island. Aged Care has been problematic and failed in several other countries – those with similar social systems.”*

“ACC is concerned that counsel and possibly the Royal Commission has been captured by this belief system and the powerful people who identify with it. They are ignoring important issues and relevant data as a consequence”.

(Later) *“We are concerned that the Commission has been captured by these same patterns of thinking and that, in working so closely with members of the policy silo, the Commission is developing a program that does not address the real issues but which can be sold to the public as part of another branding exercise. It is not listening and has become wilfully blind to alternate points of view and the evidence that supports them.”*

We wrote more about the market and its problems. The Royal Commission did not publish this submission which was critical of them. We think the last quote above was prophetic and predicted what is happening in 2024.

Previous submissions to the department: The Department of Health and the many marketplace consultants they appoint have solved the problem created for believers by evidence and logical argument. They protect ideology, by not publishing submissions and so limit critical discussion. This has allowed them to pick and choose without fear of strong opposition.

Aged Care Crisis has made five submissions to the department in the last 15 months in which we are critical of what is being done and have tried to make constructive suggestions.

We include an outline of each (and the appendices to them) in the Appendix at the end of this submission:

- 1. 18 Oct 2022: Exposure draft of the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022**
- 2. 21 Nov 2022: Aged Care Quality Standards Consultation**
- 3. Jun 2023: Consultation Paper No. 2: A new model for regulating aged care**
- 4. Aug 2023: Response to Consultation Paper on the Aged Care Taskforce *Submission to Department of Health and Aged Care***
- 5. Sep 2023: Response to Consultation Foundations of the new Aged Care Act *Submission to Department of Health and Aged Care***

The majority of the serious issues which we have raised in these submissions have been ignored in the exposure draft of the new Aged Care Act. All we can do is to describe the problems in the present system that have not been addressed and then go through the exposure draft and indicate the additional changes that are needed to make this system work.

3 Flaws in the present system

Only a few days ago the minister for aged care spoke¹² about the findings of the Royal Commission acknowledging that *“It’s a blunt, black- and-white description of failure. It’s a report that described the aged-care system under the coalition’s lead as a shocking tale of neglect and one which was unkind and uncaring”*. Then she boasted about what the government was doing about staffing and clearly there was no intention of doing much more than that to fix the problems.

There was no mention of the *“deep and entrenched systemic flaws”* that existed in the system, the *“fundamental reform”* that was needed or the *“whole-of- system reform and redesign”* that the Royal Commission promised Australia and its citizens.

There has been no sign of any intent to acknowledge or address these systemic flaws by either major political party, the department, the many marketplace consultants, the industry or the consultations and roundtable meetings held by COTA and OPAN. This draft Act does little, if anything, to address the entrenched flaws. Only Commissioner Pagone had the courage to condemn what he describes as a *‘renovation’* of the current system and not the *‘rebuild’* that was required.

This flawed system is the system that the present minister of health redesigned in 2012. Both he and the other parties referred to above have strong vested interests in this system. This is a dreadful betrayal of Australia and its citizens.

We can talk about strategic ignorance, wilful blindness, state capture and more, but at the end of the day we have a minister who, perhaps because her job depends on it, seems to be deliberately deceiving parliament and the public. It is time that someone in parliament acted in the public interest rather than their own.

We describe some of the key problems, the *“deep and entrenched systemic flaws”* that are not addressed in the new draft act and should be.

¹² Hansard 15 Feb 2024. House of Representatives page 57 Question time “Aged Care” Minister Wells

3.1 A root cause

There are deep flaws in the neoliberal free-market policy that has been indiscriminately applied to most of society including the most vulnerable, aged care¹³.

We have written about this in many submissions and supplied evidence to show what was happening and that it was the wrong way to provide aged care. There has been extensive criticism of neoliberalism and alternative approaches are being explored¹⁴.

Wrong Way

We recently obtained access to a 2018 book¹⁵ “*WRONG WAY - How privatisation and Economic reform backfired*”, edited by political economists Cahill and Toner. The twenty-four credible economists and related experts contributing chapters, described multiple sectors that had failed in Australia – including aged care.

We were particularly interested to read the comments made in Cahill and Toner’s introduction describing what was happening across the world as well as in Australia including in aged care. They echo what we have been saying for years and have said in our submissions to the department of health, but they have done it more eruditely and with greater knowledge, insight and depth.

¹³ **Why our society and human services are in trouble** - Aged Care Crisis (2021 Updated 2023)
<https://www.agedcarecrisis.com/images/whysocietyandhumanservicesareintrouble.pdf> When the health department planned a centralized alignment of aged care regulation and invited submissions but imposed a word limit, we decided it was time to do a full analysis of what had and was still happening in aged care, We wrote briefly indicating that any alignment should start locally and supplied a link to this analysis: (<https://www.agedcarecrisis.com/opinion/articles/471-aligning-regulation-across-care-and-support-sector>)

¹⁴ **A small sample about neoliberalism's problems**
When Will 'The World's Dumbest Idea' Die? Steve Denning Forbes 5 Jul 2013 (USA)
<https://www.forbes.com/sites/stevedenning/2013/07/05/the-overunder-on-when-the-worlds-dumbest-idea-will-die/#61a9c8f04939>
'New managerialism' in education: the organisational form of neoliberalism | openDemocracy 16 Dec 2014 (Aus)
<https://www.opendemocracy.net/kathleen-lynch/new-managerialism-in-education-organisational-form-of-neoliberalism>
Neoliberalism – the ideology at the root of all our problems George Monbiot 15 April 2016 (UK)
<https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot>
Even the IMF Now Admits Neoliberalism Has Failed Fortune 5 June 2016 (USA)
<http://fortune.com/2016/06/03/imf-neoliberalism-failing/>
If we are reaching neoliberal capitalism's end days, what comes next? The Conversation 6 Feb 2017 (Aus)
<https://theconversation.com/if-we-are-reaching-neoliberal-capitalisms-end-days-what-comes-next-72366>
What is the alternative to neoliberalism? Simon Duffy The Centre for Welfare Reform in the UK 2018
<https://www.centreforwelfarereform.org/library/what-is-the-alternative-to-neoliberalism.html>
Beyond neoliberalism Insights from emerging markets Report Brookings Institute April 2019 (USA)
<https://www.brookings.edu/wp-content/uploads/2019/05/beyond-neoliberalism-final-05.01.pdf>
Capitalism and the Future of Democracy Isabel V. Sawhill Brookings July 2019 (USA)
https://www.brookings.edu/wp-content/uploads/2019/07/Sawhill_Capitalism-and-the-Future-of-Democracy-.pdf
It's time for a democratic socialist agenda for Australia ALLAN PATIENCE Pearls and Irritations 2 Jul 2019 (Aus)
<https://johnmenadue.com/allan-patience-its-time-for-a-democratic-socialist-agenda-for-australia/>
A Society Built From The Bottom Up, Not The Top Down Wayne Swan ALP National President 2021 (Aus)
<https://www.alp.org.au/national-president-media/a-society-built-from-the-bottom-up-not-the-top-down>
Simon During on the demoralisation of the humanities, and what can be done about it The Conversation 15 July 2022
<https://theconversation.com/friday-essay-simon-during-on-the-demoralisation-of-the-humanities-and-what-can-be-done-about-it-186111>

¹⁵ Wrong Way: How Privatisation and Economic Reform Backfired Cahill and Toner Sept 2018 (Aus)
<https://www.amazon.com.au/Wrong-Way-Privatisation-Economic-Backfired/dp/1760640387/>
Introduction and then Chapter 5 “The Marketisation of Aged Care in Australia” by Bob Davidson

They describe what happened as these policies developed and then spread as large businesses “funded a global network of think tanks”. They described the consequences of these policies, including the adverse impact on society and on democracy indicating that “many of the unexpected turns of the last few years (including Brexit, Trump and others) - -are only comprehensible within this context”. They describe the current global condemnation of neoliberalism indicating that it is “being challenged from the left, the right and the centre”.

They tell the story of its origins in the 1940s and its domination starting in the USA and UK in the late 1970s and then its domination in Australia. Its persistence here and the irrational nature of the arguments used to justify the many failures are examined indicating that “neoliberal public policy justifications were often crude in the extreme”.

We try to briefly encompass the content and also the flavour of this important analysis by using a selection of quotes.

Representative quotes from the introduction:

What happened: “Since the early 1980s, Australia and its economy have been radically transformed by the processes of privatisation, deregulation and marketisation; free trade agreements; and new approaches to macro-economic policy focused on balancing budgets, reducing rates of income and corporate tax, constraining organised labour and targeting inflation”

Key findings: “It is no longer credible to explain away the deleterious consequences of this process as ‘transitional problems’ or as the result of imperfect implementation- - - - “The book “analyses the effects of privatisation, contracting out and economic reform. Its key findings are that not only have processes of reform failed to deliver many of the benefits promised by their advocates, they have also imposed a raft of economic and social costs on the Australian community”.

Resistance to evidence: “As is characteristic of ideological movements, adherents explained away negative developments as the results of incorrect implementation, political interference and electoral backlash to ‘reform fatigue’ - in sum, ‘transitional problems’. Historically then, economic reform has been relatively impervious to criticism and to evidence querying its success”.

The Story: What happened to **government and the public service:**

“During the 1980s and 1990s neoliberalism became embedded in the Australian public service through rules of conduct, constraints on the scope of acceptable advice, and incentives to recruit and promote people who shared the broad neoliberal worldview. A migration of senior executives from the key economic departments of Treasury and Finance to other departments from the 1980s onwards led to the creation of a diaspora of policymakers sympathetic to the neoliberal worldview. These other departments included the centre of government policy formation, the Department of Prime Minister and Cabinet, and the key spending departments of Health, Education and Social Security. Neoliberalism was also cemented federally through organisations such as COAG, and the greatly expanded policy role granted to the chief advocate of neoliberalism within government, the Productivity Commission”.

Capture: How the entire system was **captured** and became the servant of big business

“Democracy generates coalitions of special interests that seek to use government coercive tax and regulatory power to direct economic ‘rents’ to them by imposing financial burdens on others; politicians prosper only by pandering to powerful lobby groups, and bureaucrats are motivated by empire building and career progression achieved by assisting politicians meet the needs of special interests”.

The failure of regulation across Australia:

“Contributing to all of this (The consequences of policies) is an ever expanding but malfunctioning regulatory apparatus governing each contracted out and privatised activity”.

They expand on regulatory capture in an endnote:

“Endnote 2: *George Stigler, a leading neoclassical economist and market advocate, argued for the inevitability of ‘regulatory capture’ of government by special interests and the impossibility of regulation in the public interest.*

‘Until the basic logic of political life is developed, reformers will be ill-equipped to use the state for their reforms, and victims of the pervasive use of the state’s support of special groups will be helpless to protect themselves’. (Stigler 1971: 18).

