

8 September 2023

Department of Health and Aged Care  
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Via email: [AgedCareLegislativeReform@Health.gov.au](mailto:AgedCareLegislativeReform@Health.gov.au)

### **Submission to consultation: A New Aged Care Act: The foundations (consultation paper no.1)**

Thank you for the opportunity to prepare a submission for consideration during the first stage of public consultation on the new Aged Care Act (the Act).

As the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.<sup>1</sup> There are several conditions that may affect a person's decision-making ability, including intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse.

Given the prevalence of neurological conditions like dementia amongst Australia's ageing population,<sup>2</sup> it is likely that many of the people currently accessing aged care services, and people who will be accessing aged care services under the proposed new Act, may experience impaired decision-making ability.

I support the Department of Health and Aged Care's (the Department's) aim to develop a rights-based legislative framework that places older people and their individual needs at the centre of the aged care system.

In relation to the proposed aspects of the new Aged Care Act included within the first consultation paper, I would like to put forward the following for consideration.

#### **Supported decision making and proposed nominee model**

People accessing, or seeking to access, aged care services under the new Act will have the right to 'exercise choice and make decisions that affect their lives, be supported to make those decisions where necessary, and have those decisions respected'.<sup>3</sup> This emphasis on the right of older people to make decisions, or be supported to make decisions, is also reflected in the proposed Statement of Principles, which includes older people 'being active and informed partners in decision-making as they wish about the funded aged care services delivered to them'.<sup>4</sup>

For those who require support to make decisions, the Act will include new nominee arrangements based on a supported decision-making model, which will enable authorised representatives to act on behalf of aged care recipients under the new Aged Care Act only.

The use of a supported decision-making model is critical to supporting the autonomy of older adults, in line with article 12 of the United Nations Convention on the Rights of Persons with Disabilities

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<sup>1</sup> *Guardianship and Administration Act 2000* (Qld) s 209.

<sup>2</sup> Australian Institute of Health Welfare (AIHW), *Dementia in Australia*, web report < <https://www.aihw.gov.au/reports/dementia/dementia-in-aus/contents/summary>>, 2023.

<sup>3</sup> Department of Health and Aged Care, *A New Aged Care Act: The foundations, Consultation paper no. 1*, 2023, p. 16.

<sup>4</sup> Department of Health and Aged Care, *A New Aged Care Act: The foundations, Consultation paper no. 1*, 2023, p. 22.

(UNCRPD). This will help to ensure that people are able to participate in decision-making to the fullest extent possible, and avoid the use of substitute decision-making wherever possible.

The nominee model outlined in the consultation document is consistent with the ALRC recommendation that 'The *Aged Care Act 1997* (Cth) should be amended to include provisions dealing with supporters and representatives consistent with the Commonwealth decision-making model.'<sup>5</sup>

However, as the ALRC noted in its report on elder abuse, implementation of this recommendation should also include 'consideration of the interaction with state and territory appointed decision makers'.<sup>6</sup>

Under the proposed model, the Secretary or delegate appointing the representative will be 'required to have regard to whether a person is authorised to make decisions for the aged care recipient under other laws'.<sup>7</sup> However, they are not bound to appoint that same person.

The interaction between this proposed nominee model for aged care and State and Territory guardianship systems is potentially complex, confusing and, in some situations, problematic.

To address this issue, I would suggest that, where a decision-maker has already been appointed for relevant matters by a Court or Tribunal, or has been appointed by the older person under an enduring instrument (e.g. enduring power of attorney), this should be recognised to the extent and for the period that the appointing instrument allows, to enable them to act as the older person's representative under the new Aged Care Act.

The proposed nominee model could then apply in situations where a person does not have a decision-maker appointed by a Court or Tribunal or under an enduring instrument.

The consultation document notes that in situations of elder abuse the Secretary would not be bound to appoint a person who is a representative under other laws as a representative under the new Aged Care Act. In situations where elder abuse is identified, this should immediately be reported or referred to relevant agencies as appropriate to facilitate a change in decision-making arrangements under those other laws to support the safety and wellbeing of the older adult.

