8 March 2024

The Hon Anika Wells MP
Minister for Aged Care
Department of Health and Aged Care – New Aged Care Act Consultation
GPO Box 9848
Canberra ACT 2601
Via email - AgedCareLegislativeReform@health.gov.au

Dear Minister

Retirement Living Council submission on the Exposure Draft Aged Care Bill 2023

The Retirement Living Council (RLC) welcomes the opportunity provide feedback to the Exposure Draft of the Aged Care Bill 2023 (the Bill).

The retirement living sector supports the government's commitment to reforming the aged care sector and ensuring older people who access government-funded aged care services are treated with the respect and dignity they deserve.

We welcome the renewed consumer focus in the provision of care, and the objectives to enable *individual choice*, *sustainable funding arrangements*, and *to promote innovation* in the aged care system, as referenced in the Bill.

However, genuine consultation on the Bill has been challenging. While we acknowledge the extended timeframe to provide this submission, key sections of the legislation remain to be drafted, and there is a lack of clarity from the Department of Health and Aged Care regarding the implications arising from the inclusion of retirement villages in the Bill. Of particular note is the potential interaction between the Bill and the state-based retirement village legislation that governs the sector.

Additionally, the delay in the release of the recommendations of the Aged Care Taskforce prevents a meaningful understanding of the holistic intentions for the future funding and provision of aged care services in Australia, which has flow-on impacts to the retirement living sector.

The aged care system is failing to keep up with current demand, let alone the 'silver tsunami' we know is coming. There are currently 2 million people aged over 75 in Australia, increasing by nearly 70 per cent to 3.4 million people over the course of the next two decades. The CBRE 2024 *Seniors Living Report* identifies a severe lack of supply forecast for aged care beds, with "the number of new build aged care homes per state counted on a single hand".

To meet what will be significantly increased demand for aged care services, these reforms must facilitate new and innovative models for the provision of care, not impede them.

It is not possible to consider the future of aged care without discussing the important health and housing value proposition presented by retirement communities. Our sector is already providing privately funded wellbeing services for residents at all stages of their care journey, however, we can and want to do more to enable older Australians to live independently for as long as possible.

Living independently in a retirement community delays entry into taxpayer funded aged care, freeing up space in the system and delivering significant economic savings to government budgets – up to $945 million in annual savings through a two-year delay into aged care – as revealed in the RLC's 2023 report ***Better Housing for Better Health***.

As outlined in the RLC's previously submitted ***Shared Care*** framework, retirement living communities are perfectly placed to provide home care services at scale to support the hundreds of thousands of residents who call a retirement community home, and the policy approach to home care should enable this.

Shared Care provides three models for retirement village operators to deliver community-based care services under the Support at Home program within the village setting, either independently or through a delivery partner. These models offer significant efficiencies (16-18 per cent) and savings to both consumers and government ($100 million per annum).

While the RLC supports the more consumer-led approach being taken in the Draft Aged Care Bill, the government should be wary of the unintended consequences associated with overregulation which dissuades good operators from entering the market and stifles necessary innovation in the seniors' care industry.

Industry believes the sector can grow to meet the increasing demands of our ageing demographics while still increasing the quality of care being provided, but only if the right regulatory framework can be put in place. In many ways, there is great risk but great opportunity at the same time.

Therefore, the RLC's attached response to the Bill recognises the increased regulatory demand that is required for higher acuity levels of care but seeks to clarify a number of provisions which would place undue burden or unintentionally capture the retirement living sector.

[redacted]

Daniel Gannon

Executive Director
Retirement Living Council

Attachments: RLC Submission on the Exposure Draft Aged Care Bill 2023
[redacted]

Submission on the Exposure Draft Aged Care Bill 2023

The Retirement Living Council

The Retirement Living Council (RLC) is the national peak body for Australia's retirement living sector, championing policies that deliver age-friendly homes and better services in retirement.

