Bupa submission: Exposure Draft – a new Aged Care Act

Bupa welcomes the opportunity to make a submission to the Department of Health and Aged Care's consultation into the Exposure Draft of the new Aged Care Act.

As an aged care provider with 58 homes across four states, with over 7000 team members caring for more than 5000 aged care residents, Bupa is one of the largest aged care providers in Australia, and the largest provider in regional areas.

The development of a person-centred, rights-based Aged Care Act provides a generational opportunity to build a strong and sustainable foundation for the long-term provision of world class aged care services that older Australians expect and deserve.

The Exposure Draft seeks to give effect to the remaining recommendations made by the Royal Commission into Aged Care Quality and Safety, underpinning a person-centred aged care system that delivers high quality care outcomes for older people and facilitates continuous improvement.

Though we are disappointed that some concerns raised in prior stages of consultation have not been addressed, we are hopeful that the Act is refined to deliver much needed clarity and confidence for everyone involved in or receiving aged care support. This would ensure reforms are implemented without causing unintended consequences for the aged care workforce and, ultimately, for older Australians.

In particular, we are concerned with the ambiguity of key provisions in the Exposure Draft. In its current form, the new Act may have significant unintended consequences for the aged care sector's ability to attract and retain people in leadership roles and make it more difficult for older Australians to access affordable care when and where they need it.

Should you have any further inquiries regarding Bupa's submission, please contact Tim Janczuk, Public Affairs Manager, on timothy.janczuk@bupa.com.au or 0401 169 826.

Summary of Bupa's recommendations

Recommendation 1: Ensure a clear, targeted definition of *responsible persons* to maintain accountability for providers' senior leaders while mitigating unintended consequences upon non-executive aged care workers. With this in mind, Bupa strongly recommends the Act includes a provision that states the statutory duties under Part 5 only apply to those responsible persons who are: (a) on the governing body (a defined term i.e. directors); or (b) persons that fall within clause 11 (1)(a) of the draft (i.e. persons responsible for executive decisions).

Recommendation 2: That the statutory duties be redrafted to limit liability in the manner contemplated by the Royal Commission which would effectively be: (a) no criminal penalties; and (b) civil penalties to persons responsible be limited to circumstances of accessorial liability i.e. person who has knowledge and fault.

Recommendation 3: Review the penalty and compensation pathways that, in the current draft, extends both criminal liability and potential compensation pathways to non-executive aged care workers, which may cause a loss of talent and deter much-needed new workers from entering aged care.

Recommendation 4: Commission the Independent Health and Aged Care Pricing Authority to measure the costs associated with the reform process and ensure providers are funded to transition to the new arrangements.

Recommendation 5: Establish an advisory function within the Aged Care Quality and Safety Commission, embedded in legislation, to facilitate proactive regulatory engagement and build the capability of aged care providers.

Recommendation 6: Reduce subjectivity and ambiguity of draft legislation with clear and objective definitions (e.g., "high quality care"), to ensure clear and consistent expectations of care by older Australians, their families, providers, and the regulator.

Recommendation 7: Ensure a timely release and consultation period for the final Act, subordinate legislation, and guidance materials with sufficient implementation timeframes for providers.

Impacts on the aged care workforce

Persistent workforce shortages in the aged care sector are acutely impacting older Australians' access to care and the financial sustainability of the sector. StewartBrown estimates that the aged care sector lost over $1bn in the 2022-23 financial year[1], the fourth consecutive year of significant losses. The new Act must give greater weight to these realities and facilitate the growth of a skilled workforce so that the aged care sector can meet the needs of an ageing population. It must not act as a deterrent to those wishing to enter the sector or encourage talent to leave the sector.

