

Aged Care Act 2024 (Exposure draft)

Submission to the Department of Health and Aged Care

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About us

Baptist Care Australia is the national representative body for Baptist community service organisations and their clients in the national policy debate. Together, the network of organisations that make up Baptist Care Australia care for:

- Over 5,000 residents in 62 residential aged care facilities
- Over 1,300 residents in 37 retirement living communities
- Almost 20,000 older Australians in their own home

Baptist Care Australia's members operate residential aged care facilities across Australia's urban cities, regional centres and remote towns. From single-site operators to large multi-state organisations, our members provide over 1 million days of care each year. We support over 5,000 older Australians with high quality residential aged care to enable them to live and age well, including specialised models of care for people diagnosed with dementia, those seeking respite and palliative care. Our members employ more than 11,500 staff, work with 3,000 volunteers and have an annual turnover of almost \$1 billion.

As a peak body, Baptist Care Australia works to bring social justice to Australian communities, advocating nationally on issues important to our members and the people who access their services. Our vision is a nation of hope-filled, purposeful people, building communities where every voice is heard.

Baptist Care Australia is a company limited by guarantee, a registered charity and a public benevolent institution.

Baptist Care Australia and our members seek to work in partnership with the department and government on these critical reforms as experts in the delivery of Federally funded aged care services. We work in close collaboration with the wider aged care sector to align policy and collectively navigate industry challenges. We note Baptist Care Australia's aged care service providers are also members of the national peak body for aged care services – the Aged and Community Care Providers Association - and we commend their submission to you.

1. It is critical we get the revised Aged Care Act right

We must ensure the Act, as legislated, includes a balanced approach to all parties participating in the aged care sector – maintaining the focus on older people while valuing the challenging work done by aged care workers, health professionals and providers.

The reforms being undertaken by the Australian Government will have a profound impact on the support for older Australians and the aged care sector for decades to come.

Baptist Care Australia fundamentally supports this crucial redesign and wishes to work collaboratively to ensure the reform is successful. The new Act goes a long way to addressing the complexity of existing legislative framework and a single piece of primary legislation is an approach that will provide simplicity and greater clarity for all stakeholders in the aged care system. . As part of our charter, Baptist Care Australia is committed to supporting marginalised populations and we strongly encourage the new system to ensure equal access for those elder groups who face systemic barriers to aged care services.

The focused agenda for change provided by the Royal Commission into Aged Care Safety and Quality provides the direction to secure older Australians' rights as the centre of the system's redesign, empowering their decision making and assuring their right to access quality aged care services. While the Act must safeguard the rights of older Australians and the quality of services they receive, it must also address the reciprocal responsibilities of all parties and address significant workforce and sustainability issues facing the aged care sector.

Baptist Care Australia urges the Government to commit to additional discussion and consultation ahead of legislating and to provide clarity around funding and transition periods well in advance of the passage of the Act in Parliament. The Government is currently operating with the benefit of broad support for the majority of these reforms; holding onto a prescribed timetable which does not allow time for effective consultation risks undermining this significant foundation of support.

2. We welcome a rights-based approach but seek recognition of associated responsibilities

The Act should expand the Statement of Rights to recognise the rights of other individuals in the aged care system (such as workers), clearly articulate the responsibilities that bind all rights holders in their engagement with others and empower providers to assist people to balance these competing rights and responsibilities when managing daily interactions.

Baptist Care Australia supports the Government taking a rights-based approach to aged care, as recommended by the Royal Commission.

We note that, appropriately, there are significant rights set out for aged care consumers. We also note it is not unreasonable to expect a statement of rights to be accompanied by a statement of reciprocal responsibilities.

The Act should give greater consideration to the social and physical environments in which services are provided – whether this is 1-on-1 in a person's own home or within the community of a residential aged care facility – as well as the range of governing, leadership, support and volunteer staff who make service delivery possible. There are circumstances where the actions of older people accessing services (or their family members) result in harm to other people, whether that be other residents, workers, health professionals or volunteers, and this should be acknowledged and anticipated within the Act.

Notably, the Act must recognise the existing legal obligation and WHS responsibilities on employers to mitigate risk and to actively protect their staff from harm when delivering aged care services. The Act must empower providers to manage risks to the people they support and their workforce. This means striking a balance between those groups' rights. While care must be taken to ensure that the rights of staff do not unduly diminish the rights of care recipients, plainly some rights can and must be replicated and explicitly recognised for workers (e.g. to be free from all forms of violence, degrading or inhumane treatment, exploitation, neglect, coercion, abuse or sexual misconduct).