However, the efficacy of regulation was a key presumption of Australian neoliberal policymakers! They relied as much on the vast array of new regulatory regimes established to monitor and control the new markets they created as the discipline of the market to ensure the goals of privatisation and contracting out were met. (See Black 2013 for a thorough critique of Stigler’s arguments.) The failure of privatisation and contracting out in the industries covered in this book is as much due to regulatory failure as it is to policymakers not understanding the ‘markets’ they created. Regulatory failure has flowed from this misunderstanding”.

The Marketisation of Aged Care in Australia¹⁵ (Chapter 5 by Bob Davidson):

Davidson describes the serious problems that developed in aged care as a result of these policies. He explains that this is a *“valuable case study of the experience of the marketisation of human services more broadly”*.

He indicates that *“The most fundamental driver of the marketisation of aged care”* has been *“neoliberal transformation of the economy and society, with its core messages of the power and superiority of markets, and the desirability of reducing the role of the state”*.

We try to encompass the content and also the flavour of this detailed article using a montage of short extracts (not all in order)

He tried to explain why this market policy: *“ - continues to be extended, even as the limits and problems of markets in human services are increasingly revealed. The pro-market ideology and philosophies of powerful entities in government and business have been a central factor- - - the public is encouraged to regard human services such as aged care as simply another commodity*

He described how the “Productivity Commission’s inquiry into aged care (2011), and the ‘Living Longer Living Better’ package- - aimed at moving towards a ‘consumer-- driven competitive market’- - - - “

In 2016 the Aged Care Roadmap- - “signalling an intention to further marketise aged care.- - - (he described)- - - the growing power of large non-government providers, both non-profit and for-profit----- towards the greater presence of large corporations- - - - at the expense of social objectives, as shown in the mission drift by NPOs large and small”.

Capture and failure: “The presumed virtues of competition and choice have been used to progress hidden or opaque political agendas - - - - substantial economic and political power enables them to influence government in changing the design and management of human services programs and markets in ways that benefit them (ie large corporate interests)- - - there are limits to the extent to which market mechanisms can be used in the provision of any human service. ----- the distinctive characteristics of human services are also a source of significant and intrinsic market failure- - - - -market mechanisms are most effective in human services when used in a limited and strategic way”.

Regulation and capture:- - “- - government has to play a major role in most human services if the quantity and quality of these services are to be maintained - - - regulation is critical for the effective marketisation- - - - - But “once the regulation of the entry of providers is relaxed ----(then)---- the regulation of services not only has limited effect, but can be used by powerful incumbents to entrench and extend their privileges.- - - Importantly, policy and regulation are now also substantially influenced, if not captured, by larger providers, both NPO and FPO. Not only are policy and advisory forums dominated by these providers and by consumer groups sympathetic to market mantras, but representatives of providers sit on regulatory bodies”.

Weakness: He describes the “limited personal agency of many users, the major information asymmetries-- (and) -- many limitations inherent in human service markets- - - better information - cannot overcome these inherent limits and – (the)- potential power of providers

Consequences: Davidson describes the lack of benefit as well as the little robust evidence to support claims for marketisation. In regard to staffing he indicates that “the commercial pressures generated by marketisation have led others to take a ‘low road’ approach, based on less skilled staff, more casual staff, minimum wages and little training”. He considers there have been some improvements but “there is strong evidence that the overall improvements in the sector have primarily resulted from other factors, especially the professionally driven reform of aged care practice”. He describes the many problems created by policy, which “has been misguided in some important respects - - gone the wrong way”.

Davidson ends on a profoundly pessimistic note. While he strongly advocates control of the entry of providers saying “Tight regulation of the entry of providers is fundamental” he considers “we may now have passed the point beyond which effective control of entry can be restored” and he considers that “the regulation of actual services becomes even more important” because “a more socially driven sector would seem very difficult now” and it is “too late to turn back the tide of large FPOs, or to stem the mission drift of many NPOs”. Once they get entry then “the problematic features of marketisation emerge inexorably over time”. He emphasises the large power imbalance and even more depressingly concludes “no amount of the regulation of provider behaviour will lead effectively to optimum service standards”.

Comment: It is five years since Davidson's depressing conclusions and many around the world have been confronting these problems in multiple sectors including aged care and other human services. No one is wanting to turn back the clock as he indicates. They have been developing forward looking strategies building on knowledge and experience that can make this a more "*socially driven sector*" and which can make this market work and eliminate capture by restructuring it to change the balance of power.

The most promising of these is a decentralised approach using "*place-based collaboration*", a reach down and support model. Its success has grown over the last five years as it spread from country to country including Australia. It does require good regulation but that should be done in the same place-based manner. Commissioner Pagone recommended a move in this direction but it was ignored.

Aged Care Crisis has been pressing for changes along these lines and developing similar models for almost 15 years. We now argue for a version of place-based collaboration adapted to aged care and its problems. The sector is well placed to pioneer this approach in human services in Australia.

Need to reform

The major faults in this market must be addressed by restructuring it. Action is needed to take back control, reverse many of the policies and address the consequences. The requirements to do this should be clearly specified in the objectives, incorporated into the principles and then implemented in the act. It will take years to undo the harm that has been done over the years and build a new system but the foundations should be central to the act and the first steps down this path should be taken.

4 Major Issues

1. Addressing the power imbalance

The balance of power and knowledge between the seller of services and the buyer, needed to make a market work for citizens, does not exist in many human services. It is not possible to change this in aged care where there is a huge power imbalance. This makes a mockery to claims of choice and control.

Traditionally, in situations like this, it is civil society (our communities) who have set and enforced the limits of acceptable conduct and decided who can be trusted to operate in vulnerable sectors. Neoliberalism has pushed civil society and the communities that comprise it aside and disempowered them. The only constraint is the sort of central regulation that Davidson indicates will not lead to “*optimum service standards*”. It becomes an uneasy equilibrium that breaks down frequently. This is what has happened in health and aged care in the USA.

Objectives: To address the power imbalance between providers on the one hand and residents and their communities on the other in order to create balanced aged care and democratic systems where rights are preserved and to which citizens contribute.

Principles: Management, oversight and regulation of aged care should be decentralised and empowered local community structures established to do the actual management, oversight and on the ground regulation. They must have the power to decide who will be licensed or contracted to provide care to their communities, and to remove those who fail them. This is what makes markets in human services work.

Central bodies have an important role to play in building, mentoring, integrating and when needed supporting local communities. Local communities should elect members to represent them on a central body which in turn would appoint representatives from the community to represent them on other central bodies managing and advising government, regulating aged care, managing complaints and any other related activities. They can keep their communities informed.

This should be a system in which accountability is ensured by providers, community and governments all having the knowledge, the power and the representation on central bodies to check and hold one another to account.

Legislating it: The structural changes to empower communities, create roles for them and establish the reach down and support structures should be legislated in the act so that the process can commence.

2. Addressing the failure of neoliberal competition policy

Neoliberalism's focus on competition has ignored and discounted the balancing community forces that require collegialism, social responsibility and customer satisfaction from providers. As a consequence, businesses are currently put out of business when they fail to make money and not when they fail to provide services. Regulatory capture, marketing and public relations skills have been used successfully to protect industry and government by hiding the consequences and making deceptive claims.

In a functioning market it is a failure to provide the services that citizens want that causes them to turn elsewhere and that in turn causes the provider to fail and lose money. That is not happening in aged care. This is not something government does, it is the way well-structured markets work. In a functioning democracy that is not captured, governments support citizens in doing this.

Objectives: To create a market where providers fail because they fail to deliver services and not because they fail to squeeze as much money from that intended for care as others. In our system it is those providers who are socially responsible and spend money on care who fail and are then acquired by those who spend less. Those who provide less care make money and prosper. Data from the USA since at least 1994 has consistently shown that successful market driven corporate providers have staffed more poorly and failed standards more often. Australian data is insufficiently robust to assess this in the same way, but there is data to suggest it.

Principles: We are social animals and we have empathic social selves and value systems. We live in communities. We help and support one another when we are in trouble. We are there to help and advise when our neighbours need it. We are all responsible for helping those in need and seeing that they are cared for. It is our responsibility to see that our friends and neighbours are well cared for. We know that others are there for us when we need help.

When someone sets up a business to care for those who need help, they are doing it for us and on our behalf. They are our agents and it is our responsibility to see that it is done well. We need to take action to protect our fellow citizens when they fail to do so. Our government and its regulations should support us. Understanding neighbours give others choice and control, but are there to advise and help when they get it wrong.

What neoliberalism did: Research shows that contrary to popular belief Neoliberalism's origins were less a response to economic problems, than to a period of social failure and 'populism' in the 1930s. Neoliberalism's first enemy was 'the collective' and its free-market policies were an escape from this collective, a potential threat it marginalised.

As Cahill and Toner explain briefly in their introduction the consequences for society across the world have been huge and are a plausible explanation for our present problems - but that is more complex. The erosion of civil society by these policies has affected succeeding generations by eroding our social selves our values and our societal stability. Social scientist Emile Durkheim first described these socially unstable situations in about 1901. Societal problems in the 1930s were an example.

In aged care believers have pushed society aside and focussed on the individual. Instead of building community and social selves, they have fanned self-interest with incentives and rhetoric. Believers have used the catchphrase "choice and control" to sell something that they failed to deliver.

If we are to address this problem then it is essential that we restructure aged care and other vulnerable sectors in ways that rebuild civil society and involve community in ways that enable them to see what their agents are doing and put those who fail them out of business. Government's role is to support communities and not exclude them as this act does.

Legislating it: This act should be restructuring aged care as the first step in a social reform program that rebuilds our civil society and frees us from those who have captured our politicians and our regulators as well as the minds of our citizens. It needs to legislate changes that empower and enable citizens and their society to hold their agents to account, and then help them to meet their responsibilities to one another.

3. Addressing the consequences of paradigm conflicts (patterns of thought)

Aged care is a community service and yet our communities have been pushed aside and have no say in what happens or how it is provided. Care depends on community and professional values, on empathic caring relationships and on responsible citizenship. It requires cooperation and collegialism.

Free-markets are driven by self-interest and depend on competition - a very different set of values. The two are incompatible. The threat which pressures like this create for the vulnerable has been recognised for about 2500 years. The Greek physician Hippocrates first addressed them by promoting ethical values and collegialism so ensuring a supportive and restraining social context.

As the insights of philosopher Michel Foucault and social research shows, the powerful control information and the way those without power think and behave. The powerless must pay service to the values and requirements of the powerful and develop their careers and often 'inauthentic' identities using them. They have no choice,

Since at least the 1940's philosophers and social scientists have studied and explained the way we do this and the unhappiness that accompanies it. We end up with conflicted paradigms (patterns of thinking), cultures and roles. This often results in toxic cultures and unpopular workplaces with high staff turnover where people are harmed.

These situations are recognised and readily apparent in health and aged care facilities but are disregarded by government and markets. Putting neoliberal management in charge of public services, a sector whose traditional values are in serving the public creates a similar situation. We have seen toxic cultures and staffing issues in the Department of Health¹⁶ (2012-14), in the Department of Social Services¹⁷ (Robodebt) and most recently the Aged Care Quality and Safety Commission¹⁸ (Tune review) that will be responsible for regulating aged care under the new act.

