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Catholic Health Australia – New Aged Care Act Exposure Draft Submission

March 2024

Catholic Health Australia

www.cha.org.au

Catholic Health Australia (CHA) is Australia's largest non-government grouping of health, community, and aged care services accounting for over 15 per cent of hospital-based healthcare in Australia. Our members operate hospitals in each Australian state and in the Australian Capital Territory, providing about 30 per cent of private hospital care and 5 per cent of public hospital care in addition to extensive community and residential aged care. CHA Members also provide approximately 12 per cent of all aged care facilities across Australia, in addition to around 20 per cent of home care provision.

CHA not-for-profit providers are a dedicated voice for the disadvantaged which advocates for an equitable, compassionate, best practice and secure health system that is person-centred in its delivery of care.

Executive summary

Catholic Health Australia (CHA) is Australia's largest non-government grouping of health, community, and aged care services accounting for approximately 12 per cent aged care facilities across Australia, in addition to around 20 per cent of home care provision. Catholic aged care providers have a vital interest in working with the Australian Government to ensure the sustainable provision of aged care and support services for older Australians meet community expectations of safety and quality of care.

CHA appreciates the opportunity to provide input into the Department of Health and Aged Care's (the Department) consultation on the exposure draft of the new Aged Care Act (the Act). We look forward to continuing to work constructively with the Department and the government on the drafting process to ensure the new Act achieves its intended outcomes.

Overall CHA is supportive of the rights-based approach adopted under the new legislation. CHA and member organisations share common values grounded in the mission of the Gospel - for the good of all. We are committed to showing love and respect for service users and staff, providing the best care especially for the vulnerable and marginalised and to approach every encounter as an opportunity for healing, companionship, compassion, comfort, and hope. A rights-based approach fundamentally aligns to our core values and mission.

However, we have several critical issues of concern to our members about the exposure draft released. We recognise the development of a new Act creates an opportunity to not only address significant complexity and confusion around the current legislative framework, but to establish a robust and enduring framework for the aged care system. As the current exposure draft stands, there are a range of issues, which if not addressed, will have significant unintended consequences which may mean the objectives articulated by the Royal Commission into Aged Care Quality and Safety (Royal Commission) will not be achieved. CHA strongly advocates for further public consultation during the next stage of the drafting process to ensure a legislative framework can be designed to support safe, quality and innovative care now and into the future. Specific issues we have articulated in our submission include:

- The need for basic protections for aged care workers to ensure the challenging work they do is valued
- The statutory duty and compensation pathway provisions which could have significant unintended consequences for the workforce and the future viability of the aged care sector
- The compressed timeframes for development and consultation on the new Act which do not allow for sufficient analysis and resolution of policy issues
- Overlap and duplication of new provisions with existing legal protections and frameworks
- The ability to achieve the outcomes set out under the new Act without a comprehensive plan to deliver long-term, sustainable funding to the aged care system, expected to be articulated in the Taskforce report
- The missing chapters and detail are needed to assess the impact of the new Act on the sector.

CHA makes the following recommendations to the Department for amendments to the exposure draft prior to it being considered by Parliament:

1. Include a set of responsibilities for older Australians under the Statement of Rights and/or recognise the rights of the community and other actors within the aged care system.

2. Align the statutory duty penalties to the Royal Commission's recommendations and only provide for civil penalties (not criminal penalties). Or if criminal penalties are to be included, confine penalties to circumstances where there is proof of fault.
3. Revise scope of statutory duty to members of the governing body or persons who are responsible for executive decisions.
4. Appropriately model the Act off Work Health and Safety Laws (WHS Law) and ensure safeguards contained in WHS Law are included.
5. Confine the definition of an aged care worker to those involved in the provision of aged care, exclude volunteers and address disproportionate offence provisions.
6. Ensure the remaining chapters and subordinate legislation are made available for public consultation and open debate in Parliament to ensure the full Act is able to be reviewed and implications considered in totality. This should include consultation on a Regulatory Impact Statement.
7. Review the exposure draft to ensure the new Act dovetails, rather than overlaps or duplicates, existing legal arrangements.
8. Adequately fund the outcomes of the Act with sustainable, long-term funding and support to attract and retain a diverse, trained and appropriately skilled workforce.
9. Address critical policy issues in the Supporters and Representatives chapter including alignment of arrangements to existing state and territory Power of Attorney and Guardianship arrangements.
10. Provide adequate transitional arrangements to allow for the sector to implement the new Act. This should be a minimum of 12 months from Royal Assent or the publication of the rules for new provisions which will have a material impact on providers, noting the impact of the new Act cannot be fully assessed until a complete draft is released.
11. Ensure new regulatory powers are subject to appeal or independent review.
12. Make the Complaints Commissioner an independent Statutory Authority.