Further detail relating to the nominee model is also required, including the process for appointing representatives, and information on who would make particular decisions in the proposed model, for example decisions relating to restrictive practices. I look forward to additional information becoming available when the Exposure Draft of the Bill is released for public consultation later in the year.

### **Aged care restrictive practices**

Under the UNCRPD, which the new Act is based upon, people with disability have, amongst other rights, the right to 'liberty and security of person',<sup>8</sup> 'freedom from torture or cruel, inhuman or degrading treatment or punishment',<sup>9</sup> and 'freedom from exploitation, violence and abuse'.<sup>10</sup> It is important that the use of restrictive practices, which limits these rights, is reduced, and ideally, eliminated.

The proposed Statement of Rights to be included within the new Act includes the right to 'freedom from inappropriate use of restrictive practices'.<sup>11</sup>

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<sup>5</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC report 124 (2014), p. 170.

<sup>6</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response*, ALRC report 131 (2017), p. 150.

<sup>7</sup> Department of Health and Aged Care, *A New Aged Care Act: The foundations, Consultation paper no. 1*, 2023, p. 41.

<sup>8</sup> *Convention on the Rights of Persons with Disabilities*, art 14.

<sup>9</sup> *Convention on the Rights of Persons with Disabilities*, art 15.

<sup>10</sup> *Convention on the Rights of Persons with Disabilities*, art 16.

<sup>11</sup> Department of Health and Aged Care, *A New Aged Care Act: The foundations, Consultation paper no. 1*, 2023, p 16.

However, it is not clear how this right will be ensured, or how the new Aged Care Act will drive a reduction in the use of restrictive practices.

The Department could consider including the requirement that any restrictive practice used is the least restrictive practice and that there is evidence that less restrictive alternatives have been trialled prior to the use of a restrictive practice.

### **Definition of high quality care**

The new Act will include a definition of 'high quality care' with the aim of improving the standard of aged care services delivered to older people in Australia. It is noted that the proposed definition of high quality care has been developed based on the recommendation from the Royal Commission into Aged Care Quality and Safety (the Aged Care Royal Commission)<sup>12</sup> and feedback received in response to the Department's consultation on 'A new model for regulating aged care'.

As I noted in my submission to the above consultation, the Department could also consider the following in relation to the definition of high quality care:

- Linking the definition of high quality care to the rights of older people that are to be embedded into the new Act, implementing Recommendation 2 of the Aged Care Royal Commission.<sup>13</sup>
- Specifically including a number of these rights into the definition of high-quality care, in particular;
  - the right of recipients to provide feedback and complain about the services they receive free from reprisal;
  - the right of recipients to be centrally involved (with support where necessary) in the making of decisions that affect them including about the personal aspects of their daily lives, financial affairs and possessions; and
  - the right of recipients to have a person of their choice support them or speak on their behalf.
- Placing a focus on not only the enhancement but also the *maintenance* of physical and mental health for people receiving services, which includes maintaining a person's sense of identity.
- Using the words 'being designed to address' rather than 'responsive' which changes the focus of the definition to being proactive rather than reactive.
- Providing that care will be delivered, as per the Aged Care Royal Commission's recommendations, by caring and compassionate people who are educated and skilled in the care they provide.
- Noting that high quality care will be measured regularly, via a process that incorporates the views of aged care recipients, their supporters, aged care providers and the regulator.

### **Complaints mechanisms and safeguards**

The consultation paper notes that complaints and feedback systems will form a key safeguard and mechanism to ensure that the rights of older people accessing, or seeking to access, funded aged care services under the new Act are upheld. It is intended that all registered service providers will be required to implement a system to manage feedback and complaints as a condition of registration. People will also be able to make complaints to, or escalate their complaints to, the Complaints Commissioner.