Objectives: To change the structure of the service so that the balance of power is sufficiently reversed that survival and success will depend of embracing values and services that serve the community and its members.

¹⁶ Funding feeds profits over aged care - ABC 7.30 Report, 16 Aug 2012 <http://bit.ly/2AIND1K>

The Federal Health Department: 80-hour weeks, bullying, command and control The Canberra Times 6 Dec 2014 <http://bit.ly/2CVYtHC>

¹⁷ 'Crude and cruel' scheme: robodebt royal commission report recommends civil and criminal prosecutions The Guardian 7 July 2023

¹⁸ **Report Of The Independent Capability Review Of The Aged Care Quality And Safety Commission Tune D 31 Mar 2023**

Principles: This needs to be done in communities, in nursing homes and in the public services responsible so that the power lies with the community and its values. The changes must ensure that the current situation is reversed. To succeed providers must adopt community values, cooperate rather than compete and engage collegially with the communities they serve.

Businessmen are members of the community and there was a time in the 1950s and early 1960's when many, even in large global enterprises, embraced community values and behaved responsibly. Neoliberalism changed that.

Government departments responsible for public services like health and aged care should learn to work with and through local communities whenever possible. Community representatives should be represented on boards and advisory bodies where they can see what is happening and report back to their communities.

It should not be possible for a situation to develop where, as Cahill and Toner described *“bureaucrats are motivated by empire building and career progression achieved by assisting politicians meet the needs of special interests”*.

Legislating it: This too requires legislating to ensure that structural changes are made so that citizens become involved and a process for wide community representation is set up.

4. Focusing on Trust and Trustworthiness

In vulnerable human services like aged care, trust and trustworthiness are vitally important, yet in 1997 the probity regulations that vetted new providers and investors to ensure they could be trusted were abolished. Instead, a welcome mat was laid out for all. Large profits were predicted. This attracted the wrong people and the majority who invested did so for financial and not social reasons.

Those profits they expected were taken from the money provided for care. As explained above, the strong competition in this market is to reduce costs from staffing and care to the minimum they can get away with. Success depends on it and those who don't do it are often not viable and fail. The consequences of these policies were predictable and they were predicted.

Objectives: We need to ensure that new providers entering the sector can be trusted and that those whose conduct subsequently shows they cannot be trusted can be expelled from the sector. In addition, we should remove or markedly reduce the competitive pressures on providers and protect the money allocated for care from profit taking as was done in the 1980s but then abolished in 1997.

Principles: The past conduct of new providers and owners, as well as subsequent new investors large enough to influence policy, should undergo a probity review to decide whether they can be trusted before the transactions can proceed as happened prior to 1997. Citizens are often far more diligent than regulators and the public should be invited and be given an opportunity to supply information. Bob Davidson stressed its importance.

To ensure that providers remain trustworthy each local community or region should conduct its own assessment of probity before deciding to license or contract a provider to provide services for its citizens. They should be supported in this by a central body representing all communities. They would have information and be able to make inquiries from their members in all other communities where the provider operates. Contracts and licenses would be renewed periodically and those providers who failed to give satisfactory services replaced.

Problems to be overcome: The problem in closing down a local provider is that most providers also own the bricks and mortar so that doing so would close a large number of beds and leave residents in limbo. Changes are needed to prevent this.

The new act in its current form will empower the regulator to stop an operator who has multiple issues from operating in the sector, but this is not really a practical option either and for the same reason. We now have several very large profit focussed corporations providing care and they are usually the most problematic.

They are too large to be allowed to fail because of the vast numbers of residents who would suddenly be without care and the impact on them (in the past this has prevented action in the USA and possibly in Australia). In addition, these companies may hold many millions in Refundable Aged Care Deposits (RADs). This is guaranteed by government and this would be a cost for tax payers if the company cannot pay. This is a deterrent.

This problem would be resolved if providers were required to split their operations into two, a REIT (Real Estate Investment Trust) owning the facilities and a provider providing the care. This should not interfere with their operations unless or until the community decides to replace the provider so that it now only owns the bricks and mortar.

The problem could be avoided when building new facilities. They could be built and owned by the community or a REIT could be licensed to build them.

Local community could then easily replace an unsatisfactory provider with another, with minimal impact on residents and staff. Big corporations could then be replaced progressively until they either changed their approach, stopped providing care and became only a REIT, or sold up.

Enabling and supporting the community to replace a provider is more complex but critically important. Giving the community the power and enabling them to readily replace those who do not measure up is essential if we are to make this market work for them and their members. This power by itself would make a huge difference and hopefully might seldom be needed.

Legislating it: Once again it will require legislation to set the necessary structures and processes in place. This act should at least initiate the process so that real reform can start and future legislation is enabled.

5. Capture and the erosion of our democracy

Braithwaite and his team investigated and found no evidence of capture in Australia in 1993. They investigated our aged care regulator again in 2005/6. In his 2007 book¹⁹ *“Regulating Aged Care”* he described the way regulation and departmental thinking had been captured by industry.

“The post-1997 Australian regime is more captured by the industry than the English and US regimes. Things have to be bad for non-compliance to be recorded or strong criticisms to be made in an accreditation report.”

When those regulatory values are about protecting the most vulnerable members of our society from abuse and neglect, the community should be concerned

Accreditation Agency clung to the ideology that it was a child born of industry deregulation”.

“the agency almost universally today manages to deal with problems of poor-quality care while keeping them out of the media”.

In Appendices C and D of our response to *“Consultation Paper No. 2: A new model for regulating aged care in June 2023”* (See outline in the Appendix) we describe the failure of the regulatory system since 1997 and show that it was protecting the government and the industry rather than the residents requiring care.

Multiple advocacy groups spoke out about the failures of the Complaints system and its lack of accountability²⁰ in 2013 with one claiming that *“it perpetuates a system where, judging by the numerous stories of neglect, abuse and premature death, poor care is endemic.”* A report found that *“only one in three nursing home residents was aware of the scheme”*. The AMA called for the Complaints system to be more independent indicating that you couldn’t have confidence in a system where *“matters were kept in the dark”*.

Since about 2014 there have been multiple articles writing about what was happening in politics and regulation revealing the way both regulation and political policies were captured. We wrote about regulatory capture in some depth in our submissions to inquiries²¹ in 2017 and 2018 and then to the Royal Commission and others subsequently. We have mentioned it in many others.

Around 2018 when Cahill and Toner’s introduction described how extensively governments were captured and Davidson in his chapter described how it was happening in aged care, others were also writing about it. Moral Philosopher Ramon Feenstra published an article *“Kidnapped democracy: how can citizens escape?”*.

¹⁹ **Regulating Aged Care** by J. Braithwaite; T. Makkai; V. Braithwaite e.Books.com: <http://bit.ly/2rnUgU8>

²⁰ **Call to set up independent aged-care watchdog**

The Age 23 Aug 2013 <http://www.theage.com.au/national/call-to-set-up-independent-agedcare-watchdog-20130824-2sin4.html>

²¹ Attachment to: Review of National Aged Care Quality Regulatory Processes – Public Submissions Carnell and Patterson Review 23 July 2017 https://www.agedcarecrisis.com/images/pdf/Attach_RNQR.pdf

Submission to the Senate Inquiry into Effectiveness of the Aged Care Quality Assessment and accreditation framework Aug 2017 https://www.agedcarecrisis.com/images/pdf/sub41_ACC.pdf

Community managed aged care An analysis Attachment to Submission: Inquiry into Quality of Care in Residential Aged Care Facilities in Australia by the House of Representatives Standing Committee on Health, Aged Care and Sport March 2018 <https://www.aph.gov.au/DocumentStore.ashx?id=04bdb6a4-52ac-4ac7-bd62-731b235f3abf&subId=564157>

Feenstra writes²² about *“the power of well-established financial oligarchies, particularly in the US, to impose systematic policies that are self-serving”* but he was writing about Australia too. He searches for ways to free us from our *“stealthy, wealthy, elite captors?”* He stresses the importance of *“demonstrating with evidence, the extent to which our democracies have been kidnapped”*. He indicates that the key to *“renewal surely lies in new democratic mechanisms and forms of citizen participation that are capable of ending the concentrations of power that are kidnapping our democracies and victimising their citizens”*.

The Australian Democracy Network has written extensively²³ about state capture on its web site and elsewhere. In February 2022 it issued a report explaining what a problem it had become in Australia. This was followed by a Crikey webinar and an article by an ex-politician Scott Ludlam in the Monthly. In 2021 he wrote a book *“Full Circle: A Search for the World That Comes Next.”*

A search of our database reveals multiple submissions, articles and even books that mention state capture and criticise neoliberal markets.

We referred to and explained capture in some of the five submissions we have recently made to the department. We have tried to summarise what we said in them in an appendix at the foot of this submission.

We addressed the issue of capture in depth in our response to **Consultation Paper No. 2: A new model for regulating aged care** June 2023. Three lengthy appendices to that submission about regulation described how the system was captured and what happened.

Appendix A of that submission- **‘Aged Care and the Society we live in’** (15 pages) described the introduction of neoliberal policy to Australia and the consequences for multiple sectors. It pads out and gives more depth to Cahill and Toner’s introduction. It describes what happened in aged care as these policies were developed and the system was captured. It reveals the extent to which governments were ignoring evidence and analyses that conflicted with ideology. We described what credible critics were saying and then concluded that *“Aged care is part of this captured society and we need to find a way out of this mess”*.

Appendix B “Denial (12 pages) describes the way believers denied what was happening and then continued to do so after the Royal Commission.

Appendix C - Regulatory failure Early experience (11 pages) describes the early failures after accreditation became the only regulator in 1997. **Appendix D - Persistent Regulatory failure** (50 pages) takes up the story and illustrates what was happening by using extracts from our submissions including the data supplied since 2005. We showed how studies of outcomes contrasted with the findings of the regulators on which claims to world class care were based.

²² Kidnapped democracy: how can citizens escape? Feenstra RA. The Conversation 26 Apr 2018 <https://bit.ly/2KhL4ZK>

²³ What is State Capture? : <https://bit.ly/3waXvnk>
Confronting State Capture Feb 2022 <https://australiandemocracy.org.au/statecapture>
State capture and the 2022 election A Crikey talk introducing the report <https://bit.ly/48dOh6U>
The scourge of state capture Scott Ludlam The Monthly Feb 2022 <https://bit.ly/42zxwSu>

We concluded:

“adverse information about aged care was more threatening to the regulators than to the public. The worse it got, the harder they tried to conceal it”.

We summed up:

“If we consider that the necessary conditions for the market to work are firstly an informed and effective customer and secondly an empowered, knowledgeable and involved civil society, then the regulatory system in aged care has effectively neutralised both and rendered them ineffective. It is responsible for preventing citizens and society from controlling and managing the market that should be serving society. It has played a pivotal role in ensuring that the aged care system would not work and that the elderly would be harmed.”