We would welcome the opportunity to discuss this further or to arrange meetings with Catholic aged care providers from around the country, to provide further information needed to support the drafting and implementation of the new Act.

Introduction - The importance of getting the new Aged Care Act right

CHA welcomes the opportunity to provide input on the new Act and continues to support the constructive dialogue facilitated by the Department and government on aged care reform in recent years.

We are at a critical juncture in our reform journey. The call to action provided by the Royal Commission heralded an opportunity to grant older people the rightful place and support they deserve. It is imperative that this opportunity not be missed.

The new Act is a fundamental piece of the puzzle in setting the right foundations for a future aged care system. It must be simple, complete and enduring to support the current and future needs of older Australians. It must also have the right balance of provisions to foster a culture of continuous improvement and high-quality care. The opportunity cost of not getting it right is significant. That means that the new Act must be fully cognisant not just of the rights older Australians are due, but how to ensure the system can provide them.

In addition to the detailed analysis and recommendations provided in this document, we have identified some broader issues and themes which should be considered in the next stage of drafting the new Act. CHA urges the Government to carefully consider all key parts of the aged care sector as it further develops the Act and to pursue further public consultation during the next stage of the drafting process to ensure a legislative framework can be designed to support safe, quality and innovative care now and into the future.

Fostering a culture of continuous improvement, innovation and better practice

The new Act must strike the right balance between improving risk management practices (including fostering continuous learning and practice improvement), enabling consumers to exercise their rights, and appropriately holding providers to account and building their capacity. It must embed greater flexibility to allow and incentivise innovation. As in any care system, adverse events occur. Adverse events are often system breakdowns related to human error, usually as part of work undertaken in good faith by those participating in the provision of aged care services. As it stands, the new Act is insufficiently focused on strengthening the design and operations of care systems to minimise risks and adverse events and foster continuous improvement. This could have significant unintended consequences, including requiring providers to expend greater capacity on regulatory compliance, rather than innovation and continuous improvement.

The new Act must also have sight to the future needs and preferences of consumers and the future shape of our community. This means issues such as climate sustainability, technology and cyber security need to be comprehensively considered and incorporated into a new Act to ensure it is enduring.

Workforce and funding sustainability

The language in the new Act is focused on ensuring older Australians have a right to assessment for the receipt of aged care, but not on making aged care readily available for older Australians. The Act must safeguard the rights of older Australians and the quality of the care they receive. Critical to the success of a future aged care system and the delivery of high-quality care is long-term, sustainable funding and a skilled and qualified workforce. This means the Act must encourage support for older people through addressing the workforce and funding sustainability of the aged care sector.

Valuing our workforce

The new Act speaks to how aged care providers and their workforce should care for older people but is insufficiently robust in considering safeguards for the aged care workforce including volunteers. In addition, there are specific provisions that could be damaging to recruitment, retention and innovation in the aged care workforce, such as disproportionate criminal and civil penalties.

In pursuing reform, the Government must ensure that while the rights of older people are paramount, the workforce providing their care is treated with dignity and respect, with their contribution to this great initiative to improve Australia's society valued appropriately.

Rights-based approach and roles and responsibilities

Recommendation 1: Include a set of responsibilities for older Australians under the Statement of Rights and/or recognise the rights of the community and other actors within the aged care system.

CHA strongly supports the rights-based approach adopted under the new legislation. CHA and member organisations are committed to providing the best care to older Australians especially for the vulnerable and marginalised and to approach every encounter as an opportunity for healing, companionship, compassion, comfort, and hope. A rights-based approach fundamentally aligns to our core values and mission.

The Statement of Rights contains a range of rights for the individual receiving funded aged care services. It gives effect to the intent of the Exposure Draft, placing the individual at the centre and embedding a rights-based approach in the legislation.

We note that the Exposure Draft recognises that limits on these rights might be necessary to balance 'competing or conflicting rights and the rights and freedoms of other individuals' (section 21 of the Exposure Draft). While CHA is supportive of enshrining resident rights in the Statement of Rights and placing the individual at the centre of the Exposure Draft, it is not clear based on the current drafting whether such rights are absolute and the new Act is insufficiently robust in considering safeguards for the aged care workforce including volunteers.

- **Recognising provider responsibilities to protect their staff**

The Act will underpin both residential aged care and in-home support service provision. In both environments workers provide care to older Australians either alone or in the company of their family members. It is broadly understood that there are circumstances where the actions of a care recipient or their family members can result in harm or the fear of harm for an aged care worker or other residents.

