

8 March 2024

Department of Health and Aged Care - New Aged Care Act Consultation

By email: AgedCareLegislativeReform@health.gov.au

Dear Sir/Madam

Submission - Bill for an Act about aged care, and for related purposes (Aged Care Bill 2023)

Opal HealthCare is pleased to provide the attached submission on the *Bill for an Act about aged care, and for related purposes (Aged Care Bill 2023)*.

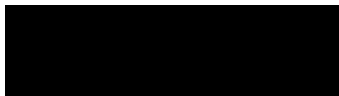
Opal HealthCare supports the policy objectives of the Bill as reflected in the framework of a Statement of Rights, a Statement of Principles, and Code of Conduct. Opal HealthCare wishes to see Australia continue to strengthen the resident rights-based, high-quality care system that commenced with the reforms introduced following release of the Royal Commission Final Report.

This submission sets out key concerns and the following seven recommendations to assist the Department and Government to implement a transparent, robust and sustainable aged care legislative framework that can be effectively governed and enforced:

- (a) **Timeline:** Reconsider the implementation timeline for the Bill having regard to the feasibility and administrative burden on providers to comply by 1 July 2024.
- (b) **Funding certainty:** Expedite release of legislation and regulation covering the fees, payments, and subsidies aspects of the Bill to provide funding certainty.
- (c) **Statutory penalties:** Reconsider the imposition of statutory liability and remove criminal penalties.
- (d) **“person responsible”, “aged care worker”, and “associated provider” scope:** reconsider the expanded scope of these definitions and consider potential negative impacts on operations for providers and their teams.
- (e) **Entry to care homes without a warrant:** remove the right to enter care homes without a warrant for investigating and monitoring purposes. A warrant should be required for entry for relevant investigative purposes.
- (f) **Supporters and representatives:** Clarify how the proposed roles align with State-based substitute decision making legislation.
- (g) **Whistleblower regime:** Reconsider the sector-specific Whistleblower regime to clarify the scope of disclosures under the Bill and the relationship with employment-related grievance matters and laws.

Opal HealthCare welcomes the opportunity to engage with the Department and Government to assist with revising the Bill to address the concerns raised in this submission.

Yours sincerely



Rachel Argaman (Herman) AO
CEO



Professor Peter Shergold AC
Chair

1. Introduction

Opal HealthCare (OHC) supports the policy objectives of the *Bill for an Act about aged care, and for related purposes (Aged Care Bill 2023)* (Bill), as reflected in the framework of a Statement of Rights, a Statement of Principles, and Code of Conduct. OHC wishes to see Australia continue to strengthen the resident rights-based, high-quality care system that commenced with the reforms introduced following release of the Royal Commission Final Report. OHC considers that the compressed timeframe for implementation may compromise good policy objectives of balanced and reasonable legislation and that some areas require further consideration and clarity.

OHC is pleased to make this submission to assist the Federal Government and agencies to deliver the Federal Government's policy objectives of ensuring residents' rights, quality of care and transparency.

This submission sets out nine key concerns and recommendations to assist the Department and Federal Government to implement a transparent and robust aged care legislative framework that can be effectively governed and enforced.

OHC's submission is made against the following sector strategic context:

- workforce and leadership resourcing challenges at all levels.
- the need to attract and develop governing body expertise, particularly in light of the requirement for majority independent directors on governing bodies/boards.
- the need for funding certainty.

2. Opal HealthCare

As the largest privately owned residential aged care provider in Australia, OHC is committed to providing the highest quality of care to our ~9,000 residents across 101 Care Communities in five States, employing ~13,000 team members. We supported the Federal Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety (Department of Health, May 2021) and the subsequent implementation of the reforms in 2021, 2022 and 2023. OHC has invested significantly in its team and systems to align with the already-implemented reforms and to optimise its ability to comply with current and future legislative change.

3. Key concerns

The following section summarises nine key concerns followed by a recommendation for each aspect.

3.1 Timeframe for implementation

The proposed timeframe for implementation of the Bill of 1 July 2024 does not allow sufficient time for the sector to put in place systems and processes to deliver, monitor and effectively implement the new reform.

OHC requests that the Government re-consider the implementation timeframe to allow for thorough consultation and time for the sector to prepare for implementation. This may be done by a phased approach to compliance for each section of the Bill.

3.2 Statutory duties (Chapter 3 – Registered providers, aged care workers)

OHC supports increased transparency and accountability for providers, and consequences for failure to deliver quality care, non-compliance, and statutory breaches.