That is very much what Cahill and Toner then Davidson were saying.

Objectives: To reverse and undo regulatory and state capture in aged care and address the harm it has done.

Principles: To address regulatory and state capture and prevent it from happening again, we need to decentralise regulation by making regulators work with and through regional government and civil society organisations. In addition, regional organisations need to be represented (and not appointed by government) on the boards, and other bodies involved in regulation or management of aged care. A proportion of those on bodies advising government should also be representatives from community.

To manage all this, we need to ensure that there is suitable unbiased representation that will raise unpalatable matters that are concerning for citizens and communities, and also report back to communities. There should be a central body with representatives from communities across Australia that independently appoints suitable people to represent them. We need to rebuild our captured society and so restore our democracy.

Legislating it: Legislation is needed to enable and create the community organisations that are needed, to ensure that central structures work with and through community groups who know what is happening and that community is independently well represented on central regulatory, management and advisory bodies. Community consultations with those who don't have knowledge that are managed and steered by believers is not adequate.

6. Comment and conclusions about this captured market

Strategic Ignorance and Wilful Blindness: There has been a vast amount of information, criticism and argument about all this but particularly about neoliberalism, power and capture. Quite apart from our submissions the department and its members, if they look around them, cannot be unaware of the evidence and the concerns about these issues, by many credible members of our society who feel impelled to speak out.

Yet unless we have missed it these issues have been absent and not addressed by the many information sheets, consultations and webinars conducted by the department and others who have been a part of this.

Instead, we have an act that seems to be set firmly within neoliberal ideas. Community are consulted but there is no real involvement, empowerment nor any real role for those who are not appointed by government. Most worrying of all is the structure of the new management, regulators and oversight bodies all of whom are appointed by government or the governor-general who is appointed by and advised by government.

This highly centralised system is comprised of bodies that have previously been captured. It is highly vulnerable to capture, particularly in the current state of our politics and our nation.

Ignoring information and advice: The *“Review of international systems for long-term care of older people”* by Dyer et al from Flinders University (see more in the appendix at the end) commissioned by the Royal Commissioner found that unlike Australia.

“The majority of countries analysed have a decentralised responsibility for quality regulation, with multiple players responsible for regulating quality”. They found that Australians “reported the highest rates of dissatisfaction with the quality of health care. Countries that have “have high-quality LTC-systems” like Denmark and Sweden “fund LTC through local authorities”.

Like Aged Care Crisis the review advocated *“Increased involvement of local or regional authorities (decentralisation) in the regulation and monitoring of LTC services.”*

Commissioner Pagone must have understood what was happening. He tried desperately to make management of the system independent of government and to decentralise, but this was buried.

We note that Dwyer et al found that funding aged care through local authorities was associated with good care. This is something eminent gerontologist Hal Kendig had investigated and for the same reasons advocated for it²⁴ in 2001. He continued to do so for the rest of his life including in his 2011 submission²⁵ to the Productivity Commission Inquiry *“Caring for older Australians”*. We have supported this in submissions including to the Royal Commission. Instead, Australia has copied Activity Based Funding from the USA where it caused many problems – calling it AN-ACC funding.

²⁴ Australian directions in aged care: the generation of policies for generations of older people Kendig H and Duckett S 2001 Australian Health Policy Institute University of Sydney Commissioned Paper Series 2001/05

²⁵ Submission to the Productivity Commission Inquiry into Caring for Older Australian Professor Hal Kendig July 2010

An appalling betrayal of Australia and its citizens: When we look at all the evidence and the opinions of so many critics of a deeply flawed system that are being ignored it is clear that anything that challenges or threatens neoliberal beliefs and the market's dominance and control is being buried. There is no mention of these issues on the department's web site and they have not been explored in the consultation papers or the webinars that we have attended.

All this and the new act that is based on it is a terrible betrayal of Australia and its citizens. We hope and feel confident that balance and rational debate will eventually return and that what has been happening will be examined and those responsible exposed and held to account. This happened when Robodebt became uncontrollable and a commissioner had the integrity to expose it. It should happen here too in due course.

Our Criticisms are not new

We had high hopes that the Productivity Commission inquiry 'Caring for Older Australians' that commenced in 2010 would finally confront and address the problems in this market. While we had pressed for more community involvement in accreditation and then complaints to submissions in 2008 and 2009, our first in depth analysis of this market with proposals for wide reform was made to the Productivity Commissions 'Caring for Older Australians' in 2010. We include the summary from that submission below.

Summary Submission to the Productivity Commission's Inquiry: Caring for Older Australians

J M Wynne (July 2010)

<https://www.pc.gov.au/inquiries/completed/aged-care/submissions/sub368.pdf>

This submission examines what has gone wrong in the care of the vulnerable aged by looking at the social dynamics and belief patterns adopted by different participants in the system – particularly in nursing homes.

The Aged Care Act of 1997 established corporate competitive marketplace paradigms and commercial managerialism as dominant patterns of thought in aged care. These were prevailing political ideologies. As a consequence, inappropriate patterns of thought became legitimate. There have been multiple consequences of this but a number stand out.

1. The exploitation and misuse of vulnerable senior citizens - wrinkle ranching
2. Alienation of the work force and groups in the community.
3. The detachment of the community from their responsibility to the elderly with consequent disengagement and disempowerment.
4. The creation of oversight processes that hid the sort of information that might have exposed the new system to criticism.

We cannot turn back the clock but we can reduce the adverse consequences of what has happened. This submission proposes two core solutions.

1. The proper collection and analysis of information about financing, staffing, care and quality of life.
2. Giving local communities leverage by involving them more closely in nursing home care, in the resolution of complaints, in oversight, and critically in the collection of financial information, staffing information and in measuring standards of care and quality of life.

It is suggested that care of the elderly is primarily a community responsibility and that the community should have a key role in the provision of aged cares services in each region.

It is suggested that the persons responsible for oversight, data collection, complaints resolution, and a number of other support and integrative responsibilities be sited locally in the communities where community and residential care are provided. These processes should be closely tied to the local community.

The employees and a community group would be structured as a local organization. The employees would work with and be jointly responsible to this group. The community group will be in a position to negotiate directly with the providers of care when there are issues they feel should be addressed and the employees would be in a position to monitor the outcome of this.

There would be a strong central representative and independent umbrella group. This would have important responsibilities and functions. Employees would be jointly responsible to this body. A central mentor and supervisor, to whom employees would report, would provide backup. Mentors would visit and supervise to be sure that oversight was appropriate and data collection uniform. The central organization would provide training. It would represent communities in negotiations with other large groups and with government.

Employees would be supported by their mentors as well as by a local community member. They would work closely with this local person who would be in a position to promptly mediate any disputes that arise locally and support the employees in their work with providers.

The central organization would collect information, collate it and make it available. It would report directly to government, to the accreditation agency and back to the communities. It would have an important roll in recommending increased support by the accreditation agency, sanctions, or closure to government. It would represent the community in matters such as the approved provider status of organizations.

Over the years we have changed and modified the methods but the thrust of the arguments is unchanged. We had not yet learned about state and regulatory capture but we were deeply disappointed when those ideas fell on deaf ears. When we finally got a Royal Commission and read the interim report ten years later, we dared to hope again only to see those hopes dashed in 2020 as the Royal Commission simply turned its back on its promises in its deliberations.

It has taken another 4 years of inquiries, consultancies, consultations and reviews. Groups across the world are now criticising this ideology and looking at community-based solutions with, as Dyer et al's report to the Royal Commission revealed, success in improving services. Yet all these processes and the many powerful groups involved are ignoring the core problems in this market in Australia and the obvious solutions to them.

We realise that these groups have a vested interest in preserving this system and the ideology on which it is based. They have invested their lives and their credibility and instinctively respond defensively. But surely it is time to set self-interest aside and accept that the ideology is flawed and millions are suffering as a result.

Concern about outsourcing

We sincerely hope that it is not members of the department who are primarily responsible. We are aware that the department seems to have been so poorly resourced that over the years its reviews and investigations have been contracted to marketplace advisors, most frequently KPMG. Even the conduct of its recent roundtable meetings has been contracted to marketplace consultants including KPMG.

The recent Australian Public Service (APS) Audit of Employment found²⁶ that “*External labour formed almost 54,000 FTE positions on top of the reported APS headcount*” of 144,300. It cost “*\$20.8 billion*” and “*outsourcing government work was approximately 25 per cent of departmental expense*”.

We suspect that the department simply does not have the resources to examine all of the submissions and no longer has the numbers and skills to assess documents and conduct the many reviews that it is asking citizens to respond too. There are far too many. We know that the Morrison government contracted multiple marketplace advisors to help it respond to the Royal Commissions findings and set \$10 million aside for this (reported in *The Saturday Paper*).

We were worried that in addition to reporting on the consultations and the evaluation of submissions, the response to the Royal Commission and the drafting of the new regulations and the act had also been contracted in the same way. When asked a KPMG representative denied it was actually writing the act. But even control of community and submissions feedback gives them enormous influence. The Big 4’s main customers are the industry. They are deeply conflicted as their core business would suffer if the Act they help design is not what the industry wants.

All these advisers seem to offer services to providers and help them to be more efficient in keeping costs down. KPMG’s web site²⁷ says “*KPMG offers aged care providers with a range of audit, tax and advisory services*”.

The interests of these advisers, more than any other group are deeply embedded in this neoliberal free-market ideology. – Duckett’s 20th century zombies “*that stalk the aged care policy corridors*” would be the major victims if this market was reformed. Government and industry would no longer need their profitable services – and they know it.

The strong free-market approach of the government and the department is revealed in its relationship with EY, which it is funding to provide free advice²⁸ on “*business, financial and workforce challenges*” to providers. Instead of addressing the market pressures responsible for poor care, it is funding business advisors who are likely to help providers find ways of reducing costs – a minimalist strategy that will compound the problems.

We worry that our submissions (and many others) have been buried and that the department is not even aware of the content.

Some years ago, we were concerned about the extent to which KPMG was being used to do the departments work. We searched for reports about its past conduct and found many international reports about KPMG, as well as other members of the Big 4 that we felt were worrying. We supplied the titles and links to the senate at the time and included a few to support our concerns in our 2023 submission about the new regulatory system to the department.