Providers have important responsibilities under existing laws to provide for a safe work environment for their staff (this extends to protecting residents in residential aged care facilities from harm caused by other residents). As it is written, the Exposure Draft offers protections for older people, without assigning responsibilities focused on treating other residents and aged care staff with respect and dignity. This undermines the ability of providers to meet their obligations under existing legislation and common law. CHA recommends that the rights of aged care staff and providers be explicitly acknowledged in the Act and the responsibilities of care recipients, their families and other supporters be outlined.

CHA recognises that many older people accessing aged care services are extremely vulnerable. However, the Act should also recognise that the workforce that serves these older Australians is also vulnerable.

- **Meeting obligations under International Law**

CHA represents the interests of communities served by our Members who adhere to the healing ministry of Christ and based on principles including the Common Good which is described as:

“Based on our fundamental relational nature and connection to one another, we have an obligation towards not only our own good but the good of other. The rights and duties of individuals and groups must be harmonised so that all may share in the gifts of creation.”

To enact the proposed legislation, the Commonwealth is relying on powers that “give effect to Australia’s obligations under the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities.”¹

The preamble to the International Covenant on Economic, Social and Cultural Rights mirrors the intent of ‘Common Good’ where it identifies that:

“Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”

CHA believes the legislation is at risk of failing to meet its Objects in relation to this as well as other components of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities, thereby exposing this legislation to subsequent legal challenge. In its current form the Act fails to recognise the obligations of individuals to others and as a result fails to ensure basic protections for aged care workers and value the challenging work done by aged care workers, volunteers and providers.

- **Empower providers and the regulator to manage systemic risk**

CHA is open to a number of models for achieving the goal of a balanced approach to the rights of all participants in the aged care sector. The Act should give effect to a provider’s ability to make reasonable adjustments to manage risks to both care recipients and aged care workers. In turn, the Aged Care Quality and Safety Commission (the Commission) should be empowered to review these decisions where they are of consequence to an older person’s care (e.g. where a provider seeks to cease providing them with care), with consideration given to the reasonableness of a provider’s decisions.

The next iteration of the Act should consider the following adjustments to ensure a balanced and sustainable approach to rights:

- Include a set of responsibilities for older Australians under the Statement of Rights and/or recognise the rights of the community and other actors within the aged care system.
- Extend the framework (and the remit of providers) to consider the balance of rights and responsibilities (such as their duty of care) with protections for care recipients and staff.

¹ Exposure Draft - Aged Care Bill 2023 5 (a)

- Consider security of tenure where there are risks posed to the safety of staff and to support providers to meet their obligations to provide a safe workplace and people entering, be they residents, supporters or representatives or others to not create a risk in that workplace.
- Where there are known issues regarding the substitute decision maker's behaviour, prior to appointment as a 'representative', we recommend that the System Governor be given greater power to not appoint that person under the Exposure Draft. Currently, the System Governor must appoint the person already appointed under state-based legislation unless, amongst other things, the System Governor is satisfied that the person would not uphold the legislative duties. This should particularly be the case where the behaviour of the proposed representative is not just in relation to the treatment of the resident but should extend to aged care workers, other residents and visitors.

CHA expects that a reasonable, balanced framework of rights and responsibilities for all parties would lead to a greater number of challenges being mitigated through a partnership between care recipients, staff and providers. In rare instances where significant steps are taken by a provider, such as seeking to cease care, it is appropriate that the Commission review the circumstances and assess the reasonableness of a provider's decision.

New Statutory Duties and associated penalties

Recommendation 2: Align the statutory duty penalties to the Royal Commission's recommendations and only provide for civil penalties (not criminal penalties). Or if criminal penalties are to be included, confine penalties to circumstances where there is proof of fault.

Recommendation 3: Revise scope of statutory duty to members of the governing body or persons who are responsible for executive decisions.

Recommendation 4: Appropriately model the Act on Work Health and Safety Laws (WHS Law) and ensure safeguards contained in WHS Law are included.

Recommendation 5: Confine the definition of an aged care worker to those involved in the provision of aged care, exclude volunteers and address disproportionate offence provisions.

CHA supports the Royal Commission's recommendations, in particular the policy objectives of a statutory duty to provide safe care and for this duty to apply to both providers and officers (like the model Work Health and Safety Laws (WHS Law)).

The Exposure Draft was developed with consideration of workplace health and safety laws that have generally been effective. However, the Exposure Draft goes much further than WHS laws and as a result undermines their intent and the stated policy aims of aged care reform, including by elevating attrition in the aged care workforce and deterring people from working in the aged care sector. The new provisions should be redrafted to better reflect WHS Law.