OHC is deeply concerned that the proposed statutory regime will result in loss of responsible persons of all levels (governing body members, senior management, Care Community leadership and registered nurses) and further, will deter key workers from joining the sector for fear of prosecution and penalty.

OHC is a party to a separate joint submission made regarding the statutory duties and compensation pathway regime urging certain revisions. In summary:

- (a) the regime does not follow the RC recommendation 101 that proposed to apply civil penalties, not criminal penalties. The criminal penalties should be removed.
- (b) the provisions are inconsistent with corresponding statutory duty legislative frameworks, such as the Model Workplace Health and Safety Law, which is a well understood non-industry specific framework prescribing statutory duties. Aspects of the WHS Model Law have been used, but not all.
- (c) equivalent duties and pathways do not apply in adjacent health sectors thus further increasing the risk of a workforce and talent drain to such sectors (i.e., health and NDIS sectors). The expansion of the ‘responsible person’ scope discussed below, compounds the negative impact on sector workforce and talent.

OHC recommends the proposed statutory duties and compensation pathway in the Bill be revised to limit penalties to civil penalties (as recommended by the Royal Commission) which would be feasible to enforce, so that workforce and governing body talent remain, and join, the sector.

3.3 The need for funding certainty - Chapter 4 (Fees, payments, and subsidies)

It is critical that providers have funding certainty to underpin quality care and accommodation.

The Exposure Draft and Departmental consultation process expressly excluded detail relating to means testing, subsidies, and payments and fees arrangements. Whilst representations were made that the current funding mechanisms would continue, the sector urgently requires confirmation of this as soon as possible for business certainty and for timely and responsible budgetary decision-making. OHC understands that the Sustainability Taskforce recommendations and Government Response will inform this aspect of the Bill. OHC requests that the Taskforce report be released as soon as practicable to allow adequate time for sector review and consultation.

3.4 “Responsible person” definition scope (Chapter 3, Part 5)

The “*responsible person*” concept replaces, and augments, the current “*key personnel*” concept. While OHC supports, and is committed to, the general principle of key person accountability, it is critical that the expansion of this definition does not act as a deterrent to attracting and retaining talent to the sector.

OHC has two specific concerns regarding the expanded definition, and the vagueness of the concept of “*due diligence*” that must be exercised by responsible persons:

- (a) Registered nurses in a care manager role are now expressly captured within the “responsible person” definition (in addition to the well-accepted category of clinical manager or clinical coordinator) - which includes “*any person who has responsibility for overall management of the nursing service delivered by the registered provider, or overall management of the nursing services delivered at an approved residential home of the registered provider and who is a registered nurse*” (s11(1)(c)). Any change that impacts on attracting registered nurses to the sector needs to be viewed against projected aged care workforce needs. Australia is facing a shortfall of at least 110,000 aged care workers by 2030, according to a projection by the Committee for Economic Development of Australia (CEDA). The issue is expected to have a

profound impact on the aged care sector which already struggles to compete with other nursing sectors to hire and retain between 20,000 to 40,000 available staff over the next two years. In addition, the Department of Health and Aged Care predicts aged care in Australia is facing a gap of 5,918 nurses by 2024-2025.

- (b) From a practical perspective, it is not feasible for a team member at the levels covered by the “person responsible” definition to be expected to exert the level of control over an entire registered provider’s operations to “ensure that” the provider complies with its overarching statutory duty. A responsible person “must exercise due diligence to ensure that the provider complies with the provider’s duty under s120”. The registered provider’s duty under s120 is “to ensure that as far as is reasonably practicable, that the conduct of the provider does not cause adverse effects to the health and safety of individuals to whom the provider is delivering...services”. Failure to adhere to this duty is a strict, and not fault-based, liability offence with a 1000-unit maximum penalty (\$313,000).

3.5 “Aged care worker” definition scope (Chapter 1)

The Code of Conduct is core to OHC’s culture in providing quality care with an expectation that all those who deliver care must comply with the Code.

OHC wishes to note that there may be some downstream consequences with the introduction of the expanded definition of “aged care worker” to include a person “otherwise engaged (including as a volunteer) by the registered provider or by an associated provider” of the registered provider and extends to an “independent contractor” could be considered unreasonably broad.

In the context of insurance and protections for volunteers, volunteers are not covered by workers compensation insurance.