Complaints models, including the model that has been proposed for the aged care sector, can enable people accessing services to raise issues and facilitate improved service provision. However,

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<sup>12</sup> Commonwealth Royal Commission into Aged Care Quality and Safety, *Final report: Care, dignity and respect, Volume 1 summary and recommendations* (2021), pp. 218-219.

<sup>13</sup> Commonwealth Royal Commission into Aged Care Quality and Safety, *Final report: Care, dignity and respect, Volume 1 summary and recommendations* (2021), p. 206.

as was highlighted in a recent research report commissioned by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, there are challenges associated with the use of complaints mechanisms, particularly for the reporting of abuse, neglect and exploitation.<sup>14</sup> The report noted that:

the use of complaint mechanisms to report such experiences [violence, abuse, exploitation and neglect] creates a number of unique challenges, including whether existing complaint mechanisms are fit for purpose, whether complaint mechanisms are able to guarantee equality before the law and equal rights to justice for people with disability, how complaint mechanisms relate to other reporting pathways, in particular police and courts, and whether complaint mechanisms are able to protect individuals from violence and create system change to prevent violence.<sup>15</sup>

The Aged Care Royal Commission found that the 'abuse of older people in residential care is far from uncommon'<sup>16</sup> and heard about many situations of abuse of residents by staff members and other residents.

It is therefore critical that pathways are put in place that acknowledge the difference between complaints, and allegations of violence, abuse, neglect and exploitation, and that these pathways are designed to ensure that these disparate issues are responded to appropriately.

Complaints mechanisms can be challenging for people to navigate. People with impaired decision-making ability, or people who experience difficulty communicating verbally or in writing, face additional difficulties in reporting incidents or making complaints.

Independent advocates can play an important role in supporting people who are accessing, or seeking to access, services to understand and exercise their rights. However, it can also be difficult for some people, including people with impaired decision-making ability, to take the necessary steps to request the assistance of advocates. There can also be significant waiting times to access advocacy services due to the current unmet demand for advocates.

To further support the identification and reporting of issues and complaints in aged care, as noted in my submission to the consultation on 'A new model for regulating aged care', the Department could consider the introduction of a new community visitor scheme for the aged care sector. This community visitor scheme would differ to the Aged Care Volunteer Visitors Scheme (previously known as the Community Visitors Scheme) currently operating within the aged care sector which focuses on social connection between older people and volunteer visitors.<sup>17</sup> Rather, under this scheme, community visitors could visit eligible people receiving aged care services and assist in the identification and reporting of issues and complaints.

This scheme could be similar to that of the Community Visitor Program in Queensland, which is operated by the Office of the Public Guardian. Under this program, community visitors can make announced or unannounced visits to 'visitable sites' and can make enquiries into:

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<sup>14</sup> Wadiwel et al, *Complaint Mechanisms: Reporting pathways for violence, abuse, neglect and exploitation*, prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, < <https://disability.royalcommission.gov.au/publications/complaint-mechanisms-reporting-pathways-violence-abuse-neglect-and-exploitation>>, November 2022.

<sup>15</sup> Wadiwel et al, *Complaint Mechanisms: Reporting pathways for violence, abuse, neglect and exploitation*, prepared for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, < <https://disability.royalcommission.gov.au/publications/complaint-mechanisms-reporting-pathways-violence-abuse-neglect-and-exploitation>>, November 2022, p. 3.

<sup>16</sup> Commonwealth Royal Commission into Aged Care Quality and Safety, *Final report: Care, dignity and respect, Volume 1 summary and recommendations* (2021), p. 68.

<sup>17</sup> Department of health and Aged Care, *About the Aged Care Volunteer Visitors Scheme* (28 June 2023) <<https://www.health.gov.au/our-work/aged-care-volunteer-visitors-scheme-acvvs/about>>.