CHA's concerns and recommendations detailed below align to a submission put forward by an in-house general counsel of a mix of leading for-profit and not-for-profit aged care services providers in Australia and should be read in conjunction with that submission.

- **The most pressing concerns**

We share concerns with other stakeholders in the aged care sector that the proposed statutory duties and compensation pathways, as they are currently drafted, will not achieve the intended outcomes as proposed by the Royal Commission. Specific issues in the exposure draft include:

- The obligations are poorly worded, inequitable and materially and adversely depart from commensurate legislation (e.g. WHS Law and Heavy Vehicle National Laws). For example, the Exposure Draft specifically departs from the WHS Law with the inclusion of a strict liability offence. Moreover, it is difficult to reconcile how the statutory duty proposed, can create an offence of strict liability (where fault becomes irrelevant) when considerations of ‘reasonable practicability’ and ‘due diligence’ are to be weighed in determining a breach.
- Criminal penalties and potential personal liability to compensate are disproportionate (potential penalties of 1,000 penalty units (\$313,000) or 5 years imprisonment or both and a compensation pathway against responsible persons).
- The Royal Commission did not recommend criminal penalties and there is little to no justification made for the provision of criminal offences. Further, none of the offences include a “fault” element (including notably both of sections 120(6) and 121(7) which prescribe a penalty of 5 years imprisonment).
- Offence provisions for aged care workers and responsible persons who do not comply with the Code of Conduct rely on the Code which includes standards of behaviour which are difficult to determine legality and illegality. There are also civil penalties of 250 units that translate to \$78,250, which is greater than the annual pre-tax income of many aged care workers. In this instance, both the nature of the punishment mechanism and its quantum are inappropriate.
- The equivalent duties and compensation pathway do not apply in adjacent industries (e.g. NDIS and public and private health). Not even directors and executives of financial services business, also the subject of an extensive Royal Commission, are subject to individual civil or criminal liability.
- The duties and pathway threaten to impugn many dedicated volunteers who are critical to the ongoing viability of the aged care sector.

The consequences of enacting these changes could be sweeping. Beyond reduced investment and ever greater challenges in attracting a skilled workforce, direct costs to providers will increase substantially due to greater staff training, insurance and legal costs (as detailed below).

- **The consequences of a poorly designed penalty system**

The aged care workforce does not exist in a vacuum. The typical aged care worker is a skilled, compassionate individual who has chosen to make a positive difference in the lives of older Australians through their work. These skills are broadly applicable across care industries, particularly health and disability. Significant, punitive and poorly designed criminal and civil penalties that are out of step with the rest of the care industry will lead to elevated attrition in the aged care workforce and an exodus of key talent to adjacent sectors, further exacerbating aged care workforce shortages.

The proposed duties could have profound impacts on the ability of providers to recruit and retain well-qualified individuals as governing body members and senior managers. Some directors and senior managers are already considering their positions due to the potential new exposure to civil and criminal liability. This risk is greater for smaller providers and those operating in already thin markets in regional, rural and remote areas where volunteers serve as governing body members. The new provisions could exacerbate the ongoing viability challenges of aged care providers and have significant consequences for the overall governance of providers and therefore quality and safety of care for older people.

The duties and pathways threaten to impugn not only remunerated individuals, but also the many dedicated volunteers who are critical to the ongoing viability of the aged care sector. This means people who willingly give up their time to support older people in their community will potentially be subject to civil or criminal penalty. These provisions risk significantly reducing volunteer involvement.

Penalties as they are currently designed are also likely to lead to reduced investment in aged care. Staff who do remain in aged care will be forced to expend greater capacity on regulatory compliance, rather than continuous improvement. This is likely to lead to excessively risk-averse practices in aged care – at odds with the intention of the Act to expand the opportunities and quality of life of older Australians.

Most egregious is the inclusion of strict liability offenses that by definition remove context from any decision to enforce a penalty on an aged care worker. The inclusion of such offenses in the Act would represent a strong disincentive to work in an industry where any mistake, regardless of intent, could result in significant legal implications.

There is also considerable overreach in the Exposure Draft pertaining to compensation. Already under existing laws, compensation can be sought where there is a conviction for negligence or other applicable criminal or civil offense. Under the proposed model, consumer expectations of compensation for even the most minor issues are likely to be significantly increased. This will place pressure on the Commission to seek compensation as part of a larger portion of investigations. Such an outcome will result in significant legal costs and divert scarce resources from providing care.

In practice, the overwhelming majority of complaints are made directly to providers and managed effectively at that level – this is not reflected in the proposed compensation regime.

