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Office of the Public Advocate (Queensland)

Position Paper – National Aged Care Reforms

On 20 April 2012, the Federal Government released the *Living Longer Living Better* aged care reform package, a comprehensive ten-year plan to reshape aged care and build a better, fairer and more nationally consistent aged care system.

While the first tranche of reforms commenced in 2013, the changes that commenced on 1 July 2014 brought with them a range of concerns. Notably these concerns relate to the increased complexity of decision-making (particularly with respect to financial aspects of aged care placements), and uncertainty and inconsistencies within the sector in operationalising the reforms.

Decision-making complexity

For people with impaired capacity requiring an aged care placement, the decision regarding accommodation involves both personal and financial considerations. Statutory trustee agencies in state and territory jurisdictions are the appointed administrators for many people with impaired decision-making capacity across Australia. Since the commencement of the aged care reforms, these agencies have undertaken significant work to ensure appropriate procedures are in place to support their decision-making in respect of such placements. This work sought to ensure understanding of the reforms themselves, and the potential implications for individual decision-making. This has also been an issue for statutory guardians whereby the financial implications associated with making accommodation decisions have limited their ability to make timely decisions.

The issue of potential legal liability for decision-makers is also a concern. All forms of decision-makers (e.g. those appointed via a tribunal, court or enduring instrument; or who are otherwise acting for a person) are arguably subject to a fiduciary duty to make decisions that a reasonable person would make in the circumstances of the matter. However, despite the complexities associated with making decisions in respect of aged care placement, it is highly unlikely that decision-makers, particularly private guardians/administrators and informal decision-makers, are aware of the legal risks to which they may be subject.

The need to understand the options available to a person and to weigh up the appropriateness of options and resultant financial impact that may arise from each option means that even statutory guardians/ administrators often have to obtain financial advice prior to making decisions. Some of the key issues that need to be understood include choosing between making Daily Accommodation Payments (DAPs) versus Refundable Accommodation Deposits (RADs) versus a combination of these; the ways in which asset structuring can be used to enable a more viable assessable financial position for the individual; ensuring today's financial decisions provide sufficiently for the person's likely lifespan; and other such considerations.

Further, the binding and specific nature of residential aged care agreements means that if a person's care needs change, or if a person wishes to move facilities, a new contract is required and possibly a new raft of contract negotiations. If not undertaken in a timely manner or if there is no support to do so, it is possible that this may result in people becoming trapped in overly restrictive arrangements. Conversely, insufficient funds may preclude a person from accessing a 'high care' arrangement.

In light of this, the issues that are likely to arise for those with insufficient understanding about these reforms are concerning. While statutory agencies can obtain financial advice to understand the viability of the different options that may be available to a person, this is not likely to be possible for everyone. The average person who has to make a decision regarding an aged care placement (whether that be the individual, an attorney, or a private guardian or administrator) may not realise that they lack the requisite knowledge and skill to make appropriate decisions in respect of committing to a placement (i.e. they don't know what they don't know).

The cost of accessing financial advice may also be prohibitive for some people. Equally, while the expense of doing so may be a worthwhile investment, such advice may not be easily accessible (e.g. for those living in rural and remote areas) and there are few financial advisors with sufficient knowledge and expertise to adequately assist clients in making such decisions.

At an individual level, this lack of understanding brings with it the risk of significant financial impact. These impacts may result in an individual being financially disadvantaged not just at the point of entry to an aged care placement but also on an ongoing basis. A potential outcome is that the individual may have insufficient funds to cover the cost of care over their remaining years.

While extreme, a potential risk that may arise over time is an increasing number of individuals on the verge of, or entering, a state of poverty. Such circumstances will inevitably lead to reduced levels of service provision and resultant declines in health that will increase pressure on other systems.

Systemic pressures in Queensland

At the state level, these national changes sit alongside the reform of the health system in Queensland, initiated in 2012, whereby responsibility and accountability has been decentralised and devolved to local Health and Hospital Service Networks and the Boards that govern them.

Under the new service delivery model, there is a service agreement in place between the Department of Health and each Hospital and Health Service (HHS) for the provision of public health services. The service agreement defines the health services, teaching, research and other services that are to be provided by the HHS and the funding to be provided to the HHS for the delivery of these services. It also defines the outcomes that are to be met by the HHS and how its performance will be measured.

Alongside the aged care reforms, the changes to Queensland's health system are a notable factor in the shifting dynamics that are increasing the pressure on Queensland's guardianship and administration system.

For example, it has been mooted that the division of cost responsibility between state-based health systems and the federally-funded aged care system may be responsible for some of this pressure as hospitals and other state-funded health services seek to 'encourage' people to pursue aged care placements as a means by which to shift responsibility for day-to-day health maintenance into the federal arena by having this catered to as part of an individual's aged care support arrangement.