²⁶ APS Audit of Employment Reveals Coalition Shadow Workforce Media Release Senator The Hon Katy Gallagher 6 May 2023 <https://www.financeminister.gov.au/media-release/2023/05/06/aps-audit-employment-reveals-coalition-shadow-workforce>

²⁷ KPMG Ageing <https://kpmg.com/au/en/home/industries/ageing.html> Services: <https://kpmg.com/au/en/home/services.html>
Others advisers include Nous (<https://nousgroup.com/sectors/health-ageing/>),
PwC (<https://www.pwc.com/au/health/aged-care-australia.html>) and
(<https://www.pwc.com/au/health/aged-care-royal-commission/opportunities-for-a-new-aged-care-system.html>),
MP Consulting (<https://www.mpconsulting.com.au>), Mirus (<https://www.mirusaustralia.com>)
Deloitte (<https://www.deloitte.com/au/en/services/economics/perspectives/australias-aged-care-sector-economic-contribution.html>)

²⁸ Aged Care Business and Workforce Advisory Service <https://restructuring.ey.com/campaign.details.html?path=aged-care-advisory>

We supplied this material to the current parliamentary inquiry into these marketplace advisors but they did not publish it. We also supplied information about another company that collects data used by government and industry. Some years ago, it published incorrect inflated wrongly labelled data about staffing levels in one of its reports that government and industry used. They used this data on social media to challenge criticisms of staffing.

Instead of responding and explaining what happened to the senate, they mounted a savage and unsupported attack on our credibility and used this to avoid an explanation, claiming that it was no longer relevant. We worry that KPMG did the same sort of thing when shown the material we supplied and that this might be happening again now.

This sort of attack will resonate with believers because some of us have in the distant past successfully frustrated plans by believers in both major parties when in power, to bring unsavoury multinationals into Australia's health and aged care systems by supplying unwelcome information. Older believers in both major parties and perhaps the department will remember that! Some were very critical of us at the time and might still be!

5 Other issues

We addressed several other issues in our Sept 2023 submission responding to the Consultation Foundations of the new Aged Care Act. There is a summary of that in the Appendix.

We list additional issues that we have become anxious about below.

1. The privatisation of aged care assessments

Background: We are deeply concerned both by the privatisation of aged care assessments and of the sneaky way it is being done. Plans to privatise the Assessment process became policy in 2014 and the RAS (Regional Assessment Services) was put out to tender by the Abbott government in October 2014, when Morrison was the minister. Thirteen organisations including 10 who also provided care services were successful²⁹. They engaged “*over 75 subcontractor organisations*”. There was talk of also privatising the accreditation process and the ACAT assessment but this was very unpopular and there was strong criticism. Both were abandoned by the Turnbull government.

Then during the 2018/19 holiday period after Morrison became prime minister, when the community were holidaying, a public consultation was held about amalgamating and privatising the RAS and ACAT processes. There was a lot of criticism from multiple sources over the next year. It was only during the same holiday period in late Dec 2019 that it was quietly put on the department’s web site promoting its claimed benefits. When questioned by the *Sydney Morning Herald* the minister claimed that “*the reform was supported by the Royal Commission into Aged Care Quality and Safety*”.

Aged Care Crisis immediately wrote to the Royal Commissioners, describing what was happening and asked for confirmation³⁰. The Commission released a public statement essentially denying this. The minister’s media release³¹ then denied that this was privatisation stating that government “*has consistently refuted claims that our intention is to privatise the assessment process*”.

A webinar conducted by the department on 11 December 2019 was still accessible. The department did not use the word ‘privatisation’ but referred to a “*contestable market approach*”. Those on the floor used the word privatisation and the panel did not deny it. Everyone there knew what it was.

The *Sydney Morning Herald* published the story³² and described the strong criticism particularly from the states on 15 January 2020.

On 20 January 2020, Aged Care Crisis wrote an open letter to multiple state and federal politicians³³ describing what happened “*asking for their assistance in stopping this retrograde change from happening*”.

²⁹ Request for Tender for the My Aged Care Regional Assessment Service Dept Social Services 22 Oct 2015. <https://bit.ly/2Ex4Ws7>

³⁰ The history of privatization of ACAT is told in a letter Aged Care Crisis wrote to the Royal Commissioners on 8 January 2020 expressing anxiety <https://www.agedcarecrisis.com/opinion/your-say/431-open-letter-to-royal-commission-regarding-acat-privatisation>

³¹ Statement on ACAT/RAS integration Senator the Hon Richard Colbeck 15 January 2020 <https://www.health.gov.au/ministers/senator-the-hon-richard-colbeck/media/statement-on-acatras-integration>

³² States hit out at federal government's 'rush' to privatise aged care assessments SMH 15 Jan 2020 <https://bit.ly/42JtPKi>

³³ Open letter to politicians about privatisation of ACAT from Aged Care Crisis 20 Jan 2020: <https://bit.ly/49Tk6Dq>

But that did not stop them trying again and it was on the table again after the Royal Commission reported. On 7 September 2021 an AMA press release³⁴ expressed its opposition to this privatisation and indicated that the president of the AMA had written to the minister “*expressing his concern with the market approach to aged care assessments*” and reminding him that the Royal Commission “*did not recommend privatisation*”. In its ‘*Report: Putting health care back into aged care*³⁵’ released on 1 March 2022, one of the AMA’s eleven recommendations was “*Ensure that Aged Care Assessment remains with State health services which involve medical specialists, coordinating and collecting information from the older person’s usual GP*”.

Labor stealthily does it again: A departmental webinar³⁶ in May 2023 mentioned this revealing that labor was rubber stamping this. It was not Morrison or Colbeck but the Labor government with ministers Butler and Wells at the helm that quietly did this over the Christmas holidays in 2023. The information for tenderers was put on the departmental web site³⁷ in December 2023 and the tender process closes³⁸ on 14 March 2024. They have clearly been working on this for some time, and once again there was a market advisory group contracted to “*to review the end- to-end aged care assessment process*” - this time the Nous Group.

Problems doing assessments

The nature of care: Dealing with people, their intimacy and their many medical and social problems as well as their cultural differences is a variable and complicated process. Neither clinical status nor social problems are static they can vary from week to week or even day to day and need to be responded to. It requires empathic relationships, intimate insights, cultural awareness and the insights of those who know and understand the person. Trust and trustworthiness is an essential component of this and other relationships.

The present system: CHSP funding has worked well in Australia because of its close association with community and volunteering. The market based ‘packages’ that were supposed to provide choice and control have been much less successful. There has been overcharging by providers and many of the services allocated under this structured funding were not taken up and large sums remained unused. There were no checks and balances.

Consumer Directed Care (CDC) is hugely appealing and gives the individual a sense of control and yet there is no evidence that care is improved. When introduced as an option in the UK many did not take it up and there was no difference. We do not think that the sort of community-led system we describe will give any less choice and control. It will offer better and more trustworthy support and advice.

³⁴ Privatised aged care assessments will result in poorer health outcomes Press Release AMA 7 September 2021 <https://www.ama.com.au/media/privatised-aged-care-assessments-will-result-poorer-health-outcomes>

³⁵ AMA REPORT: Putting health care back into aged care 1 March 2022 : <https://bit.ly/42ZgKMQ>

³⁶ Departmental Webinar ‘Reforming in-home aged care update’ – 18 May 2023: <https://bit.ly/49XeDLI>

³⁷ Single assessment system – Information pack for potential tenderers Dept Health 18 Dec 2023: <https://bit.ly/3SZLFnU>

³⁸ Request for Tender <https://www.tenders.gov.au/Atm/Show/bc788798-2f24-47e7-bffc-bea4930440c5>

A sensible system is needed: The needs of vulnerable people cannot be managed or become part of crude if complex structures of impersonal assessments nor can priorities be managed in this way. It needs to come from the culture and the knowledge of the communities of which people are a part. The doctors who care for them in the community know them and their families and their illnesses. Specialists and Allied professionals in hospital have greater understanding of their immediate more acute issues.

Members in the community with knowledge and training including physiotherapists, occupational therapists and social workers are well placed to assess their needs and those of their families at home.

These groups, working together in an active involved civil society will have by far the best knowledge of local services. They can guide the person to the best resource for them. We need an assessment process that brings this expertise and knowledge together and is then continuously available. It would work with providers of care so able to respond rapidly to change, including ceasing services when the person improves and no longer needs them. They would also be well placed to manage and allocate funding efficiently to get the maximum benefit for their communities from available funding, which is never unlimited. This was advised over the years by Professor Hal Kendig. In their report, Dwyer et al found that it was a feature of countries providing good aged care.

The relationship with the NDIS: We have had contact with Peter Wilcocks who has personal experience, an excellent grasp of the problem and whose investigations are thorough. We strongly support what he says in his submission. It is ludicrous that someone who has been served by the NDIS and has well established services and close relationships should be forcefully moved to a new system simply because of their age. Both are community services and both are vulnerable people who need help.

We were critical of the government's plans to integrate disability and aged care programs centrally¹³ in 2021. Instead, we urged them to first integrate the two more closely regionally and locally. Those with both disability and aged care issues should then be able to access the best service for their situation and their lives should not be needlessly disrupted simply because they have turned sixty-five.

The privatisation of aged care assessments and the way it is to be compressed into a centrally constructed framework is a sad reflection of the sort of people who are managing aged care and their priorities. The community will be excluded again. It is a betrayal.

Computerised decisions using Artificial Intelligence (AI): Peter Wilcocks was justifiably horrified when he saw what was planned. This is another graphic illustration of just how out of touch those who are designing this act are with the real world. The data collected by the assessment teams is to be fed into a computer system which will then make the decisions to allocate the level of care needed and the priority on the waiting list. It will be taken to "*be a decision made by the System Governor*". Appealing those decisions will be a complex and difficult issue This will greatly compound the problems created by privatisation, marketisation and this act.

We completely agree with Peter Wilcocks' assessment. He quotes an expert who indicates that used in this ill-informed way it will *“reinforce biases we've spent generations trying to overcome”*. In aged care, those biases by businessmen and managers are already a huge problem. The expert uses nurses and doctors as an example and stresses that *“the emphasis (should be) on enhancing and augmenting human skills, not replacing them”*. AI has the capacity to help them *“tremendously”*.

One of us was once a registered Apple programmer and was interested in overcoming the inaccuracies of computer interpretation of written text and particularly doctor's notes by developing a medical record keeping program and information display using a graphic interface. He never had time. This was intended to intelligently interrogate databases and when they became available, AI systems, so giving the medical practitioners the data and support they might need to enhance their skills, help them solve the many complex problems and jog memories.

What this act proposes is a nightmare situation. It will create huge problems. What is needed is a computer system that gives the assessors on the ground the information they need to resolve the sort of problem each complex individual presents.

2. Limiting on-site oversight by advocacy and visitor schemes

Advocacy in aged care 2007: Advocacy has been a controversial issue in Australia for a long time. Braithwaite et al addressed it in aged care in their book¹⁹ 'Regulating Aged Care'. In commenting on both the visitors scheme and the advocacy system recommended by Ronalds in her 1989 report, they wrote about the government steering both from *“the rights perspective that gave them birth to a ‘partnership’ perspective with the industry to improve quality”*.

In regard to advocacy Braithwaite et al wrote *“We were told if they criticize the government, it has a ‘long memory’*. *Their funding contracts with the government have clauses that explicitly fetter their capacity to criticize government policy without notice or even to criticize named providers who they believe should be closed”*. - - - - - *“Government by contrast attempts to ensure this is advocacy with a small ‘a’”*.