- **Proposed solutions to meet the intended objectives set out by the Royal Commission**

CHA strongly recommends the following amendments are made to address the concerns raised related to statutory duties and pathway above:

- The statutory duty penalties should align to the Royal Commission’s recommendations and only provide for civil penalties (not criminal penalties)
- If criminal penalties are to be included for breach of statutory duties, then (especially in the case of individuals) those penalties should be confined to circumstances where there is proof of fault. Criminal penalties should not apply (at least in the case of individuals) for a failure to exercise due diligence.

- The statutory duty in section 121 should only apply to persons on the governing body or those who are responsible for executive decisions (per section 11(1)(a) of the Exposure Draft) rather than responsible persons. As drafted, responsible persons could extend to middle management including registered nurses in managerial roles who are unlikely to make or participate in decisions that affect the provider and who are unable to exercise due diligence. Nursing staff are already subject to a registration scheme under the Health Practitioner Regulation National and this is the appropriate forum for consideration of any issues involving a breach of professional standards of practice.
- The Act must expressly provide that (except as expressly set out in section 127 (Compensation pathway)) nothing in the Act confers a right in civil proceedings in relation to contravention of that Act.
- Ensure the true intent of the Royal Commission recommendations is followed by appropriately modelling the new Act off WHS Law. This means including safeguards contained in WHS Law in the new Act including those related to burden of proof, volunteers, removal of “systematic pattern of conduct”, legal professional privilege, limitation periods and maximum penalties.
- Confine the definition of an aged care worker to those involved in the provision of aged care services and exclude volunteers.
- Redraft sections 118 and 119 to clearly define obligations and address disproportionate offence provisions.
- Limit the compensation pathway to an individual receiving aged care services and a provider only (not a responsible person). Further, an individual should not be able to recover damages twice and the compensation pathway limitation period should be 3 years (not 6 years) in accordance with other relevant statutory limitation periods.

Adequate consultation on the new Act

Recommendation 6: Ensure the remaining chapters and subordinate legislation are made available for public consultation and open debate in Parliament to ensure the full Act is able to be reviewed and implications considered in totality. This should include consultation on a Regulatory Impact Statement.

The drafting of any new piece of legislation takes time. At present, large sections of the Act are not yet available. Yet some parts of the Act will be integrated and/or impact our understanding of the existing available sections. Several chapters of the primary legislation and the subordinate legislation are missing, including Fees, Payments and Subsidies. Much of the detail on how the primary legislation will be applied in practice will be contained in subordinate legislation. This means that we are not able to fully assess the new Act and consider its impact on the sector at this time.

For example, the new Act will require organisations that deliver funded aged care services to become a registered provider and, to be registered in certain categories, complete an audit against the Aged Care Quality Standards. The new Act specifies this process will generally apply for three years and providers will need to apply and be re-assessed by the Commissioner. It is unclear how this transition process will work and to what extent existing accreditations will be grandfathered or how the Commission will manage this process. The detail that is likely to be contained in the Rules will significantly impact our point of view on the magnitude of this change for our members and the sector.

The new Act also introduces a definition for High Quality Care. While CHA is supportive of an aspirational statement, without the subordinate legislation, it is unclear how this will be applied in practice, particularly for providers who operate in thin markets and face significant barriers to delivering aged care.

The Department has noted that a targeted consultation process will be used for some of the remaining chapters. We strongly recommend that a public open consultation process is used to adequately assess and consider the full extent of the new legislation. The legislation must be considered in its entirety to ensure the Act is well integrated, easy to navigate and the impacts of the legislation are able to be comprehensively considered and assessed. The Fees, Payments and Subsidies must also be drafted with consideration of recommendations put forward by the Taskforce report which is yet to be released.

Overlap and duplication with existing legal protections and frameworks

Recommendation 7: Review the exposure draft to ensure the new Act dovetails rather than overlaps or duplicates with existing legal arrangements.

The aged care system and its legislative framework does not operate in a vacuum but rather sits within a broader legal architecture which offers protections and legal responses for all actors within the system, including consumers, workers and providers. However, the new Act, through its establishment of a range of new provisions, seeks to set aged care apart from other sectors, and in many cases duplicates or overlaps with existing legal processes. For example, professionals with health qualifications (including Directors of Nursing) working in aged care are subject to oversight by the Australian Health Practitioner Regulation Authority (AHPRA) and therefore providers and the Commission have channels in place to report and for AHPRA to respond to incidents of professional misconduct or otherwise. Similarly, assault and fraud by aged care workers are criminal offences, common law redress is available for negligence in aged care service provision, privacy laws deal with protection of personal information and the legal basis for substitute decision-making (including enduring guardianship) is already well established.