Likely to be related to this is the increasing number of applications for interim orders that are being received by the Queensland Civil ad Administrative Tribunal (QCAT), many of which are dismissed due to there being no immediate risk of harm. This approach, despite being contentious from the perspective of hospital staff and health care providers, will continue to prevail due to the nature of the legislative regime in Queensland, which does not allow for appointments in such circumstances.

The policy position that has been adopted by the Public Guardian with respect to not making aged care placement decisions as Statutory Health Attorney of last resort for high-care adults is another factor that may be influencing the trend by hospital staff to seek the appointment of a guardian and/or administrator, particularly given the insistence of some aged care providers that an appointed decision-maker be in place.

QCAT has commenced undertaking some hearings 'on the papers' and appointing a guardian and/or administrator on a non-reviewable basis with a term that comes to an end 28 days after the adult is placed into a 'permanent' aged care placement. Such appointments only occur in situations where the evidence supporting a determination of impaired capacity is clear and not controversial, and where there is no evidence of dispute about the appointments. The appointment of an administrator in such cases is usually the Public Trustee who remains appointed until further order. In cases where a family member is appointed, such appointments are made for a short term until such point that an oral hearing can be arranged and longer term arrangements for financial decision-making put in place.

Operationalising the reforms

There is little support available to guide individuals and service providers in relation to reasonable policy and practice approaches in operationalising these reforms. It has been noted that the Government website is not kept up-to-date and that the information exchange mediums that are being used (i.e. internet, smartphone apps, etc.) are often difficult for people to access due to either physical limitations, lack of familiarity and confidence in using such mediums, and/or people not having access to them. This, unfortunately, lends itself to many people having insufficient information when needing to make an urgent decision in respect of aged care placement.

A particular trend that is emerging relates to people who have been admitted to hospital due to age-related medical issues, and for whom an aged care placement is considered an appropriate transition plan to support their move out of hospital. In many such circumstances, it would appear that hospital staff seek the appointment of a guardian and/or administrator to make a decision in respect of the proposed aged care placement and thus facilitate the person's discharge from hospital. It has been suggested that this often occurs without consulting the person in the course of submitting the application for appointment.

There is also an emerging policy position whereby aged care providers are requiring, as a condition of entry, that people have a valid Enduring Power of Attorney (EPOA). Ostensibly the reasoning behind this position relates to providing a safeguard for the facility by ensuring that all people seeking placement have a mechanism in place to ensure continuity of decision-making in respect of the person's placement should they cease to have capacity (especially for financial matters) at a future point. While the making of an EPOA is arguably a positive obligation, the process of drawing up an enduring document can take some time, which may impact their ability to secure the placement. Further, once an EPOA is in place, many services and facilities assume its immediate authority as opposed to recognising that it may not take effect until the person lacks decision-making capacity.

Of significant concern in respect of the above scenarios is that the concept of supported or informal decision-making appears to be completely absent from the way in which aged care providers are operationalising the aged care reforms. In many circumstances, there are family members who are available and willing to assist their ageing family member to make decisions in respect of aged care placements, and/or to make decisions on their behalf, however this no longer appears to be sufficient.

This is further complicated by the reticence of many aged care providers to offer interim placements. This often means that, due to concern that a placement offer may be withdrawn, individuals (and/or family members) feel pressured to make immediate decisions without having sufficient time to adequately consider the options and associated financial implications, and/or find themselves pushed into seeking formal guardianship and/or administration appointments to satisfy the requirements of the aged care provider.

The financial implications for spouses and/or other family members associated with securing an aged care placement for their ageing family member may give rise to concern, particularly where financial assurance is required to enable the placement. This may arise, for example, in situations where there is a perceived (or actual) need to sell the family home to provide the finances to support the aged care placement.

Similarly, concerns have also been raised about situations in which aged care providers seek to ensure that the financial commitments associated with aged care placement are met by requesting that family members enter contracts as a guarantor for the aged care placement, or where 'caveat clauses' against the resident's property are inserted into aged care agreements. These caveat clauses usually refer to all real estate that the person has an interest in, which may have significant implications in cases where the required fees are not paid and a partner or other family member is a joint owner or continues to remain in the property. Additionally, and despite there being no provision within legislation to enable it, some aged care providers are also requiring a 'security deposit' paid in advance (upon entry) and separate to the RAD.

For some people, the above scenarios may be a disincentive to engaging with the scheme and may therefore lend themselves to increased situations of neglect due to individuals/families opting out of the aged care system but without making adequate provisions for the needs of their ageing family member. Alternatively, there is potential for an increase in financial abuse (which may be assisted by the victim) as a means by which to ensure that the family, rather than the government, receives the person's inheritance following their death.

The next tranche of reforms will be progressively operationalised throughout 2015-16. The Public Advocate will continue to monitor and respond to risks emerging for people with impaired decision-making capacity accessing aged care services.

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