What you need to know about Ontario's Fixing Long-Term Care Act

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Background

Struck in the midst of the COVID-19 pandemic, Ontario's Long-Term Care COVID-19 Commission had a mandate to investigate how and why COVID-19 spread in long-term care (LTC) homes, actions taken to prevent the spread, and how key elements in the existing LTC system affected the spread of COVID-19. On April 30, 2021, commissioners the Honourable Frank N. Marrocco, Angela Coke, and Dr. Jack Kitts, produced their report. The commission's recommendations led to the creation of the *Fixing Long-Term Care Act, 2021* (the Act).

On December 9, 2021, Ontario's Bill 37, *Providing More Care, Protecting Seniors, and Building More Beds Act, 2021* received royal assent. When proclaimed into force (at a date yet to be determined), Bill 37 will repeal the *Long-Term Care Homes Act, 2007* and replace it with the Act.

Notable changes

The Act generally maintains the status quo set out in the *Long-Term Care Homes Act, 2007* while making incremental changes relating to staffing and care, accountability and transparency, enforcement, and licensing.

Staffing and care reforms

A key reform is setting minimum hours of direct care. The Act implements a mandatory average number of direct care hours provided to each resident by nurses and personal support workers. That target must be reached by March 31, 2025, with periodic increases to the current mandatory target through 2022-2024. Direct care hours provided by personal support assistants will not count towards the target. The Act also implements a mandatory target for direct care hours provided to residents by allied health care professionals (to be defined in regulations), to be met by March 31, 2023.

Of note, the minimum hours of direct care targets will be calculated on a system-wide basis, rather than for each individual LTC home. Accordingly, the average hours of direct care will be calculated by taking the total number of direct care hours provided in all Ontario LTC homes, and dividing that by the total number of resident days in all Ontario LTC homes.

The Act requires that the Minister of Long-Term Care publicly report the progress made towards the targets, and to identify and assess barriers or risks to achieving them. If the targets are not met, the minister must develop a plan to achieve the targets.

Accountability and transparency mechanisms

The Act expands the *Residents' Bill of Rights* to further align it with the Ontario *Human Rights Code.* The expanded *Residents Bill of Rights* allows necessary amendments to rectify circumstances that arose during the pandemic, such as allowing family to visit residents at end of life, 24 hours per day.

There are also new requirements to measure and improve quality of care. For example, licensees will be required:

- To implement an enhanced infection prevention and control program, headed by an "infection prevention and control lead" (whose qualifications will be set out in regulations).
- To ensure all residents are provided with care or services that integrate a palliative care philosophy (this concept has not been defined).
- To implement a continuous quality improvement initiative (which will be set out in the regulations).
- To include responses from a resident's caregivers in their annual satisfaction survey.
- To create and monitor an email address so that residents or substitute decision makers may communicate directly with the LTC home.

There are also a number of reforms directed at the Ministry of Long-Term Care (the Ministry) aimed at improving quality of care. For example, the Ministry will be required to consult yearly with the organizations representing residents' councils and family councils. The Act also gives the minister the power to create a long-term care quality centre, which will support mission-driven organization and advance and share research on innovative and evidence-informed person-centred models of care.

Stepping up enforcement tools

The *Fixing Long-Term Care Act* doubles the monetary fines for offences and the amount of funding that can be withheld from a licensee for non-compliance.

In addition, the Director of Long-Term Care (the Director) and inspectors are given more power to streamline non-compliance with the Act. For example:

- The Director and inspectors now have the authority to issue an administrative monetary penalty on the spot if they believe that the licensee has not complied with the Act.

- As part of issuing a compliance order, the Director and inspectors have been granted a new power to order a licensee to allow employees of the Ministry, or agents or contractors, to perform any work or activity at a non-compliant LTC home that is necessary to achieve compliance. Licensees may also be ordered to pay the reasonable costs of that work or activity.
- The Director is given the authority to suspend the licence and take over a LTC home without revoking the licence and closing the home completely.
- Suspension orders will be immediately effective, notwithstanding any appeal rights.
- "Interim managers" are replaced with "supervisors", who are empowered to occupy and operate a LTC home in circumstances where (a) it would not be safe for residents if the home was closed immediately; and (b) the licensee is unable or unwilling to safely operate the home in accordance with all applicable requirements. Supervisors are directed to give the Ministry full control of the home, and the Act now specifies that the licensee cannot surrender its licence during the period of supervision without the Director's approval.

To encourage prompt corrective actions, a non-compliance that is remedied prior to the conclusion of the inspection need not result in a written citation from the inspector, provided that the inspector is satisfied that the non-compliance caused no harm and created no risk or minimal risk of harm to a resident. However, the findings, as well as the corrective action taken, must still be documented.

Enabling the building of modern homes

The Minister is now permitted to directly restrict a licence application through developing a licensing policy based on the public interest. The policy will have to take into account the effect that issuing a licence would have on the concentration of ownership, control, or management of LTC homes, and the balance between non-profit and for-profit LTC homes in a specific area, or the province generally.

If the Minister has developed a policy that sets the number of beds required in the province, and where the beds under a licence application are needed, the Director may decide whether individual applications are covered by the policy and whether the restrictions in the policy apply. Alternatively, where no policy has been implemented, the Minister may make a restriction in a particular application for a licence to provide accountability, the Act will allow stakeholders the ability to request that the Minister review the Director's decision to issue or not issue a licence.

Under the previous legislation, a person that gains a controlling interest in a LTC licensee by any method is required to obtain the approval of the Director. However, the new Act provides that the regulations may override this requirement. It remains to be seen whether this discretion is to facilitate integrations or amalgamations.

Furthermore, licensees will be required to ensure that every person in a leadership position receive training, the substance and frequency of which will be set out in the regulations.

Takeaways

The Act has set out the framework for LTC reform, but the majority of the operational changes will be clarified through the regulations, which have yet to be drafted for public consultation. Operators may wish to keep apprised of developments, including the consultation process for the regulations. BLG's Senior Living & Housing group will continue to monitor the progress of the Act and any related regulations. If you have any questions about the new *Fixing Long-Term Care Act, 2021*, please reach out to your BLG lawyer, or any of the key contacts listed below.

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