We are specifically concerned about the introduction of new whistleblower provisions. The Act, as it stands, presents a duplication of the Corporations Act requirement to have a whistle-blowing policy and framework. The coverage is incredibly broad, extending to volunteers and workers with significant penalties for these individuals if they mishandle a whistleblowing complaint. To remove duplication, the Corporations Act requirements and framework should be adopted for whistleblowers and only properly qualified and skilled staff be in scope, supported by an independent hotline to take whistle-blower complaints.

As noted elsewhere in this submission, the current legislative framework for aged care is complex and challenging to navigate. Including new provisions which overlap or duplicate or even extend beyond those in place in adjacent care sectors will not only create further complexity in an already complex system, but compound risks of provider exits from the market, workforce attrition and stifle innovation. The new Act's provisions must align with existing arrangements rather than complicate or cut across those arrangements as is evident in the draft Bill.

Funding and financing and broader barriers to delivering high quality care

Recommendation 8: Adequately fund the outcomes of the Act with sustainable, long-term funding and support to attract and retain a diverse, trained and appropriately skilled workforce.

The aged care sector faces numerous economic headwinds while simultaneously working through the most comprehensive set of aged care reforms in decades. Broadly, cost pressures on residential and community aged care are rising, particularly labour costs. In addition to each individual staff member becoming more expensive to obtain and retain, there are significant shortages of staff which has been exacerbated by expanded staffing responsibilities under ongoing Commonwealth Government reforms.

Previous CEDA research found there would be a shortfall of at least 110,000 direct-care workers by 2030. In 2022 a CHA-sponsored survey by the University of Notre Dame and Evaluate found there were almost 60,000 care and nursing vacancies in aged care and over 82,000 for the combined health and aged care sector.

Critical to the success of a future aged care system and the delivery of high-quality care is long-term, sustainable funding and a skilled and qualified workforce. CHA welcomes the inclusion of an object related to sustainable funding arrangements and a diverse, trained and appropriately skilled workforce. However, the new Act will fail to achieve its intended outcomes without a comprehensive plan to deliver long-term, sustainable funding to the sector. CHA notes that at time of writing, the Aged Care Taskforce is yet to release its review into funding options for residential and in-home support aged care services and the Fees, Payments and Subsidies chapter is yet to be released. CHA will offer further observations to Government based on the Taskforce Review, but we in-principle recommend that, where their means allow, older Australians can and should make a co-contribution to the costs of their aged care. For residential aged care, it is particularly important for fairness and sustainability that aged care consumers be able to make contributions to lifestyle related components of their experience.

In relation to workforce, CHA appreciates the extensive work the government and the Department have undertaken recently to understand the workforce issues aged care providers face, and the progress that has been made towards remedying these, for example with sped up visa processing times. Workforce challenges nevertheless continue and will be ongoing until the number of locals training, graduating and working in the health and care sectors increases dramatically. No single solution will get us there, but implementing a package of short, medium and long term interventions will help to move the dial on this problem on a variety of fronts and ensure the outcomes of the new Act are achieved. This includes supporting and funding the case being heard at the Fair Work Commission to address historical low pay with a 25 per cent pay increase and granting the full increase to the 100,000 non-clinical staff working in the sector.

Both of these positions are detailed in our Pre-Budget Submission (Media Release at **Attachment B**). Addressing these serious barriers to delivering high-quality care must be considered in the drafting process of the new Act. The government must also ensure any new provisions under the Act which will have cost implications for providers are adequately accommodated in any new funding environment.

Supporters and representatives

Recommendation 9: Address critical policy issues in the Supporters and Representatives chapter including alignment of arrangements to existing state and territory Power of Attorney and Guardianship arrangements.

Under the new Act, Supporters and Representatives have been introduced as new legislated roles to be registered by the System Governor to support older people to navigate the aged care system and make decisions about their aged care. CHA strongly believes that older people should be empowered to make decisions about their aged care, and where they need it, have assistance available to do so. CHA members already actively work within these parameters through state and territory Guardianship and Power of Attorney arrangements, and in day-to-day interactions with older people as part of providing care.