The RLC sits within the Property Council's national advocacy team and is the leading voice of the sector, representing for-profit and not-for-profit owners and operators of retirement villages and seniors' living communities.

About retirement communities and the continuum of care

While an increasing number of retirement communities provide personal services and wellbeing support for their residents as part of a suite of discretionary services, it is important to understand the distinction between retirement communities and aged care facilities as they are not the same thing.

Retirement communities are an independent housing solution designed to foster a sense of belonging and connection for seniors over 55 which brings a host of benefits, such as reducing isolation and improving mental wellbeing.

While state and territory legislative frameworks allow for Australians over the age of 55 to live in these communities, the average age of entry is actually 75 years old, with the national average age of a current retirement community resident being 81 years. The average tenure for a resident across Australia is nine years.

There are currently 250,000 people around the country living in one of 2,500 retirement communities, which are suited to older Australians who want to live independently in their own homes for as long as possible but with the benefits of community living.

These statistics are important and offer demographic context given the shifting care landscape and projected future demand.

By contrast, aged care facilities cater to individuals who can no longer live independently and need a high level of care and support around the clock.

Unlike the aged care sector which has always been funded and regulated by government, retirement communities have been regulated by states and territories and privately funded without the benefit of public funds. Retirement communities have developed and evolved as a viable alternative to the traditional residential market for those older Australians who wish to delay entry into institutional care, such as residential aged care.

Both retirement communities and residential aged care facilities play a critical role within the housing ecosystem but for very different reasons and at different stages of the continuum of care.

Australia is facing a dramatic demographic shift, with the number of Australians aged over 75 forecast to increase from 2 million to 3.4 million by 2040. The retirement living sector presents a great opportunity for government to assist in achieving a high quality, responsive and economically sustainable aged care system by delivering care and support services in a village setting to help residents live independently for as long as possible.

The value proposition presented by the government working with the privately funded retirement living sector is twofold. The "upfront" value proposition is because of the health and wellbeing benefits that exist for residents of retirement villages which delays entry into taxpayer funded aged care, freeing up space in the system and delivering significant economic savings to government budgets – as revealed in the RLC's 2023 report, **Better Housing for Better Health**.

In a fiscal sense, a two-year delay into aged care generates $945 million in annual savings for the commonwealth.

As there are on average 120 independent living units per retirement community, this provides the density and scale required to deliver the second value proposition, which is the efficiency benefits generated by the provision of services through the Support at Home program, as outlined in the RLC's **Shared Care** framework.

General feedback on the Bill

The RLC broadly welcomes the Australian government's aged care reforms through the draft Aged Care Bill 2023 (the Bill) and understands the government's aim to put the individual at the centre of the aged care system through a rights-based framework.

We also support the intention of the Bill to improve flexibility in accommodation types for those receiving aged care and to allow for innovation in the aged care sector, but we are wary some onerous provisions and unintended consequences may stifle innovation and operator entry to the already undersupplied market.

Retirement communities already provide homelike environments and services that enable older Australians to age in place. Many operators have expanded their service models to care for their residents in a format akin to residential aged care, albeit under the applicable *Retirement Villages Act* (RV Act) and in a fee-for-service model. The sector would welcome the opportunity to enable their residents to continue living within their communities, within their own home and with all the dignities that this affords them, while receiving the government funding that might otherwise only have been available within a residential care home (RCH).

Timeframe for the implementation of aged care reforms

While the RLC respects the government's ambition to adhere to the Royal Commission into Aged Care Quality and Safety's (Royal Commission) recommendation for the new Bill to commence no later than 1 July 2024, we urge caution to rush into the unknown, particularly as the current Bill is incomplete with large sections undrafted and the associated Rules also remain unseen.

At present, "some parts of the Bill, such as fees, subsidies and means testing, are also under active consideration by the Aged Care Taskforce, so further changes may be included following decisions of Government."[1]

It is therefore difficult to determine the full impact of the Bill, with the sector reliant on understanding what changes may be implemented before making a fulsome representation to government.