They also noted that after 1997 *“More quietly, the advocacy organizations that had been the biggest thorns in the side of the industry had their government funding terminated”*. The authors felt that the rights of residents were not taken seriously and that *“the political neutering of advocates, makes whistle-blower protection for nursing home staff one imperative reform”*.

Community Visitor's scheme in 2007: In regard to the Community Visitors Scheme that Ronalds advised in 1989, the authors commented that government *“insist that community visitors leave matters of compliance with standards to standards monitoring and stay away from legal conflicts with nursing homes to assert rights”*.

The Public Advocates in Victoria and Queensland (and the Public Guardian) have used empowered visitors successfully to identify problems in care and more recently urged this for aged care in submissions to inquiries. They were ignored.

Advocacy generally over recent years: There have been concerns over the years since then.

A lengthy discussion paper by Carers Victoria in 2011 gave a broad review of different types of advocacy³⁹. It did not address the issues Braithwaite raised and looked at advocacy across multiple sectors including aged care where access for caring families was rated as only fair compared with other sectors that were poor. Individual funding for advocacy in aged care was “*under resourced and not well promoted*”. They stressed the importance of individual advocacy informing systemic advocacy, which was the sort of advocacy that Braithwaite was concerned about.

In our 2015 submissions⁴⁰ to an inquiry into advocacy contracted to consultants, we commented that apart from advocates websites “*there is limited public evidence to suggest that the service exists. For example, advocacy is rarely mentioned in the many reports in the press, feedback to ACC, comments made to many review/feedback websites, in coroner’s reports, or when criticisms of the Aged Care Complaints Scheme are made*”. We stressed the power imbalance in the sector and urged greater community involvement indicating “*21st century thinking sees a bottom-up community operated representational structure rather than a top-down bureaucratised one as the most effective for community services*”.

Advocacy groups have been critical of restrictions placed on them. Soon after becoming minister for Social Services, Morrison was accused of cutting funding for Disability services including advocacy services⁴¹. Advocacy groups were worried about threats to their funding, by those in government who did not believe that the government should be funding their critics. There was an outcry among advocacy groups⁴² when Gary Johns, who held these views, was made head of the “Australian Charities and Not-for-profits Commission” that regulated them in 2017.

Hunyor and Goldie explored this further⁴³ in an Opinion piece “*Whose Afraid of Advocacy*” in 2019. They indicated that “*governments and some powerful interest groups do not always like advocacy by civil society, and regularly object to government funds being used for that purpose*”.

They explained “*the Howard Government not only cut advocacy funding to civil society organisations, but went further to include explicit ‘gag clauses’ into Commonwealth funding contracts*”. They considered that the Gillard government had tried to legislate to address this, but more recent coalition governments had found more ways of preventing criticism using government funding.

³⁹ Discussion paper on Individual Advocacy and Caring Families Anne Muldowney, Policy Adviser Carers Victoria Oct 2011

⁴⁰ Review of Commonwealth Aged Care Advocacy Services: Aged Care Crisis Inc. (Sep 2015) Feedback form <https://www.agedcarecrisis.com/images/subs/aged-care-advocacy-options-paper-feedback-form.pdf>
Review of Commonwealth Aged Care Advocacy Services Aged Care Crisis Supplement to Submission 4 Sept 2015 <https://www.agedcarecrisis.com/images/subs/aged-care-advocacy-options-sub-supp.pdf>

⁴¹ Gov’t axes funding for disability peak bodies Green Left 23 Jan 2015

⁴² Government accused of trying to ‘silence’ charity sector with new commissioner ABC News 7 Dec 2017 <http://www.abc.net.au/news/2017-12-07/governments-new-charity-commissioner-will-silence-the-sector/9237432>
Petition Calls for Gary Johns to Resign as ACNC Head Probono 11 Dec 2017 <https://probonoaustralia.com.au/news/2017/12/petition-calls-gary-johns-resign-acnc-head/>
The Gary Johns appointment The Saturday Paper 16 Dec 2017 <https://www.thesaturdaypaper.com.au/news/politics/2017/12/16/the-gary-johns-appointment/15133428005650>

⁴³ Opinion: Who’s afraid of advocacy? Public Interest Advocacy Centre Hunyor and Goldie 1 April 2019 <https://piac.asn.au/2019/04/01/opinion-whos-afraid-of-advocacy/>

Hunyor and Goldie wrote *“some organisations are able to comply with restrictions on their use of Commonwealths funds without being completely silenced, because they can find other sources of income to support advocacy activities. But others cannot, particularly those representing people who are least powerful and most poorly resourced”*. Then *“Most recently, the Commonwealth Government has upped the ante, informing a number of organisations, including ACOSS, that they would no longer receive funding for ‘advocacy activities’ because such funding is not permitted under the Constitution”*.

Advocacy in aged care: The absence of references to advocacy groups speaking out during the many failures in care reported in the press and at inquiries over the last 20 years is worrying. It suggests little has changed since 2007. Where were they during the ten years of neglect and abuse at Oakden in South Australia exposed at the end of 2016 and the *“litany of problems spanning a decade”* revealed at the Earle Haven facility in Queensland in 2019?

If they knew about this then the public, who would be vitally interested, were not informed by the advocates they trusted. Whatever the explanations given, this must be examined alongside the strong criticisms of government and advocacy during this period. It needs to change to make it transparent and accountable to citizens. To restore confidence, we must ensure that it is working for them and their communities and exposing system failures when they occur.

Fear of retribution: Another issue limiting advocacy is fear of retribution. For example, in its 2013-14 Annual Report QADA⁴⁴ (Queensland Aged and Disability Advocacy group) indicated *“Another issue and significant concern for the aged care sector is the increasing number of older people fearful of retribution who have chosen not to proceed with advocacy support or to lodge a complaint”*. In addition, as QADA’s CEO explained⁴⁵ in 2016 after problems were exposed in multiple Queensland homes *“Current residents in aged care are known as the grateful generation and are nervous about reporting issues’*.

Like previous consultations and inquiries, the Royal Commission ignored the experience of retribution despite strong evidence given by credible witnesses Noleen Hausler and Sarah Holland-Batt.

As those groups who have been watching the USA will be aware this is still a big problem in the USA⁴⁶ which has much stronger regulatory oversight than in Australia.

Responding to these problems: We argue that issues develop locally and not in capital cities. Local communities are much better placed to protect those who speak out from retribution.

Problems identified should be handled locally in the first instance and for this reason groups like OPAN should work through and with local community groups supporting and mentoring them. Citizens and their communities need to see what is happening and then have enough power to respond to the issues by confronting the provider. If needed they can seek support and sanctions from the regulator – or simply replace the provider.

⁴⁴ Annual Report QADA (Queensland Aged and Disability Advocacy group) 2013-14

⁴⁵ Fears vulnerable are afraid to report Gold Coast Sun 15 June 2016

⁴⁶ They Make You Pay June 2023 The Long Term Care Community Coalition
<https://nursinghome411.org/wp-content/uploads/2023/06/They-Make-You-Pay-June-14-2023.pdf>
How Fear of Retaliation Scares Residents into Silence Elon Caspi Webinar Long Term Care Community Coalition 18 Apr 2023
<https://nursinghome411.org/wp-content/uploads/2023/04/nh411.webinar.retaliation.04182023.pdf>

If central regulators fail them then they should use their central representative body to put pressure on government and when all else fails use the ballot box.

Community visitors who are on site regularly talking to residents and families can be the first to become concerned. They should be able to draw attention to the problems and brief those providing oversight and advocacy.

A central body representing community organisations should appoint representatives on OPAN and on government bodies advising or working with advocacy. They can report back to their communities. Civil society is in a position to support advocacy organisations and reject governments that try to muzzle them but they need to be part of this system to do that. Major changes are needed.

The Act does not address any of this and it should. To provide effective advocacy and on-site support the system should be restructured and this act avoids anything like this.

3. Limits in the Act

Only funded care is covered: This act which focuses on rights applies only to funded aged care services so it is an act that is based on and depends on funding, which under the AN-ACC Activity Based Funding (ABF) is likely to be more difficult to sort. We need to remember that markets follow the money.

When ABF was introduced into health care in the USA, business advisers encouraged companies to invest in services funded on an item per service basis and in those less closely regulated instead. This is where they could control the money they got.

These were 1) specialty hospitals (eg. Psychiatry and substance abuse) in the 1980s, then 2) by discharging patients early to nursing homes where they were provided with large amounts of step-down rehabilitation care. and 3) encouraging expansion into countries with item of service payments - both in the 1990s.

In these segments patients were kept in facilities for as long as their insurance allowed and large amounts of unnecessary treatment was provided. Many suffered and were harmed as their insurers were defrauded. When these loopholes were closed, the ABF system itself was defrauded by 'upcoding' so getting more money for each patient, doing large numbers unnecessary surgical procedures and ignoring safety requirements in order to do more operations.

In our, soon to be heavily regulated and ABF funded aged care system, providers are likely to focus on aged care services that are not funded by government and then target the wealthy. The government usually does what the industry wants and it wants seniors who have money to pay more of their care themselves.

Many might prefer to pay their way and escape the complexities, bureaucracy and long waiting periods in the funded aged care system by purchasing care from providers outside the system. The industry will encourage this but the elderly customers will not be protected by this act.

Recommendation: If we are to have rights as elderly citizens then all should be protected, not only those being government funded.

4. Regulatory complexity is driving good smaller providers out of business

In Appendix H of our submission to the *Consultation Paper No. 2: A new model for regulating aged care June 2023* (summarised below) we described how the complexity of the new regulations is causing providers who provide good care to close up their services. Eight months later, there are still concerning reports⁴⁷ of more community services closing. In this instance the “*City of Port Phillip, in Melbourne, voted to end its in-home aged care services*”. The article reports that “*Councils have been exiting the home aged care services due to the ‘significant Commonwealth Government changes’*”. The act needs to be adjusted to create a model of regulation that works.

5. Issues raised in our Response to Consultation Foundations of the new Aged Care Act Submission to Department of Health and Aged Care Sept 2023

The issues we raised in our 2023 submission are equally relevant. We have summarised them in the appendix near the end of this submission. They were not addressed in the latest draft.

⁴⁷ Council-run in-home aged care services axed in Vic Aged Care Insite 26 Feb 2024
<https://www.agedcareinsite.com.au/2024/02/vic-council-axes-in-home-aged-care-services/>

6 Appendix

We summarise five of our recent submissions to the department:

- 1. Exposure draft of the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022** 18 October 2022
- 2. Aged Care Quality Standards Consultation** 21 Nov 2022
- 3. Consultation Paper No. 2: A new model for regulating aged care** June 2023
- 4. Response to Consultation Paper on the Aged Care Taskforce** *Submission to Department of Health and Aged Care* August 2023
- 5. Response to Consultation Foundations of the new Aged Care Act** *Submission to Department of Health and Aged Care* Sept 2023

1. Exposure draft of the Aged Care Quality and Safety Commission Amendment (Code of Conduct and Banning Orders) Rules 2022 18 October 2022 *(outline below)*

We expressed our concern that legislating codes of conduct was being “*given precedence over far more important structural reforms that are essential if aspirational bills of rights and codes of conduct like this are to be embraced by the sector and flow on into care at the bedside and in our communities*” and that “*the monitoring of the codes and the sanctioning is to be done by the Aged Care Quality and Safety Commission (ACQSC), the same body and the same people that failed to expose what was happening over the last 20 years*”.