3.6 “Associated provider” definition scope

The proposed registration regime seeks to cover a broader scope of organisations involved in the delivery of care services through a definition of ‘associated provider’, i.e. “*an entity that can deliver services for a registered provider*”. The registered provider will be responsible for the actions of an associated provider. The definition as currently drafted captures a range of contractors including cleaners, hairdressers etc and would place an onerous responsibility on providers to ensure these individuals and organisations are compliant with the new Act.

OHC requests clarity on the meaning of ‘services’ and the breadth of individuals and organisations captured by the “associated provider” definition so that appropriate procurement/supply chain arrangements can be reviewed. For operational reasons, the definition should be revised to include a risk-based materiality threshold of ‘services’ that is relevant to care.

3.7 Reasonableness of regulatory powers and mechanisms (Chapter 6)

The Bill proposes an expanded enforcement regime in Chapter 6 (Regulatory mechanisms) including of greatest concern new powers for authorised Commission officers to enter and search approved residential care homes without a warrant or consent for “*monitoring and investigation purposes*”.

OHC accepts that there are rare instances where an authorised officer may require rights of entry to investigate significant matters; however, this right needs to be exercised following due process and notice and be used only in extenuating circumstances, rather than merely for “*monitoring*” purposes.

Entry onto the premises in any context without a warrant is contrary to the criminal, common and statutory laws applicable in Australia. Implementation of this aspect of the Bill places the provider at

significant risk from several perspectives: the distress and confusion the entry will cause care recipients, the distraction of team members from providing critical care to residents due to the lack of notice, and lack of statutory protection that a compulsory order would give the provider when it is required to produce personal information as part of any investigation.

OHC requests that the care home entry powers are revised to provide for a notice or warrant to be reasonably issued prior to entry.

3.8 Supporters and representatives – non-alignment with State-based laws and privacy (s25-26)

The Bill introduces a new category of representatives whose appointment will be governed by the System Governor with authority to obtain information, support older people in their decision making and make decisions on their behalf.

These decision making/supporting powers are in addition to, and different from, substitute decision making powers under State based laws and other regimes (POA, Guardian, Person Responsible). Whilst always acknowledging the right of a care recipient to representation, OHC's concerns with the regime in the Bill are as follows:

- (a) It is unclear how the new regime aligns with the State-based substitute decision making regime which limits decision making powers to specific types of appointment (e.g. for financial, health, lifestyle matters).
- (b) There is potential misalignment between privacy laws, which authorise release of information to legal representatives who are often substitute decision makers appointed under State laws, and the new regime which allows releasing information to supporters who may not be so appointed; this raises the risk that a well-intentioned care home team member may breach privacy obligations owed to the individual by complying with the information provision obligations in s25 and giving information and documents to supporters. Whilst consent is required under the Bill (and the Privacy Act), the practical aspects of evidencing that consent have not been articulated.
- (c) The process to appoint a representative needs to be timely especially where medical treatment decisions are needed; the requirement for all appointments to go through the System Governor may not always be practical and timely. There is also likely to be a substantial backlog of representatives' applications in the period after the new Act is introduced.

OHC requests clarity to align the supporter and representative regime with State-based guardianship and EPOA legislation.

3.9 New Whistleblower regime – Chapter 7

OHC supports the need for multiple channels for team and others to raise concerns about resident care.

The Bill provides for a new aged care sector-specific Whistleblower regime (ss 355 – 361). The provisions of the sector-specific regime require careful consideration, having regard to the framework of the *Corporations Act 2001 (Cth.)* whistleblower regime.

OHC wishes to highlight three main aspects:

- (a) Identification of whistleblowers: OHC endorses the general principle of right to anonymity by a whistle blower, and penalties for victimisation of those making a report (noting that these are well understood principles from the Corporations Act regime and employment law); however, to allow for information to be dealt with and investigated appropriately, it will be necessary to include some limited exceptions to disclosing the whistle blower's identity. Given that

disclosures may be made in the residential care setting (including orally), administratively it will be difficult to preserve anonymity in certain circumstances while investigating a matter. The severity of any penalties flowing from inadvertent identification of whistleblowers should be reviewed.