Baptist Care Australia strongly recommends that the Act explicitly acknowledges the rights of aged care workers and health professionals, as well as outlining key responsibilities for older people accessing services and their families.

3. The proposed penalties are excessive and should be revised to align with adjacent industries

The exposure draft proposes significant new penalty regimes. We acknowledge the significant challenges and alarming evidence provided to the Royal Commission that led to recommendations for much stronger measures to mitigate the risks.

However, the proposed changes are excessive and fail to achieve a proportional response. While there is a need for sanctions aimed at driving compliance with quality standards and codes of conduct, the sanctions in the new Act far outstrip those in comparable sectors. Of particular concern is the introduction of strict liability and fault-based liability, which do not allow for contextual factors to be taken into account. In addition, the changes in the definition of 'Responsible Persons' exposes a much wider range of staff to criminal liability and now include in scope those staff without a commensurate level of authority over the organisational decisions that would impact their capacity to fulfil those expectations.

Baptist Care Australia does NOT support the introduction of criminal penalties within the Aged Care Act

Baptist Care Australia would strongly counsel adopting an approach to safety and quality compliance in aged care that is more closely modelled on workplace health and safety laws.

The draft includes significant expansions of criminal and civil penalties for "responsible persons" in aged care. However, there are legitimate concerns about the fairness and implications of these provisions. Existing state and federal laws provide adequate penalties for serious misconduct, and the proposed penalties could hinder the sector's ability to fulfill the rights of older Australians.

✓ We urge the government to remove new criminal penalties in favour of drawing on existing legal mechanisms for criminal liability, as is available in relation to assault, fraud, negligence, and privacy issues.

The civil penalties should be revised to better align with civil penalties in other human services and the healthcare sectors, and to allow for discretion in decision-making based on the severity and impact of issues.

The consequences of implementing such criminal and civil penalties may lead to increased workforce attrition as senior staff and board directors may choose to move into less risky sectors. This approach might also lead to risk-averse practices, contrary to the Act's goals. Indeed, the Act (s144e) directs the Commissioner to promote a culture of raising concerns and open disclosure and yet also introduces severe penalties for unintentional errors. The Commissioner will find it very difficult to cultivate a collaborative culture of open disclosures in an environment of heightened fear.

Implementing these changes could lead to increased costs for providers, reduced leadership opportunities, and unrealistic expectations of compensation from consumers.

- ✓ We strongly advocate for a system that promotes continuous improvement, incident reporting, and the use of enforceable undertakings, while reserving penalties for serious incidents of negligence or misconduct.

By aligning with existing workplace health and safety systems, the Act could support workforce growth and skill development, empower providers to manage risks effectively, and strengthen the role of the regulator in ensuring safety, compliance and continuous quality improvement. We believe a rights-based, high quality aged care act should position the regulator a “partner” in the system rather than an “enforcer” of the law.

4. The Commissioner’s new discretionary powers should have appropriate checks and balances

Under the draft, the powers of the Aged Care Quality and Safety Commissioner (the Commissioner) would be significantly expanded without adequate checks and balances. For example, the Commissioner would be able to determine the suitability of Responsible Persons in a provider organisation without limitation or clear criteria (s.121). The Commissioner would also be able to unilaterally vary or revoke governance conditions and impose additional conditions beyond those listed in the Act (s.103), potentially leading to arbitrary decision-making.

The broad discretionary powers vested in the Commissioner raise concerns about fairness, transparency and the application of due process including appealable decisions.

These points highlight the complex regulatory landscape and potential challenges in ensuring accountability and fairness in dealing with aged care services. They also present opportunity costs by undermining the Commission’s partnership approach to cultivating high quality care and continuous quality improvement.

- ✓ Baptist Care Australia recommends these regulatory powers be revised to ensure adequate checks and balances.

5. The Aged Care Complaints Commissioner should be an independent appointment

The new Act (s.144) allocates the complaints oversight and management function to a public servant who would be appointed by and accountable to the Aged Care Quality and Safety Commissioner (s.182), rather than an independent statutory officer. The Act is silent on the processes for appealing conflicts of interest, abuse of powers, or wrongful decisions.

- ✓ Baptist Care Australia recommends that the appointment of the Aged Care Complaints Commissioner be an independent appointment that mirrors the structures of similar bodies with multiple “independent” commissioners (e.g., the Australian Human Rights Commission)

6. Service providers need at least 12 months to prepare to operationalise the new Act once finalised

The draft Act proposes an implementation date of 1 July 2024. Yet it contains a range of new provisions, has no detail on core elements, and refers to a package of rules that are yet to be produced.

