[redacted]

8 March 2024

AgedCareLegislativeReform@health.gov.au

[redacted]

Department of Health and Aged Care
GPO Box 9848
Canberra ACT 2601
Australia

Dear Sir/Madam

New Aged Care Act Consultation -Feedback by [redacted]

[redacted] is a not-for-profit organisation registered with the Australian Charities and Not-for-Profits Commission and is one of the largest integrated providers of retirement village accommodation and ageing care services in [redacted], supporting more than 15,000 [redacted].

[redacted] provides the following feedback to the Department of Health and Aged Care (the **Department**)

1. **Provider Registration and Registration Categories**

We note under the new regime, providers will need to re-apply for registration every 3 years. There will also be categories of registration with differing compliance obligations for different categories. Categories 1 – 3 are considered 'lower risk' categories and providers in those categories will not be required to meet the Quality Standards. Categories 4 – 6 include clinical care type services and residential care. The approach of categories of registration and risk proportionate regulation may present an opportunity for retirement village operators to more easily move into the space of home care.

[redacted] notes some issues with the proposed services in each category.

We note there is a distinction between 'basic care management' (category 3) and 'complex care management' (category 5). This seems like a difficult distinction to make in practice and could well lead to confusion about which registration category is appropriate. It also seems unusual that any type of 'care management' service would not be subject to the Quality Standards. Implementing different registration categories may result in clients needing to transfer to another provider when they have more complex care needs, which at the moment is currently provided seamlessly within one organisation wherever possible.

Similarly, while 'domestic services' like cleaning are considered lower risk, it is potentially risky to leave those services outside of the Quality Standards regime. There are concerns that in a shared service scenario the seamless transfer of information about the client and holistic service provision will not be measured through standards monitoring which appears counter intuitive. It may be that some of those categories are further revised following the consultation period in early 2024.

2. Statutory duties of registered providers and responsible persons

Another significant change in the new Act is the introduction of statutory duties for registered providers and responsible persons, with corresponding offence provisions and penalties.

The fundamental duty for registered providers is to ensure, so far as 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 funded aged care services.

The corresponding duty for responsible persons is to exercise due diligence to ensure that the provider complies with its duty. In each case, there are various 'levels' of offence, with penalties corresponding to the level of harm resulting from a breach of the duty and increasing where there has also been recklessness by the provider or responsible person.

Penalties

For providers (other than individuals), the maximum penalty which applies to an offence resulting in death or serious injury is 9,500 penalty units – which is equivalent to nearly $3 million under the current penalty units value. Whilst for responsible persons, the maximum penalty is 1000 penalty units (equivalent to $313,000) or 5 years imprisonment, or both.

[redacted] notes that these penalties are significantly higher than the penalties in the current Act and the NDIS legislation.

These proposed changes may impact of on provider's insurance arrangements – firstly, whether their insurer will cover them and their directors and officers for the cost of a penalty for breach of duty, and secondly, what impact that might have on their insurance premiums.

It is significant to note that this duty extends to all 'responsible persons' – not just the board. This means that some senior executives and senior registered nurses will be bound by the statutory duty (and potentially liable for significant penalties). Given current workforce shortages, it may be that this adds an additional challenge to recruitment, particularly for senior registered nurses.

Concerningly the imposition of these statutory duties on senior staff members seems to undermine the general principle that an employer is vicariously liable for the acts of its employees – removing a degree of protection from employees who are acting in good faith in their role.

3. Compensation pathway

In addition to the penalties for breach of the statutory duties, the new Act includes a compensation pathway that applies if an entity is found guilty of an offence, and serious injury or illness resulted from the commission of the offence.

The limitation period for compensation claims is 6 years from the day the cause of action relating to the commission of the offence accrued. We query the benefit in requiring a provider to make a payment of compensation in addition to substantial

penalties for breach of duty, in a sector where financial sustainability is already an issue for many providers.

4. Supporters and Representatives

We note the new arrangements for representatives to replace the current patchwork of arrangements noting there will be two categories: supporters and representatives.

Supporters will have a support role, limited to supporting the individual to request, access or receive information or documents and communicate information, including decisions by the individual.