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[1] https://www.health.gov.au/sites/default/files/2024-01/a-new-aged-care-act-exposure-draft-consultation-paper-no-2.pdf) page 8

Once known, the sector will also require time to make amendments to relevant contracts, policies and workforce training, which is unachievable within the timeframes currently provided.

Recommendation: That the report timeframe be adjusted to receive and understand the recommendations of the Aged Care Taskforce as well as the associated Rules.

Comments on specific provisions of the Bill

Inclusion of Retirement Villages in Section 9 - where funded aged care services are delivered

The RLC notes the specific inclusion of 'retirement villages' in the definitions of a 'residential care home' per s9(2) and s9(3)(b):

> *9 (3) To avoid doubt, a residential care home includes any of the following places:*
> *(a) a place within a hospital or other health service that is covered by an agreement with the Commonwealth to deliver aged care services alongside existing health services as a part of an integrated service arrangement;*
> ***(b) a place within a retirement village that has been converted to a place described by subsection (2);***
> *(c) a place which is a complex of buildings.*

While the addition of retirement villages in the Bill can be viewed as recognition of the increasing role the retirement living sector plays in providing care, support and wellness services, serious questions arise regarding the practical interpretation and implementation per s9(3)(b).

As there is no definition of 'retirement village' in the Bill, the RLC reads that a retirement village is understood to be defined per the applicable RV Act for the state or territory where the village is located. Should references to retirement villages remain in future iterations of the Bill, this should be clearly defined.

Additionally, the inclusion has caused concern and confusion within the sector as consultation to date has not specifically envisaged retirement villages being captured in the new Bill. For the avoidance of doubt, it should be made clear that retirement village operators who do not provide government-funded aged care are not captured by the Bill.

Recommendation: A definition should be included for retirement villages within the meaning of the applicable Retirement Villages Act for the state or territory in which the village is located.

"A place within", as referenced above in section 9(3)(b) a retirement village is not easily understood in the current drafting. Retirement communities typically refer to dwellings as 'independent living units', however a place within a retirement village could also extend to a bed, serviced apartment or common areas within the village setting. It is recommended that this terminology be clarified for better understanding.

Furthermore, there is limited explanation or understanding of the term "converted". Is it the intention of the Bill that, once converted, that a "place" within a retirement village no longer operates under the relevant state RV Act? What are the impacts to residents who have existing rights and obligations under the relevant RV Act?

Once a "place "is converted for the purpose of delivering RCH services, must it always remain a place for the delivery of RCH services, or may it interchangeably be either an RCH or a retirement village depending on the needs of the resident? Equally, may a space be both an RCH for the purpose of funding care services, while also being a retirement village place for the purpose of funding the accommodation - that is, a space operationally compliant to both legislative frameworks?

Recommendation: Request redrafting, further clarity or an explanatory memorandum regarding s9(3)(b) to better understand the definitions of "a place within" and "converted". The explanation should also provide clarity to whether a place can exist as both a retirement village place and residential care home concurrently.

Ultimately, the sector seeks to understand whether the intention of the Bill seeks to impose the applicable obligations and regulations of the aged care sector on retirement communities if certain levels of care are being provided in a private capacity, or whether retirement operators can choose to pursue an RCH status (subject to being an approved RCH provider) for its facilities and services provided?

Further clarity is sought regarding the delivery of Homecare Packages, and whether these government services might be perceived to warrant an RCH status (outside of becoming a registered provider) as a factor in determining whether an RV operator 'must' become a RCH? It is the RLC's strong feedback that this should not be the case, given that other registered providers would not be captured under this drafting.

Recommendation: Provide further clarification that the Bill only applies to retirement village operators who provide government-funded aged care services.