These include:

- New Aged Care Quality Standards
- Expanded whistle-blower protections
- New representative arrangements
- New registration requirements
- Worker screening requirements

Each of these changes will require resourcing and investment by providers for ICT systems, changes to policies and procedures, workforce training and capability building, as well as engagement with the older people already in their care on the impacts on their rights, entitlements, and responsibilities.

Many elements on their own could require a 12-month transition timeframe. If the Act and associated rules come into effect simultaneously without adequate lead time, services will be forced into poorly developed and chaotic internal change processes that will not achieve the desired outcome of improved care of older people.

We note these changes are being introduced in a context in which the aged care sector has significant capability challenges and levels of fatigue amongst staff; operationalising these changes will require immense effort and financial consequences. Without adequate notice to cost and budget for the change processes required, providers face major hits to financial viability in FY2024/25. There are already signs of market failure posing significant risks to consumer outcomes and health, wellbeing, and safety.

In addition, different providers have different capabilities. Smaller organisations, including many in regional, rural and remote areas and those working with marginalised groups, will carry a greater burden as they cannot roll out new policies developed by a central governance team. Given the large number of small providers in Australia, they must be provided time to successfully implement these changes while continuously providing high quality support.

- ✓ Baptist Care Australia recommends a minimum 12 months from Royal Assent and publication of the associated rules, noting the impact of the new Act cannot be fully assessed until a complete draft is released.

7. Key elements of the Act need greater clarification

The Act would be significantly enhanced, and the system better defined, if:

- Aged care services were more strongly defined in the primary legislation
- Home and community-based care was more clearly integrated
- All the rules required were included

Definition of aged care services

The draft defines aged care primarily by reference to the rules that will be attached as subordinate legislation. Currently, residential aged care is the only provider registration category listed in Act. This is just one of the six registration categories currently proposed.

The Act is no doubt impacted by the delay in the reform of the support at home program.

Notwithstanding this issue, we are concerned that the definition of aged care is not currently incorporated in the primary legislation but instead largely articulated in subordinate legislation. The draft makes references to “funded aged care services” and “specialist aged care programs” without adequately explaining each term.

Comprehensive list of associated rules

At many points the primary legislation avoids legislating core concepts in favour of reference to rules that will be created through subordinate legislation. A comprehensive list of the rules would enable clarity on the breadth of expectation outlined for service providers in the draft. Baptist Care Australia recognises that elements of the “rules” may have already been progressed as part of the response to recommendations of the Royal Commission, but the draft act is confusing on the specific elements.

We understand the “rules” will constitute a range of supplementary legislation and regulation including, among others, the following:

- The service list
- Classification levels for service groups
- Aged Care Code of Conduct
- Aged Care Quality Standards
- Financial and Prudential Standards
- Record keeping requirements
- Incident management
- Restrictive practices
- Ceasing the provision of services
- Data sharing

8. Adequate time is needed for consultation on the Act’s missing elements

The Aged Care Act plays a crucial role in shaping the aged care sector's future. It is vital the Act balances the interests of all stakeholders, including older people, aged care workers, and providers. The reforms proposed carry significant weight and must prioritize the well-being of older Australians while recognizing the valuable contributions of caregivers. The recommendations from the Royal Commission emphasize the need to empower older individuals within the sector.

However, the exposure draft lacks adequate provisions for funding, accessibility, and workforce safeguards. There are concerns about the impact on workforce retention and recruitment, as well as the potential consequences of certain provisions. It is imperative that the Government takes a comprehensive approach to address these issues and engage in thorough consultation before finalising the Act.

This opportunity to reform the system has taken decades and is informed by a comprehensive independent judicial review consideration; clarity on funding and transition plans are essential to the successful implementation of this critical reform.

9. The introduction of Supporters and Representatives should be delayed

The introduction of Supporters and Representatives as new legislated roles under the draft Act aims to assist older individuals in navigating the aged care system and making decisions about their care.

- ✓ Baptist Care Australia supports the empowerment of older people in decision-making

However, we are concerned about the gaps and potential adverse outcomes in the proposed arrangements.

- ✗ More extensive consultation and policy work is needed with sector stakeholders, and with state and territory governments, before these proposed changes could be implemented. Introduction without adequate consideration could lead to unintended consequences for consumers, providers and government.
- ✓ Collaboration with relevant stakeholders and state and territory governments is needed to clarify the hierarchy of decision-making and align the roles of Supporters and Representatives with existing Power of Attorney and Guardianship arrangements.

