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Department of Health and Aged Care
New Aged Care Act Consultation

By email: AgedCareLegislativeReform@health.gov.au

27 February 2024

To the Aged Care Legislative Reform team,

Baptcare submission – Consultation on the Aged Care Bill 2023 (Exposure Draft)

Baptcare welcomes the opportunity to share its feedback on the Exposure Draft of the Aged Care Bill 2023, given the fundamental and long-lasting impact it will have on the delivery of aged care services to vulnerable older Australians.

Baptcare is broadly supportive of the recommendations of the Royal Commission into Aged Care Quality and Safety, and recognises this once-in-a-generation opportunity to realise the Royal Commission's vision of a new, person-centred aged care system that delivers better outcomes for older people and continues to improve over time.

The Exposure Draft does, however, raise a number of concerns for Baptcare, which we are aware are shared more broadly across the aged care sector. Noting there will be other submissions from providers and peak bodies, Baptcare's submission is intended to highlight some of its most material concerns, to be considered in conjunction with submissions from others across the sector.

Proposed statutory duty and criminal penalties

Baptcare supports the Royal Commission's recommendation that the new Act should include a statutory duty for approved providers to ensure safe and quality care. However, Baptcare considers the provider statutory duty as drafted (s.120), along with its application to the broadened group of responsible persons (s.121), goes beyond the recommendation of the Royal Commission, and leads to the negative implications outlined below.

Further, the application of criminal penalties to this duty again goes beyond the Royal Commission's recommendation, which was that a breach of this duty should attract civil penalties for approved providers. The reverse onus of proof, where a defendant bears the evidential burden to prove reasonable excuse, is harsh, unjust and out of step with a legislative framework that purports to adopt a rights-based approach.

Baptcare notes the duty as drafted materially (and adversely) departs from corresponding statutory duty legislative frameworks, such as occupational health and safety legislation (such as the Model Work Health and Safety Laws and the Victorian *Occupational Health and Safety Act 2004*). For example, the definition of what is considered 'reasonably practicable' does not include any consideration of the available resources or cost of eliminating or reducing the adverse effect, which is an accepted element of national and Victorian occupational health and safety legislation. Further, application to volunteers does not occur in these regulatory frameworks.



If criminal penalties are imposed, then they should accord with existing commensurate legislative frameworks, including provision for a fault-based element (e.g. recklessness or negligence) as well as removing the reversal of the burden of proof.

Baptcare also notes equivalent duties do not exist in adjacent industries (eg. public health), and accordingly there is a risk of an unintended exodus of key talent to adjacent industries, further impacting the ongoing sustainability of the sector. Further, challenges with attraction and retention of responsible persons (now more broadly defined), at both director and management level, are likely to be seen as a result. Given the broad definition of responsible person (s.11), such penalties could be applicable to an employee at the level of a Registered Nurse, and would likely cause prospective employees to reconsider a career in aged care. A further unintended consequence would be the resulting challenges for approved providers to meet the current 200 and pending 215 minutes of care requirement, noting providers already report challenges in meeting these benchmarks.

Insurance considerations and the sustainability of providers' insurance programs also arise as a result of the proposed criminal penalties, whereby providers are likely to experience challenges in placing insurance policies in an already constrained and volatile insurance market, with the potential for significantly increased costs either through policy premiums or the need to budget for uninsured risk, where insurers are unwilling to extend cover in relation to Directors and Officers (D&O) liability insurance.

Obligations on care recipients

Baptcare supports the creation of a simplified, rights-based legislative framework for the aged care system, including the proposed Statement of Rights and Statement of Principles (see ss. 20 and 22 respectively). It considers, however, that these rights should be balanced with clear expectations for care recipients on the expected behaviours from care recipients and their representatives to ensure a safe environment for all those associated with the delivery of their care.

Baptcare considers the Aged Care Bill 2023 should include care recipient responsibilities. More work is needed to strike the correct balance between rights (of care recipients, as well as workers, other care recipients and the community) and responsibilities, most importantly in relation to workplace health and safety obligations.

Supporters and representatives

Baptcare considers there is confusion around how the supporters and representatives provisions (see Chapter 1, Part 4) will apply, how they interact with existing state and territory requirements and how they will be administered.

While it supports the proposed reform in principle, it is concerned that this is a complex area that requires greater consultation and systems development. This includes time for the Department to establish the systems and capacity to make decisions on relevant applications. Baptcare recommends the proposed approach is replaced with the existing arrangements for the time being, which are then revisited when the Department has undertaken the appropriate consultations and preparations to implement nationally.



Scope of the Commission's role

In relation to the scope of the Commission's role, Baptcare considers that to be independent, the Complaints Commissioner (see Chapter 5, Part 5) should not report directly to the Aged Care Quality and Safety Commissioner, but rather, be established as a second, independent commissioner within the Commission. Baptcare also has concerns about the Commissioner both making and regulating Financial and Prudential Standards (s.163).

Implementation considerations

The lack of detail available to date, less than five months ahead of the new Act's 1 July 2024 proposed commencement date, is concerning. It is difficult to provide meaningful assessment of the overall regulatory proposal, as well as to begin preparing for the reforms (for example, staff training, ICT changes, changing processes) without all the details available, including the missing sections of the Exposure Draft and the subordinate legislation. Baptcare emphasises the Department must undertake meaningful consultation on remaining components of the regulatory framework, once completed.

The Act must also allow adequate time and funding to enable the training and backfilling of staff to enable providers to prepare to transition to the new regime. Baptcare seeks a transition timeframe of at least 12 months from the time at which all information is available (finalised Act, subordinate legislation, education materials) and a staged approach to implementation, given the multiple significant reforms being introduced. It is noted that in the past, singular reforms (for example, the revised Quality Standards) have taken many months to implement, and the cumulative impact of all the changes must be considered.

Finally, Baptcare considers the increased cost, obligations and compliance burden expected to result from the reforms will add additional burden on the cost of services to providers. The Department should consider parameters for providing funding to providers to assist with transition and implementation.

Thank you for the opportunity to share Baptcare's feedback on these important reforms, and we would welcome further engagement in relation to the concerns raised in this submission.

Yours sincerely,



Geraldine Lannon

Chief Executive Officer