The representative role, by comparison, allows a person to do on behalf of an individual any act that must or may be done under or for the purposes of the Aged Care Act, including making decisions.

This is an expansive role which will replace the role currently held by guardians, substitute decision makers, attorneys, and administrators under [redacted] law.

The draft Bill actually appears to exclude the power of those persons appointed under [redacted] law - so for a person to represent an individual for things that may, or must, be done under, or for the purposes of, the Aged Care Act they will need to be appointed by the Secretary of the Department as a representative. (There is an exception in the case of decisions regarding restrictive practices. Representatives appointed under the new Aged Care Act will not have power to make decisions about restrictive practices, and the relevant decision maker will be determined under State law.)

It appears that the representative will be the person a provider looks to for decisions when an individual lacks capacity on the services to provide, signing of an agreement and other decisions the individual needs to make about care. The role of the representative is modernised to reflect the current thinking on supported decision making so it must empower the individual as much as possible rather than taking the paternalistic approach of decision making that is increasingly being phased out of the law.

The replacement of [redacted] appointed representatives with this federal level arrangement presents a number of challenges. For example, on the current drafting if an individual needs to enter into an agreement for aged care services but does not have capacity to do so and a representative is not appointed. In that situation, a representative will need to be appointed as a matter of urgency, but this will be in the hands of the Secretary of the Department.

Another is resolving disputes between representatives if they are giving conflicting instructions. In [redacted], these can be resolved by going to the South Australian Civil and Administrative Tribunal or the Office of the Public Advocate but on the current drafting those mechanisms will not be available at the federal level. The issue providers will need to consider is whether discussion is required with the Secretary of the Department to remove or replace representatives, particularly if a representative is in breach of their duties under the Aged Care Act. It is not clear that the Government has appreciated these challenges when it comes to representatives.

5. Consistency with state legislation – retirement villages and supported residential facilities

We note there is currently no definition of retirement village in the proposed changes and a definition as contained in the Retirement Villages Act [redacted] (RV Act) would be welcome for clarity.

Clarification would also be welcome for operators of retirement villages like XXXX, on the implications of how a 'conversion' of a place within a retirement village to a residential care home would work. Would it for example have regard to the removal of the statutory charge from that part of the village land, whether that 'place' includes areas that are used by residents of the remaining parts of the village (for example, common corridors and communal facilities) and the contractual rights of the residents of the village as a whole.

We note that the RV Act does not prescribe a specific process that can readily be used to excise part of a village for use as an approved residential care home without impacting the rights of existing residents. As an example, if the relevant part was not properly excised from the village in a manner that addresses rights under the statutory charge on the land, as well as contractual rights of residents (which may include rights to use the relevant part), those issues would obviously impact the ongoing operation, and any subsequent sale, of the village and/or the residential care home.

We submit that detailed consideration is required at state and/or federal level to ensure that the regulatory frameworks will interact as intended once the new Act commences. For example current areas of incongruence include;
Section 5 of the RV Act states 'This Act does not apply in relation to aged care facilities under the *Aged Care Act 1997* of the Commonwealth'. Further the *Retirement Villages Regulations* [redacted] provides that for the purposes of the definition of 'ingoing contribution' in section 4(1) of the RV Act, an ingoing contribution does not include (among other things) 'an amount paid or required to be paid in consideration for entry into residential care at an aged care facility provided by an approved provider under the *Aged Care Act 1997* of the Commonwealth.

6. Issues not addressed in in exposure draft

We note it would be useful if, in addition to a complaints process, there was a formal mediation process that providers could initiate through the Commission when providers and care recipients hit a 'roadblock' – which is not uncommon.

7. Reform Timetable

We note that the current reform timetable is considered too tight to allow for this process to be run well, including allowing time for providers to have sufficient time to understand and then implement amendments to relevant contracts, policies and procedures. In our view, the limited timeframe provided for implementation would likely require substantial redirection of resources within a short space of time.

8. Summary

Whilst [redacted] welcomes some of the proposed changes those identified above can be seen as an additional impost on existing providers like [redacted].

Your faithfully

[redacted]

[redacted]
Chief Executive