Key areas requiring further clarification include:

- Managing conflicting views among multiple supporters or representatives.
- Defining the scope of decisions Supporters and Representatives can make, particularly in scenarios involving health and financial matters.
- Establishing escalation pathways for providers in cases where a supporter or representative appears to be acting against the best interests of the individual.
- Ensuring alignment with existing state and territory legislative frameworks regarding Power of Attorney and Guardianship arrangements

Potential considerations for implementation include:

- Having consumers identify their supporters and advocates as part of the assessment process.
- Developing clear position statements for these roles – highlighting the responsibilities and consequences
- Outline a clear mechanism for providers that have identified concerns and want to safeguard their consumers should standard mediation approaches fail to adequately resolve identified issue.

Adopting a Community Visitors Scheme approach has been a successful quality improvement and operational standards “check” in a number of environments.

10. A sustainable aged care system needs adequate resourcing

The exposure draft fails to provide any content regarding fees, payments and subsidies (Chapter 4).

Resourcing matters are “to be drafted” and will be made available after the period of consultation on the Exposure Draft legislation has expired (16 February 2024).

Baptist Care Australia has continued to call on the Government to ensure appropriate resourcing of the system to ensure an effective high-quality aged care system. As noted in our pre budget submission:

According to the most recent StewartBrown report, recent Government investment into aged care – including the new AN-ACC starting price from 1 July, the 24/7 RN supplement and the uplift in AN-ACC from 1 December 2023 – has moderated the impacts of cost increases. We welcome this investment and

acknowledge the Government is exploring new approaches to the funding of aged care services. We support efforts to ensure aged care will be available to all people who need it by ensuring secure and accessible aged care in Australia. In line with our vision and mission, we will seek to ensure any such changes do not adversely impact older Australians who are experiencing poverty or otherwise marginalised in our society.

We note aged care providers are facing high expectations and no known additional resourcing to operationalise the changes attached to a new Aged Care Act and associated rules. The Act is yet to be introduced to Parliament and yet is intended to be operational from 1 July 2024. The level of resourcing needed to transition to the new law will bring significant new financial burdens on service providers that will need to be adequately funded by government. Without knowing the final detail, we anticipate this will require staff education programs, reframing of organisational policies, technology upgrades, changes to business systems, and other activity needed to embed the changes within our businesses.

Baptist Care Australia recommends the Federal Government:

- Inject additional short-term funding for aged care services to undertake the raft of changes required under the new Aged Care Act and associated rules.
- Fund the uplift in wages for those aged care staff covered by Stage 3 of the Fair Work Commission Aged Care Work Value Case, including on-costs and leave entitlements.
- Implement those recommendations of the Aged Care Task Force that will ensure aged care services are more viable and sustainable in the long term; are of high quality; and accessible to all older people who need them, no matter their personal circumstances.

We also put forward the following policy recommendations discussed by our members:

- Ensure appropriate funding for allied health as an important aspect of high-quality aged care.
- Increase funding for the care of residents with dementia. The way care costs are calculated under AN-ACC does not properly fund the care of people living with dementia. There are also not enough respite services available for both day centres and overnight respite care.
- Introduce measures to address the shortfall in funding around everyday living expenses (outside of AN-ACC funding for care).
- Remove the annual and lifetime caps, for those who have the means to pay. Increase the value of the home in the means test.
- Remove the RAD caps or significantly increase the current limit to the average median house price (taking into account geographic variability).

The Government is asking the community, existing and potential clients, and current and potential providers to consult with them on a new legislative design with no idea of the costs they will incur.

Baptist Care Australia stresses the importance of sustainable, long-term funding and support to attract and retain a diverse, trained, and appropriately skilled workforce. Our members face economic challenges, including rising labour costs and staff shortages, exacerbated by ongoing reforms. Research highlights a projected shortfall of direct-care workers by 2030, emphasizing the urgency of addressing workforce issues.

While welcoming the Act's focus on sustainable funding and workforce diversity, the absence of detail in this section of the draft has again caused increased anxiety for service providers, consumers, and their advocates.

We urge the government to consider these issues during the drafting process of the Act and ensure that any new provisions with cost implications for providers are adequately funded. Any approach ought to assure provision of "clinically safe support" in areas where there is "no market" and the Department should explore broader non-siloed investment approaches that enable place-based support for older Australians.