- (b) Employment law: The Bill categorises a disclosure as qualifying for protection where: “...*the discloser has reasonable grounds to suspect that the information indicates that an entity may have contravened a provision of this [Aged Care] Act*”. Section 356 of the Bill further states that an individual making a disclosure that qualifies for protection is not subject to “*any civil, criminal or administrative liability (including disciplinary action) for making the disclosure*”. This potentially conflicts with the Corporations Act regime which provides that employment matters are not categorised as Whistleblower matters, although acknowledging that there can be overlap (see Attachment). It is also important to clarify whether a protected disclosure precludes any employment law claim or proceeding. This aspect will cause confusion for those receiving a disclosure at the residential care level.
- (c) Alignment with the Corporations Act whistleblower regime: OHC notes that the Corporations Act regime applies to large proprietary companies thus smaller providers may not be subject to this regime; however, many sector providers will already be subject to the Corporations Law regime, with a risk that there may be a conflict between the two regimes when a disclosure is made. This aspect requires review for providers that are subject to both regimes.

Many aged care providers have put in place effective policies and processes to receive and manage whistleblower reports under the Corporations Law regime where there is clarity regarding key concepts of ‘eligible report’, ‘protected disclosure’ and the relationship with employment law matters. Separate from any conflict of laws issue that may arise for larger providers, smaller providers will find it challenging to adequately resource implementation of the regime in the Bill given its breadth and lack of clarity.

4. **Recommendations**

OHC believes that several aspects of the Bill should be reconsidered, and these are set out in the following Recommendations. OHC wishes to engage with the Department and Federal Government to assist with revising the Bill to address the concerns raised in this submission.

Attracting and retaining workforce and talent at all levels from volunteers to governing body/Board members is the most critical challenge facing the sector.

The following recommendations are made in this context:

- (a) *Timeline*: Reconsider the implementation timeline for the Bill having regard to the feasibility and administrative burden on providers to comply by the 1 July 2024 proposed introduction date.
- (b) *Funding certainty*: Expedite release of legislation and regulation covering the fees, payments, and subsidies aspects of the Bill to provide funding certainty and to enable providers to make timely and appropriate budgetary decisions.
- (c) *Statutory penalties*: Reconsider the imposition of statutory liability and remove criminal penalties.
- (d) *“person responsible”, “aged care worker”, and “associated provider” scope*: reconsider the expanded scope of these definitions and obtain further insights into the operational and administrative impact on providers and their teams.
- (e) *Entry to care homes without a warrant*: remove the right to enter care homes without a warrant for investigating and monitoring purposes. Rather, a warrant should be required for entry, and only issued in extenuating circumstances for relevant investigative purposes.

- (f) *Supporters and representatives*: Clarify how the proposed roles align with State-based substitute decision making legislation.
- (g) *Whistleblower regime*: Reconsider the sector-specific Whistleblower regime having regard to the Corporations Act 2001 (Cth) regime and clarify the scope of disclosures under the Bill and its relationship with employment-related grievance matters.

OHC thanks the Department for the opportunity to make this submission on this critical next step in developing a robust and sustainable resident rights-based new Aged Care Act.

8 March 2024

Attachment – Section 9: Whistleblower regime

Extract from the Corporations Act 2001 Cth regime regarding employees Whistleblower rights and protections | ASIC

Report of a personal work-related grievance may not be covered

If you are a current or former officer, employee, or contractor of a company or organisation who has an employment dispute or work-related grievance with the company or organisation, you may wish to report misconduct by the company or organisation about that work-related dispute. However, the whistleblower protections do not cover a report of misconduct solely about your personal work-related grievance.

Generally, a personal work-related grievance will include:

- an interpersonal conflict with another employee
- a decision about your employment, transfer, or promotion
- a decision about the terms and conditions of your employment
- a decision to suspend or terminate your employment or otherwise discipline you.

Instead, you may have rights and protections under employment or contract law. We encourage you to seek your own legal advice about how you can resolve your personal work-related grievance.

Report of significant, wider concerns about employment dispute may be covered

If you have a personal work-related grievance, you may still be able to access the whistleblower protections for a report about your treatment.

However, this is only if the report also raises significant implications for the company or organisation. For example, if the company's or organisation's treatment of you breaks employment or other laws, or suggests systemic misconduct beyond your own circumstances.

In addition, you can access the whistleblower protections if you suffer or are threatened with detriment for reporting your own circumstances or making a report to your lawyer.

Similarly, you may also access the whistleblower protections if you make a report about other misconduct you have observed or been affected by.

We encourage you to seek your own legal advice about whether you may be covered by the whistleblower protections and how you can resolve your personal work-related grievance.