Interactions with state and territory legislation

The RLC expresses its concern that existing state and territory RV Acts expressly distinguish themselves from aged care facilities under the *Aged Care Act 1997 (Aged Care Act)*. Additionally, there are a number of separate rights and responsibilities for operators and residents alike which differentiate retirement living units from aged care "places". An immediate example is dispute resolution mechanisms and how these would change after an existing resident has converted between acts.

From a land tenure perspective, the RLC seeks further clarification about the impact a conversion would have on the ingoing contribution a resident makes to a retirement village versus the refundable deposit schemes which operate under the existing *Aged Care Act*.

Currently, where operators that have co-located retirement villages and residential aged care, this is catered for through a variation in contract; however, the RLC seeks further clarity to understand how the government sees this working at scale as these financial models are distinct from one another.

Recommendation: Further analysis is conducted to understand the interaction between the Bill and the relevant state and territory Retirement Villages Acts

Interactions with the National Construction Code

There is additional uncertainty about the interaction of converted retirement village places and the National Construction Code. Retirement villages are designed to be age-appropriate and welcoming community environments, favouring amenity and independence over the efficiency and clinical necessities of aged care facilities.

Therefore, while some retirement villages already adhere to the Class 9C Building Classification, many do not as they have not been designed to meet the built form requirements nor the clinical levels of operation required by Class 9C. Retrofitting these standards, particularly at the lower levels of care provision, would be prohibitive for many and at odds with the principle that funding should flow to the consumer, irrespective of the site.

Recommendation: Provide exemptions for existing retirement village places from requiring Class 9C Building Classification as part of the 'conversion' to a residential care home per s9(3)(b).

Chapter 4 – Fees, payments and subsidies

Chapter 4 relating to fees, payments and subsidies was not included in the Exposure Draft. Coupled with the delay in the release of the Aged Care Taskforce recommendations, it is difficult to provide any meaningful comments in relation to this.

Recommendation: Further consultation is provided on these matters.

Sections 120 and 121 - Registered provider duty

While the introduction of statutory duty was anticipated, it is significant to note that this duty extends beyond the board to all "responsible persons". The effect of this inclusion means that some senior administration staff and nurses will be bound by the statutory duty and therefore liable for the associated penalties.

More generally, the RLC opposes the proposed responsible person duty in section 121 of the Bill. Whilst a statutory duty was proposed by the Royal Commission, the introduction of criminal and civil liability elements was not. The RLC submits the proposed statutory duties are disproportionate given these duties are not replicated in adjacent sectors such as health and disability.

Given that responsible persons already must meet the duties under the *Corporations Act 2001* or the Australian Charities and Not-for-profits Commission Governance Standards, these additional duties appear to be an overreach.

Additionally, and in the context of workforce shortages and the high proportion of volunteers on boards, it is highly likely these provisions will add an additional challenge to recruitment, particularly for senior registered nurses and high-quality board members.

Recommendation: Reduce the scale of penalties and remove the strict liability components of sections 120 and 121.

Conclusion

The retirement living sector presents an opportunity for government to deliver home care services in retirement communities at scale, and with greater efficiency. The retirement living sector is already consumer-focussed and has been evolving over recent years to meet the needs and expectations of older Australians who choose to live in a retirement community.

Proposed changes to the duties imposed on board members and senior staff go beyond the intention of delivering higher quality aged care and will likely deter people from participating in the sector.

Additionally, operational questions remain regarding the specific inclusion of retirement villages within the Bill.

It is not possible to consider the future of aged care without discussing the important health and housing value proposition presented by retirement communities. With customers at our core, the retirement living sector is focused on meeting the needs and expectations of our residents. In many instances, our members are already providing privately funded wellbeing services for residents at all stages of their care journey, however we stand ready to do more.

The village model presents a unique environment to offer innovative, care-based services at scale which supports the growing number of older Australians to live independently for as long as possible.

Given the forecast 70 per cent increase in the number of Australians aged over 75 by 2040 – and the existing challenges associated with funding and delivering care into the community – there's no time to waste.