Due to workforce constraints, which are felt most acutely in regional Australia, Bupa has chosen to limit admissions of new residents in some locations. Jobs and Skills Australia (JSA)[2] has found persistent workforce shortages for Aged and Disabled Carers and Registered Nurses, which accords with our own experience. Bupa has experienced the biggest challenge filling vacancies in our regional homes, which is also reflected by JSA's finding that there are higher unfilled vacancies in regional areas for Carers and Aides[3]. This ultimately impacts regional communities and healthcare systems, with older Australians finding it challenging to access care where and when they need it.

We are very concerned that the new statutory duties, penalty regime and compensation pathways, though well intentioned, go beyond what was recommended by the Royal Commission and may make it more difficult to recruit and retain both direct care workers and

[1] StewartBrown_-_Aged_Care_Financial_Performance_Survey_Report_June_2023.pdf
[2] Towards a National Jobs and Skills Roadmap | Jobs and Skills Australia
[3] Labour Market Update - May 2023 | Jobs and Skills Australia

non-executive personnel.[4] The new duties and penalties on responsible persons are unique to aged care, and are not imposed on similar sectors which support vulnerable people, such as health, childhood education or disability care. Severe penalties also extend to aged care workers, with individuals at risk of fines of up to $80,000 for breaches of the Aged Care Code of Conduct.

The significant personal risks faced by aged care workers creates a very real possibility of a loss of talent from the sector and could deter much-needed workforce growth. We recommend the current proposed penalty regime be reviewed to ensure that quality of care can be protected in a proportionate manner while helping to build the aged care workforce. Our concerns are magnified by the subjective language used in the draft legislation. It is not clear how these provisions will be applied in practice, undermining the confidence of aged care workers, responsible persons, and providers seeking to do the right thing.

A clearer, targeted definition of *responsible persons* is also needed to ensure that the personal impacts on non-executive team members are limited. At present, the definition of *responsible persons* is too broad and may extend personal risks to individuals in Assistant General Manager, Care Manager, or Quality and Education Manager roles. A refined definition that includes governing persons and senior executives is more proportionate, given their authority and influence over a provider, while ensuring that providers will maintain broad oversight through robust governance structures and accountability mechanisms.

There is a real risk that in its current form, the new Act has the unintended consequences of deterring people from joining the aged care workforce or encouraging those already in it to exit. This undermines the efforts by government and aged care providers seeking to increase the capacity and capability of the aged care sector.

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[4] We note the Royal Commission recommended civil penalties, while the draft legislation incudes criminal penalties.

aged care workers, which may cause a loss of talent and deter much-needed new workers from entering aged care.

Delivering affordable and universal aged care

Older Australians rightly expect that they will have universal access to high quality, affordable aged care support where and when they need it. While the new Act gives effect to several positive reforms which drive improvements to care quality through stronger accountability and transparency, we are concerned about the possibility of unintended consequences for the sector and for older Australians.

The challenges caused by workforce constraints and financial pressures in the sector may be exacerbated by the extensive changes that providers will need to implement. Though it is difficult to quantify, as several elements of the Act and subordinate legislation are yet to be released, the reforms will place new burdens on aged care workers and will ultimately add to the cost of care. Workforce growth will be necessary across direct and administrative roles to manage the transition and carry out new responsibilities. Ultimately, these costs are borne by taxpayers and care recipients, adding fiscal pressure on government and costs payable by individuals who will need to fund their care.

Bupa understands and supports the Act's intent to lift the quality of care, including through the concept of "high quality care" in legislation. However, it is critical that providers are adequately resourced to demonstrate they can and will ultimately deliver to the expected standards. More clarity is needed to ensure that conditions of registration and the expected standard of care is clearly defined and can be accurately costed by the Independent Hospital and Aged Care Pricing Authority. Providers must ultimately be funded to achieve the desired quality of care defined in a new Act.

The drafting of the definition of "high quality care" is currently very broad, subjective and absent the requirement to deliver high quality care "so far as is reasonable" (as was recommended by the Royal Commission). There is no objective measure in the draft Act to enable a fair assessment of high quality care. There is no doubt all providers want to provide high quality care, but there must be some objective measure to determine what they are required to deliver.