However, we are concerned about the Supporter and Representatives arrangements contained in the exposure draft and the substantial gaps in detail which could result in adverse outcomes for older people, their supported decision makers and providers. Some initial areas where further clarity is required include:

- **How to work with multiple supporters or multiple representatives, particularly where conflicting views exist:** Under the new Act, older people are able to appoint multiple representatives or multiple supporters in recognition that they may want more than one person to support them in making decisions. In principle, this concept is sound. However, in practice, not all people who support older people to make decisions may be in agreement about how an older person's preferences and interests are applied in practice. Not all decisions related to a person's aged care are documented or communicated in circumstances where a person no longer has capacity to make decisions. There is a need for a hierarchy of decision making or clear processes to support providers to manage conflicting views between representatives or supporters where they exist.
- **The types of decisions that can be made by Supporters and Representatives:** The Act specifies that a Supporter or Representative can do anything that may or must be done by the individual under or for the purposes of the Act. However, it is unclear how delegations and responsibilities will be split (if at all), such as financial and health decisions, and how delegations will apply when for example an older person enters a hospital setting and there is a Guardian or Power of Attorney who is not a representative under the Act appointed. A hierarchy must be accompanied by clear processes and rules to manage a variety of circumstances which may arise in delivering care to an individual.
- **What escalation pathways exist for providers where a supporter or representative is not acting in the best interest of an individual:** In certain circumstances, a provider may become aware that a person is not acting in the best interests of an individual, taking advantage of an individual, acting in a way that causes great harm or disruption to a service. In these circumstances, the provider may need to make an application for guardianship, inform the police, issue a banning notice or place limitations on the representative. There is a need for escalation pathways and/or complaints processes to manage these types of circumstances including when a representative is not meeting their duties under the Act. This could also cover circumstances when a conflict of interest is identified.

- **How these roles will work within existing state and territory legislative frameworks:** The Department's consultation paper notes that they will engage with state and territory governments to align the proposed legislation with current state and territory Power of Attorney and Guardianship arrangements. However, the landscape of representative arrangements at a state and territory level is diverse and complex. Establishing a framework that aligns to these arrangements will take time and the current legislation does not adequately align to state-based legislation. For example, under Power of Attorney / Guardianship legislation, powers only apply when a person lacks capacity to make decisions. However, Part 4, Chapter 1 does not include this. The provisions in the new Act also neglect to recognise existing representatives including Enduring Guardians which diminishes the legal powers of these roles and certain parts of these new provisions directly conflict with state and territory arrangements such as the WA Guardianship approach.

This list is not exhaustive but recognises some significant issues with the exposure draft as it stands. Outside of these specific issues, the implementation of these requirements will take time and require significant consumer engagement and education, resourcing, system, policy and process changes by government and providers. It will also require extensive consultation with state and territory governments to align to differing Power of Attorney and Guardianship arrangements.

CHA strongly recommends the Department undertake further policy work and consultation with sector stakeholders and state and territory governments. Introducing this chapter prior to this work will create significant risks to older people in their ability to make decisions and will have significant unintended consequences for both providers and government.

Transitional arrangements for the new Act

Recommendation 10: Provide adequate transitional arrangements to allow for the sector to implement the new Act. This should be a minimum of 12 months from Royal Assent or the publication of the rules for new provisions which will have a material impact on providers, noting the impact of the new Act cannot be fully assessed until a complete draft is released.

The Exposure Draft states that it commences on 1 July 2024. The new Act contains a range of new provisions which will have a material impact on providers. This includes a new set of Aged Care Quality Standards, expanded whistle-blower protections, new representative arrangements, new registration requirements and worker screening requirements. Each of these regulatory changes will require resourcing and investment by aged care providers for ICT, policies and procedures and workforce training. In an already stretched aged care sector, the implementation of these changes by providers will be immense.

Large sections of the Act and the Rules are also not yet available for comment. This means providers are not able to adequately assess what they will need to do to comply with the new Act.

The aged care market is also diverse. Not all providers have the same infrastructure or resourcing available to adapt to policy and regulatory changes. Small providers, often providing critical care support to older people in regional, rural and remote areas, will require additional time to embed changes introduced by the new Act. Adequate transitional arrangements are required to allow aged care providers to implement the new Act. Providers should be given opportunity to apply for an extension to implement the new requirements where there are circumstances that impact their ability to implement new provisions within the specified timeframe.

The aged care workforce is also diverse and includes many people from non-English-speaking backgrounds. Implementation arrangements need to be cognisant of the diversity of the workforce to ensure the workforce has time and support to transition to the new requirements.

Careful consideration must be given by the Department as to the unintended consequences of some of the changes proposed in this Act and how they will be managed. This includes consideration of how to enable those current providers which are not prepared to accept the heightened levels of organisational and personal risk inherent in the Exposure Draft to exit the sector in an orderly manner without adversely affecting service availability.

At this stage, CHA proposes that a minimum of 12 months from Royal Assent or the publication of the rules (whichever is later) should be provided for new provisions which will have a material impact on providers. Further assessment will need to be conducted and advice provided on timeframes once the remaining chapters of the new Act are released and able to be considered. CHA welcomes the opportunity to partner with the Department and government to define transitional timeframes and arrangements such as support for providers and consumers to adopt the new Act.