We stressed the problems created by the subjugation of aged care to free market ideology in the 1990s and indicated that “*so much committed effort and so much money has been so unproductive*” over the years. Particularly damaging were the inquiries that tried to solve the problems by making aged care conform more closely to marketplace ideals.

Sadly, the response to the Royal Commission as reflected in this 2022 and subsequent acts is an even more graphic illustration of the effort that will be expended by believers in order to patch the system and avoid confronting ideology and addressing the problems it has created.

We indicated that a “*very different, regionally structured aged care system is required to address the deep flaws in the current system and balance the perverse pressures introduced by the competitive market driven system that we still have. A collegial cooperative approach is required - rather than a competitive one*”.

The divided Royal Commission did not come up with clear recommendations to address the problems leaving it to politicians to do so. We indicated that “*over 200 years of knowledge (even 2000 if you look back to ancient Greece) and over 100 years of social science has been ignored*”. We explained this by describing the way in which our political system has been captured by wealthy donors so making needed change too high a risk.

In Appendices we described:

- A. the origins and spread of neoliberal free market ideology,
- B. the incompatible paradigms (ways of thinking) that develop in social services like aged care,
- C. the broad consequences of neoliberalism in vulnerable sectors in the USA, UK and Australia as well as their impact on society,
- D. the exploitation of workers in aged care,
- E. Regulatory failure in aged care by the captured regulator and the exploitation of funding loopholes by providers, as well as the
- F. Relevant social science that explains this at a national and global level, at a social systems level and at an individual level - the problems in our nature and in our societies that make us so vulnerable. These analyses show what needs to be done.

2. Aged Care Quality Standards Consultation 21 Nov 2022 (outline below)

This submission explains *“why the repeatedly revised, improved and promoted aged care standards have had no impact on the steadily growing number of failures in the system over the last 25 years”*, and why *“the new standards are most unlikely to be effective”*. We describe *“how the regulators, politicians and industry have over these years, been able to boast about a ‘world class’ system”* when it was so poor we should have hung our heads in shame. We give the figures that expose this.

It *“was not the standards themselves. They were simply not enforced. It was the regulators that were protecting the reputation of the government and the industry by putting their interests above the residents whom they should have been protecting from the perverse market pressures many had warned about”*. This was *“a graphic illustration of the parlous state of our country, its government and its democracy”*.

We explained again how warnings had been ignored, how the public service had been eroded and its values destroyed, and how government had been captured. We describe the impact on the Department of Health and we challenged them to rally behind their values and lead the way.

We repeat what we said in the October 2022 Code of Conduct Exposure draft submission about our disillusionment, the social pathology, the way staffing and other data was ignored, the social research that informs our analysis and the state of our political system.

“We supply the data that shows the department’s culpability. Our Recommendations are directed to the Department of Health and directly challenges it to reform itself and then pioneer the rebuilding of our fractured society around aged care which is well placed to do so”.

We recommend that the department report to government that *“the available evidence clearly shows that central regulation has failed and is unlikely to be successful this time”*. Instead they should *“advise a decentralised regional and local management and oversight system overseen by local government- - - - - a reach down, mentor, support and build capacity approach”*.

3. Consultation Paper No. 2: A new model for regulating aged care June 2023

(Download full version at <https://www.agedcarecrisis.com/opinion/articles/476-new-model-for-regulating-aged-care>)

“This submission argues that Australia’s aged care system has been failing since 1997. It is deeply flawed because the philosophy, policies and the resulting structure of the system created in 1997 was deeply flawed. The new structure did not create the ‘necessary conditions’ needed for a market to work. The submission provides evidence to support this”.

“Huge efforts have been made over the last twenty-six years by the systems architects to make it work. Vast sums have been spent by them on inquiries, reforms, consultations and finally a Royal Commission. They simply cannot accept that their belief in markets, investment in time and money and the amount of effort and commitment was, and still is ineffective and the system they created is not working. They see the community and its expectations as the problem”.

“We argue that we are social animals and that care of the vulnerable is and always has been a community responsibility and cannot simply be handed to an unchecked and uncontrolled market. Civil society, our communities have every reason to be highly suspicious. They should not accept this sort of argument again. They should insist on taking overall responsibility themselves and so gain full access and insight into what is happening”.

In this detailed in-depth submission, we track the many failures and the reasons for failure using quotes from our previous submissions or web material to illustrate the problems. We use multiple Appendices.

We describe what happened at the Royal Commission again.

To redesign the system and make it work you need to understand how it developed and where it went wrong. That means confronting our failures and that has not happened. As a consequence, we are making the same mistakes.

We summarise the Appendices which show just how badly the system failed and why. We point out that the proposed regulatory changes retain an *“Essentially similar structure: Instead of addressing the paradigm conflicts and the power imbalance within the current market-led system, the proposed regulatory changes leave the market-led system largely intact. The pieces are simply being moved about and the processes adjusted”*. Those responsible for the same very similar system are still there. *“This is not the reform that we were promised”*.

We address the staffing problem by explaining that *“it is not a place where anyone wants to work or to live”*. Simply increasing wages will not address the paradigm conflicts that make staff so unhappy.

We respond to the questions asked in the consultation paper

Appendix A: Aged Care and the Society we live in

This appendix addresses the role that ‘market leaders’ as well as global and local corporate market advisers have played more broadly in creating numerous failed markets including aged care. The problem is illustrated by disturbing reports across the world about one of the advisory groups used extensively in aged care. We examine political developments and how the market came to dominate and capture the political system in Australia.

Appendix B: Denial Before and then after the Royal Commission

This Appendix examines the extent to which all parties denied and refused to accept what was happening over the years, continued to do so during the Royal Commission and still continue to do so. We have not seen any of those responsible for this system acknowledge their culpability. The reforms that are being made do not address the real problems in the system showing that they are still in denial.

Appendix C: Regulatory failure Early experience

This appendix examines the capture and failures in the accreditation process in the US Health system. It is not used in aged care there. Its introduction into aged care in Australia in 1997 is described and the many early failures are referred to. The appendix also describes the way the market saw this new market as a huge opportunity to make money.

Appendix D: Persistent Regulatory failure

In this lengthy appendix we start by describing the many failures in aged care between 2005 and 2011 by quoting from our submissions. We then examine what happened as the system came apart after the 2011 Caring for older Australians report - and the 2012 LLLB reforms based on it designed by NACA and COTA.

In 2016 staffing data in Australia became available to us and there was an inquiry into staffing levels. We supplied data showing just how far behind international staffing standards Australia had fallen. The system was imploding and the Oakden scandal was the catalyst for multiple inquiries which we made submissions to. After the Royal Commission was called we made multiple submissions to it.

We addressed the failure to collect accurate data over the years, described the problem of 'Regulatory Capture' and provided evidence that exposed the failure of the regulators to detect failures in care by comparing their findings with published studies of the problems they were ignoring. We quoted from an analysis we supplied to the Royal Commission and from our 2018 Quality of Care submission. We examine the failure of governance quoting from a Royal Commission submission pressing for structural changes.

We conclude that:

“When we look at what is happening it seems clear that adverse information about aged care was more threatening to the regulators than to the public. The worse it got, the harder they tried to conceal it. That must have taken a lot of wilful blindness and strategic ignorance as well as rationalisation.”

“It (the regulator) is responsible for preventing citizens and society from controlling and managing the market that should be serving society. It has played a pivotal role in ensuring that the aged care system would not work and that the elderly would be harmed”.

Appendix E: What families and staff have to say about care

This is a copy of Appendix 1 of our March 2018 submission 'Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia' by the Standing Committee on Health, Aged Care and Sport.

It compares the exaggerated claims made by the government on its Austrade website in 2015 and those of senior industry figures on the one hand, with the very different experiences described by families who had experienced the aged care system and the staff who were working there on the other. It goes on to examine and reference other sources which revealed just how poor staffing was and how bad the care.

We introduced the evidence with *“Contrast the comments made by staff and families at various times over the last roughly 15 years with the government and industry’s idealised view as revealed above on the Austrade web site. Yet most of the leaders in the sector seem to think this way. We have seen similar inflated assessment by market and industry providers preceding major scandals in corporate hospitals and in aged care in the USA. It sets alarm bells ringing”*.

Then after some examples of industry leaders claims, we commented *“Those who have studied society over the last 2-300 years have recognised that the most difficult situations to deal with are those in which the perpetrators believe implicitly in what they are doing, so implicitly that they are unable to see what is happening in front of their noses. Because they believe in what they are doing they are not restrained by their consciences. This phenomenon is now well recognised and there are a number of ways of understanding the psychological strategies used and the way in which groups reinforce each other in deceiving themselves”*.

To show how blind and resistant to established knowledge we are we quoted

- *“virtue is more to be feared than vice, because its excesses are not subject to conscience”* (Adam Smith 18th century)
- *“It's always the good men who do the most harm in the world”* (Henry Adams 19th century)

Appendix F: Aged Care Structure

This appendix contains multiple extracts from Aged Care Crisis' 4 August 2020 submission to the Royal Commission advocating for structural change and a community-led system.

That submission describes why the system is failing. It suggests principles for reform and makes recommendations. It describes the broader movement towards localism and citizen involvement developing globally and looks at the recommendations made in the pre-neoliberal era that advised greater regional, local and community involvement in the system. These changes were resisted by industry and then abandoned during and after the 1990s.

In explaining the consequences of *“a one size fits all, strongly competitive free market”* and an aged care system which *“has been structured as such.”* We explain that *“The powerful communitarian pressures that citizens exert on one another to confront and control inappropriate ideas by confronting them at source and to stop harmful behavior as soon as it occurs by ostracising offenders have been lost”*.

“Every one of us and every community is and has always been responsible for the care and the wellbeing of our vulnerable fellow citizens. Anyone providing that care is doing it on our behalf and they are our agents”.

We expressed *“our concern that the Commission is not addressing its terms of reference fully and as a consequence their recommendations will be an ineffective long term solution”*.

We explained and referred to the many sectors where citizens were now responding to what has been happening in our societies by pressing for greater community engagement and control.

In making recommendations we indicated:

“It is essential that communities and their members have effective oversight of their agents and that activities be fully transparent and that they be directly involved in decision making. If their agents fail to provide satisfaction then there must be a mechanism in place whereby the community can readily find another agent to replace the one that has not been satisfactory, and do so without disrupting the care that their fellow citizens are receiving”.

We looked at how these issues had been ignored after inquiries and reviews in 1975, 1982, 1985, 1989 and 1993 had addressed them and made recommendations. Gerontologist Prof Kendig continued to press for them over the years.