A failure to appreciate the material and practical realities in the sector is likely, contrary to the intention of the draft Act, to undermine universal and affordable access to aged care. There is a real possibility that these reforms will increase costs and exacerbate workforce shortages, making it more difficult for older Australians to access suitable care in an affordable way, at a time that demand for care is rapidly growing.

Recommendation 4: Commission the Independent Health and Aged Care Pricing Authority to measure the costs associated with the reform process and ensure providers are funded to transition to the new arrangements.

Supporting proactive regulatory engagement

Bupa previously recommended the establishment of an advisory arm of the regulator, similar to the advisory function within the Fair Work Commission. This function enables employers to seek advice with confidence and prevent potential issues from escalating. A similar “advisory” function should be conferred upon the aged care regulator, with this clear remit and authority embedded in the new Act.

The draft legislation and regulatory framework currently place an insufficient focus on proactive regulatory engagement and capability building in the sector. Proactive regulatory engagement and a collaborative culture facilitated by openness and transparency are critical to continual improvements to care quality across the sector.

These objectives were discussed extensively at prior stages of consultation but are not adequately reflected in the current draft legislation. The subjective language used in the draft legislation and vague thresholds for breaches may also inhibit proactive regulatory engagement and reduce the confidence of aged care workers, responsible persons, and providers seeking to do the right thing.

Subjective legislation, coupled with the risk of significant penalties, may act as a barrier to proactive regulatory engagement and transparency. For example, the prospect of significant penalties may deter a provider from proactively working with the regulator to navigate challenges before they escalate.

Aged care providers need to have avenues for proactive engagement. We believe that a collaborative regulatory posture would support the sector and ultimately deliver a high standard of care to benefit older Australians.

Recommendation 5: Establish an advisory function within the Aged Care Quality and Safety Commission, embedded in legislation, to facilitate proactive regulatory engagement and build the capability of aged care providers.

Greater clarity and certainty required

We are concerned that the draft legislation is very open to interpretation and may lead to confusion or disaffection. If providers are unclear about their obligations, or care recipients and their families mistakenly perceive a breach of their rights, this will put unnecessary strain on relationships between providers and older Australians. Again, the definition of “high quality care” in the draft Act has disregarded the recommendations of the Royal Commission that it be limited to provide high quality care "so far as is reasonable".

Reducing subjectivity in legal definitions is vital to improving care quality. A more collaborative culture between providers and the regulator can be built upon clear expectations. Unfortunately, the thresholds for breaches of the Act and regulatory action are quite vague, and definitions of terms such as “significant failure”, “systematic pattern of conduct”, “evidential material” and “high quality care” should be clarified.

Recommendation 6: Reduce subjectivity and ambiguity of draft legislation with clear and objective definitions (e.g., “high quality care”), to ensure clear and consistent expectations of care by older Australians, their families, providers, and the regulator.

Implementation timeframes

The new Act will deliver much needed reforms that will help support improvements to care quality and build confidence in the aged care system. Though we are disappointed that concerns raised by providers in prior stages of consultations have not been addressed in the draft legislation, we are hopeful that the Act in its final form will provide a strong foundation for Australia’s aged care system.

It is encouraging that the draft legislation enables better information sharing between regulators to facilitate streamlined reporting requirements and some regulatory processes. We are also pleased to see better alignment with the NDIS on worker screening processes and Code of Conduct, though we reiterate our concern that it is a missed opportunity to better align legislation and regulation across the broader care and support sector.

We note the government’s consideration of transition arrangements and adequate transition timeframes so that providers and government entities can review and prepare for these significant changes. The brief anticipated timeframes to review subordinate legislation and remaining undrafted sections of the Act are a major concern, and providers have limited scope to prepare for changes until they are published in their final form.

Recommendation 7: Ensure the timely release and consultation on the final Act, subordinate legislation, and guidance materials with sufficient implementation timeframes for providers.