Expanded regulatory powers

Recommendation 11: Ensure new regulatory powers are subject to appeal or independent review.

The new Act introduces new regulatory powers for the Commission. This includes the ability to authorise the entry of an officer to a residential aged care facility for monitoring and investigation purposes without the occupier's consent and the ability to issue directions to a provider and/or appoint an external manager to a registered provider.

CHA is concerned that these provisions, and others, are not subject to appeal or independent review and the potential for these powers to be used by the Commission without appropriate justification. We also recognise that key findings were made as part of the capability review of the Commission. Further expansion of powers should be considered in light of the recommendations detailed in its report.

Some CHA Members have raised concerns that the new Act permits the Commission to assess aged care infrastructure and capital against current standards, and impose sanctions where those standards are not met. Given the limited financial capacity of the sector, many facilities currently in use were constructed under different contemporary standards. The Government should clarify that the Commission will apply the contemporary standard when assessing residential aged care facilities with the exception of genuine safety issues.

Independence of a Complaints Commissioner

Recommendation 12: Make the Complaints Commissioner an independent Statutory Authority.

Under the new Act, it is proposed that the Complaints Commissioner is to report to and sit within the Aged Care Quality and Safety Commission. CHA supports a robust complaints framework and process in the aged care system. However, we recommend that the Complaints Commissioner have a direct independent statutory authority (such as state-based Ombudsmans and Health Complaints Commissions). The Complaints Commissioner should focus on investigating and responding to complaints, rather than assisting the Commission to carry out their intelligence gathering and compliance functions. Doing so will ensure that complaints are appropriately handled and actioned.



8 March 2024

Boost pay to fix workforce shortages in aged care

The federal government must lift pay and improve housing affordability to fix the critical workforce shortage in aged care, according to Catholic Health Australia.

Last year the Albanese Government fully funded the Fair Work Commission's interim 15 per cent minimum wage rise for direct care workers, head chefs and lifestyle officers, assisting the sector to attract and retain desperately needed staff.

However, while a welcome intervention, this has not been nearly enough to fix workforce shortages.

CHA, which represents more than 350 residential aged care providers, is calling on the government to support and fund the case being heard at the FWC to address historical low pay with a 25 per cent pay increase and grant the full increase to the 100,000 non-clinical staff who have so far received nothing.

"Aged care services are still finding it extremely difficult to attract and retain staff. If anything, the problem has got worse," said CHA CEO Jason Kara.

"Right now we have 60,000 care and nursing vacancies and this is projected to hit 110,000 in six years' time. If the government does nothing, more services will be forced to close because they can't get qualified staff at currently funded rates.

"Non-clinical staff such as kitchen hands, gardeners, and administrators, who are absolutely critical to providing quality care for residents, will leave the industry in droves if they are again overlooked for the pay rise they deserve.

"With most aged care services operating at a loss, and demand increasing as our population ages, the government must support and fund this essential investment in skilled aged care staff."

In its pre-budget submission, CHA is also urging the government to subsidise aged care nurses' rents by allowing them to pay more of their rent from their pre-tax income.



Currently nurses working in the not-for-profit and charity sector can package \$15,900 of their salary for living expenses, while nurses in public hospitals can package \$9,010. But the average yearly rent for a unit is \$36,000 in Sydney and \$27,000 in Melbourne.

“Many aged care workers cannot afford to live anywhere near work, meaning they are subjected to strenuous days and lengthy commutes which are catching up with them,” said Mr Kara.

“The lack of affordable housing near metro aged care services is a serious barrier to retention and recruitment and poses a major challenge when services are already short staffed.

“Subsidising aged care workers’ rents is a sensible step to show they are valued, improve their job satisfaction and help services retain staff.”

CHA is also urging the government to expand user contributions for aged care to make the system fairer and sustainable.

“With most aged care services running at a loss and demand only increasing, we must ask those who can afford it to make a more substantial contribution to their care, while maintaining a safety net for those who need support,” said Mr Kara.

CHA is also calling on the Commonwealth to:

- Restore national leadership to care workforce planning through the re-establishment of Health Workforce Australia
- Create a national ‘Health & Care Worker Passport’ to centralise and align compliance checks for hospital, aged, and disability care workers
- Create an aged care innovation fund or other mechanism to support investment in new models of care
- Support sector capital renewal to ensure older Australians have access to safe, comfortable facilities

Catholic Health Australia is Australia’s largest non-government grouping of health and aged care services, accounting for approximately 15 per cent of hospital-based healthcare in Australia. Our members also provide around 25 percent of private hospital care, five per cent of public hospital care, 12 per cent of aged care facilities, and 20 per cent of home care and support for the elderly.