- (a) the adequacy of services for the assessment, treatment and support of consumers at the visitable site; and
- (b) the appropriateness and standard of services for the accommodation, health and wellbeing of consumers at the site; and
- (c) the extent to which consumers at the site receive services in the way least restrictive of their rights; and
- (d) the adequacy of information given to consumers at the site about their rights; and
- (e) the accessibility and effectiveness of procedures for complaints about services for consumers at the site; and
- (f) at the request of the public guardian, another matter about the visitable site or consumers at the site.<sup>18</sup>

When issues are identified, community visitors can lodge complaints for, or on behalf of, residents and refer issues to other agencies as appropriate.

The development of a community visitor program for the aged care sector could provide an additional safeguard for those accessing the aged care system, particularly for those who may find it challenging to engage with, or who are reluctant to engage with, complaints mechanisms.

### **Enabling older people to exercise choice in service provision**

A proposed object of the new Act is that it 'enables older people accessing available funded aged care services to choose who will deliver their services, and when and how they do so'.<sup>19</sup>

This is also reflected in the proposed Statement of Rights, which includes the right of people to 'exercise choice between available aged care services they have been assessed as needing, and how these services are delivered'.<sup>20</sup>

The right to exercise choice is critical to supporting autonomy and ensuring that people can receive services that will meet their preferences and needs. However, choice in service provision also relies upon the existence of a strong service market and the availability of a range of services. It is not clear how a strong market will be assured such that people accessing, or seeking to access, aged care services will have a range of suitable services from which they can choose.

The consultation paper suggests that new providers will potentially come into the market, in part because of the new constitutional basis for the legislation. It will be important to ensure that, if there is a resulting influx of new providers, all services meet the required standards to ensure that the services being delivered meet the high quality care threshold included in the new Act.

### **Younger people in residential aged care**

Under the 'Younger People in Residential Aged Care Strategy 2020-25' (the Strategy), in recognition that the aged care system is not designed to support the needs of younger people, the Australian Government committed to targets to reduce the number of young people with disability living in residential aged care. This included the targets of 'no people under the age of 65 entering residential aged care by 2022' and 'no people under the age of 65 living in residential aged care by 2025'.<sup>21</sup>

The Strategy highlights the importance of improving the availability of suitable alternative accommodation and support for young people to prevent their entry to residential aged care. It also notes that:

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<sup>18</sup> *Public Guardian Act 2014* (Qld) s 41(2).

<sup>19</sup> Department of Health and Aged Care, *A New Aged Care Act: The foundations, Consultation paper no. 1*, 2023, p. 11.

<sup>20</sup> Department of Health and Aged Care, *A New Aged Care Act: The foundations, Consultation paper no. 1*, 2023, p. 16.

<sup>21</sup> Commonwealth of Australia (Department of Social Services), *Younger people in residential aged care: Strategy 2020-25*, 2020, p. 3.

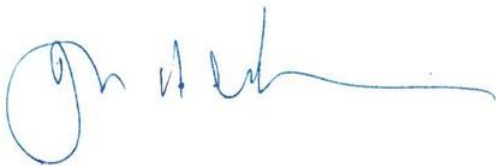
'A comprehensive assessment with an ACAT assessor to determine eligibility for residential aged care should only be undertaken for a younger person once eligibility for the NDIS has been tested and when all other support options have been exhausted.'<sup>22</sup>

The proposed Statement of Principles for the new Act includes that 'For younger people, alternative services that meet their needs are a preferred option to aged care services, which are designed to support the needs of older people.'

The Department could consider strengthening this statement to align it more closely with the Strategy and include a requirement that aged care services would only be considered for younger people when all alternative service options have been exhausted. This could help to support greater progress toward the target of having no young people living in residential aged care.

Thank you for the opportunity to make this submission to the Department. Should you require further information regarding any of the matters I have raised, please contact my office on 3738 9513.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'John Chesterman', with a long horizontal flourish extending to the right.

John Chesterman (Dr)  
**Public Advocate**

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<sup>22</sup> Commonwealth of Australia (Department of Social Services), *Younger people in residential aged care: Strategy 2020-25*, 2020, p. 12.