The Royal Commissions own research paper 2 explored this issue internationally as indicated by the extract below.

The *‘Review of international systems for long-term care of older people’* was prepared by Dyer SM et al from the Rehabilitation, Aged and Extended Care Group, Flinders University and THEMA Consulting, and Bolton Clark Research Institute.

They found that unlike Australia:

“The majority of countries analysed have a decentralised responsibility for quality regulation, with multiple players responsible for regulating quality - - - professionalism-based quality regulation systems, all - - - have multiple levels of responsibility and decentralised regulatory responsibilities”.

They confirmed the poor staffing in Australia writing that *“overall total staffing levels and nurse workforce at the lower end of the range internationally”* and that Australians *“reported the highest rates of dissatisfaction with the quality of health care and second highest levels of economic difficulties.”* Denmark and Sweden *“have high-quality LTC-systems”* and both *“fund LTC through local authorities”*.

They made a number of suggestions, all of which we support but specifically *“Increased involvement of local or regional authorities (decentralisation) in the regulation and monitoring of LTC services.”*

We were alarmed at the way the Royal Commission was avoiding important issues in its deliberations and we directly confronted the Royal Commission on this issue writing in red

“Our concern: We have urged the Commission to consider changes that closely resemble that which the Giles report recommended 35 years ago. In spite of several submissions, it has carefully avoided openly discussing anything like this. It is difficult not to conclude, that like previous inquiries it is still deeply wedded and unable to break free from neoliberal ideology and its deep distrust of community”.

We added *“The Royal Commission must surely realise that these ideas make sense and are what an informed community would identify with and want”*.

Predictably the Royal Commission ignored the unwelcome advice of its own report by Dyer et al and it buried Aged Care Crisis’s submission by not publishing it.

Appendix G: Books and people who analyse what is happening

This appendix examines some relevant analyses, criticisms and suggestions of social scientists in greater depth. We include:

1. McGoey's 2019 book on strategic ignorance,
2. Heffernan's 2011(updated 2019) book on Wilful Blindness,
3. Foucault's 20th century insights into the relationship between knowledge, power, discourse and governance.
4. Rees and Rodley's 1995 analysis of the human costs of managerialism
5. John Ralston Saul's 1997 analysis of the consequences of corporatism for our civilisation
6. Walker and Salt's 2006 book on resilience and complex social systems, and
7. Braithwaite's 2022 historical analysis of the relationships between periods
 - a. when society is dominated (including by markets) and so unbalanced (called cascades of criminality),
 - b. periods when it breaks down (anomy) and the association with war, and finally
 - c. when dominance is contained and balanced by a stable civil society (cascades of virtue). He indicates that "*Criminalised states and criminalised markets evolve when there is no networked governance of their dominations*".

Appendix H: Regulatory changes are driving the best providers out of aged care

This analysis examines the way the complexity and burden of the proposed new regulations is already driving local community home care providers and smaller nursing home operators who provide good care out of business.

Appendix I: Analysis of the Star Ratings webinar for providers

A webinar with providers left the impression that this was more about regaining public confidence than actually addressing the problems. That self-reported quality indicators by providers in the USA had given false data was used as an excuse for weighting the star ratings to give consumer reviews and assessments by the regulator that has protected industry from exposure in the past much greater influence. We still have the same centralised regulator. In our view this is even more unreliable.

Foucault's insights explain and medical experience confirms just how unreliable consumer surveys can be when there is a power imbalance.

We would be better to follow the USA by limiting Quality Indicators to those that can be verified. In a community-led system there would be independent observers regularly on site to do so.

4. Response to Consultation Paper on the Aged Care Taskforce Submission to Department of Health and Aged Care August 2023

We describe the three types of financial inequity in the current system.

1. The inequity of citizens created by the huge concentration of wealth within the free market model
2. The generational inequity created by an ageing population and a small workforce, and
3. The inequity created by the unpredictability of ageing

To address the inequity of citizens we recommended a balanced social system with a well-developed and active civil society. To address the unpredictability of ageing and generational inequity so that each generation pays for its own care, we recommend a hypothecated insurance scheme linked to superannuation. A temporary medicare-like steadily decreasing estate tax would ensure that those no longer working pay for their care in an equitable way.

5. Response to Consultation Foundations of the new Aged Care Act Submission to Department of Health and Aged Care Sept 2023

We once again summarised the history of government policy and aged care including the erosion of the public service, the reasons why repeated reviews and reforms failed, regulatory capture, the rise of market advisors, state capture, the problems with the Royal Commission and with government's response.

We indicate that *“Our reason for exploring these issues critically and setting them out is that in our view, the Royal Commission recommendations that were accepted and that both governments are doing, is exactly what the multiple reviews, inquiries and reforms over the last 20 years have done”*.

It is clear that we need a new aged care act but as we indicate *“The criticism of this proposed Act is that it makes aspirational changes and greatly increases the regulatory complexity and rigor, but does nothing to address the deep structural flaws in the system that we have been writing about for years”*.

We wrote:

The way in which the proposed new Aged Care Act is worded reflects the same patterns of thinking that lay behind the 1997 Act. This Act still ignores aged care as a community service that depends on our human values. Instead, it addresses aged care as if it were a functioning market and that more competition would make it work. We suspect that the multiple market advisers, perhaps PwC or KPMG appointed by the Morrison government drafted this consultation.

This is not what we were promised. It is a shocking betrayal of Australian citizens and needs redrafting.

In addressing the omission in the proposals, we suggested *“a more distributed and balanced regulatory system where people on the ground (ie local communities) have an oversight and regulatory role and where the regional and central systems balance and control one another”*.

In **Appendix A** we explored what happened at the Royal Commission in more depth.

In **Appendix B** we examined the way our political system and our democracy has been captured.

Addressing the proposed Act

Principles

- The first principle should be a balanced system with an effective customer and an involved and empowered community that sets the limits of acceptable conduct.
- The second principle should be that government's role is to build and empower our communities so that they can hold those they trust to provide care to their members to account.

The Objects – (we suggested an additional object)

- create a new more balanced decentralised aged care system where there is a balance of power between providers, citizens and communities. This should ensure that the objects of the act are embraced and implemented in our communities and in our nursing homes.

The purpose --- In referring to the aspirational objectives we indicated that

--- the structure and unbalanced power in the unchanged system will undermine this. It will lead to it being marketed aggressively but tokenised in practice.

Constitutional foundation – We suggested that

---- the present system is not structured in ways that will support and enable this. The constitutional foundation should embrace the sensible principle of trustworthiness.

What is different

Changing the structure of the act does not change the structure of the system itself or the perverse pressures in it.

Statement of Rights

We are not persuaded that simply moving human rights from another act to the Aged Care Act will necessarily make all that difference in a system that has been neglecting them for years. ----- In practice it really comes down to a common-sense assessment of rights on the ground. Regulation is a last resort and local empowered support and ready access to an arbitration system should be the main focus.

How will rights be enforced?

We do not see how this differs from the present system where those who speak out fear retribution. Placing an obligation on the powerful providers is not a solution. ----- The victimisation of those who speak out is a huge problem. There should be a local support person to - - - watch over the elderly person or staff member who complains to see that they do not become victims.

A new complaints framework

- --- does not solve the problem created by the parlous state of our overburdened public service and its many failures. - - Complainants need local people to guide them through arbitration and work with a central complaints system when required

If rights are to be upheld and adequately enforced then that power imbalance must be addressed. - - - We supported a compulsory attachment to the residential care contract, righting the imbalance of power between resident and Provider and the requirement for Mediation/Arbitration in Aged Care Contracts

Statement of Principles

the first and most important and fundamental principle should be trust and trustworthiness (described as probity). - - - The second basic principle should be the principle of community accountability.

Items 10, 11,12,13, 14. We responded to these by stressing the importance of a decentralised and community centred component. We commented that *“it is not so much the wording that needs changing, as the paradigms within which those designing these principles think and work. The paradigms (patterns of thinking) are relics of the late 20th century ideology that has failed so badly. The wording reflects patterns of thinking that have failed us and are not suited to the challenges of the 21st century”*.

Response to Questions on principles

Glaringly absent is any role for the community that is ultimately responsible for the welfare of fellow citizens. The principle of a **community-led system** based on **placed based collaboration** would address the huge problems created by the power imbalance in the system. - - - **‘probity’** should be a very basic clearly stated principle.

The definition of high-quality care

The definition and the means of achieving this all reflect failed 20th century ideology and the advice received from marketplace advisory groups who need to protect the interest of the industry.

There should be two important measures of care

1. Measurable standards and objective outcomes.
2. The perceptions and insights of people with knowledge who are independent of providers but regularly onsite talking and working with staff and recipients of care.

Achieving high quality care

It is clear that the approach adopted is no match for the powerful pressures in the competitive system. This proposal is simply more of the same.

Probity. We explain why this is so important.

In regard to placing obligations on registered providers: - - - it is not in the interests of commercial providers to meet obligations if they can avoid it. - - - A community led system ensures that this happens

When it is in the interests of communities to **promote best practice and continuous improvement** then it becomes in the interest of the providers accountable to them to do so as well.

Governance arrangements are an attempt to steer and induce markets to self-regulate. They are no match for the strong perverse incentives in this system

There are serious flaws and weaknesses in the current **National Quality Indicators and Star Ratings program**.

The illusion of choice We are offered 'choice' as an objective in a system that so often fails to ensure that. For example *“- large numbers of people who have carefully selected a nursing home or home provider, will be sold off to another company at least once”*.

A new duty of care and compensation pathways protections for whistle-blowers

“We are not persuaded that simply putting words and threats into legislation is enough to change the behaviour of big corporations or that the threat of regulation will deter them” - - - - “It is more effective to give communities the power to put them out of business”. - - - - We need a system that checks this sort of behaviour at source and acts as soon as they see it and not after millions have been harmed. A community-led system is on-site and better placed to do this “it requires an independent trusted community support person involved in oversight and regularly on-site to work with and support whistle blowers to ensure that their efforts are welcomed and there is no victimisation”.

Eligibility for Commonwealth funded aged care services

We expressed concern about the pressures to privatise assessment and were opposed to a complex centralised assessment process. We indicated *“This is a blunt instrument for assessing the very variable needs and requirements of people of different ethnicities, cultures, lives and disabilities. If we had a system that was based on trust and trustworthiness and no longer depended on distrust to control it, then a more flexible and responsive system might be possible”.*

Conclusion

We currently have a system that was largely designed by industry, for industry. It has failed Australia and its citizens. - - - the proposed new *Aged Care Act* is still supporting this same broken system.

“We do not see how the proposed changes will protect future residents and their families from similar treatment and are concerned that instead of addressing the problems, the Commission will try to regulate them”? - - - - “That is not going to change while it is still led by industry and regulated by government”.

Missing from the legislation are the legislative changes needed to restructure and rebuild the system and address the deep flaws that remain - - - - we need a more decentralised system with multifaceted social structures that balance one another and enhance accountability.