

9 February 2024

Department of Health and Aged Care - New Aged Care Act Consultation
GPO Box 9848
Canberra ACT 2601
Australia

Via email: AgedCareLegislativeReform@health.gov.au

Re: Consultation on the new Aged Care Act

Thank you for the opportunity to comment on the exposure draft of the proposed new *Aged Care 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.¹

There are a number of positive elements to the Bill that take significant steps towards implementing some of the core recommendations from the 2021 Royal Commission into Aged Care Quality and Safety (the Royal Commission) final report, including the recognition and focus on the rights of aged care service recipients in the Bill's 'statement of rights'.²

However, I hold a number of concerns regarding the Bill, the first of which is the Bill's provisions that enable others to make decisions for aged care recipients, and the Bill's brief mention of restrictive practices.

Decision-making

I have articulated my concerns in a recent opinion piece in the *Australian Ageing Agenda* on 22 January 2024 ('More work needed on aged care bill'; <https://www.australianageingagenda.com.au/executive/more-work-needed-on-aged-care-bill/>).

In summary, issues associated with the provisions regarding decision-making include:

- how the new system of 'representatives' and 'supporters' will interact with existing state and territory guardianship and related decision-making laws and practices;
- how the new System Governor will deal with conflict when making an appointment, such as a person being unhappy with their decision-maker or when family conflict is involved;
- the provision of safeguards surrounding the appointment of representatives and supporters and my concern that the draft Bill favours administrative efficiency to a fault; and
- whether public guardians, public advocates and public trustees can act as representatives and how the process will work given the varying legislation and policy around each of their roles across different jurisdictions.

I recommend that the Bill be modified to improve integration with existing state and territory systems, and to ensure that representatives are not appointed without appropriate safeguards.

¹ *Guardianship and Administration Act 2000* (Qld) s209.

² *Aged Care Bill 2023* (Cth) cl 20.

I propose that a representative should only be appointed if the person does not already have a relevant decision-maker under a state or territory law, and only under the following conditions:

- the appointment is consistent with the 'will and preferences' of the person concerned;
- the proposed representative has 'a close and continuing relationship with the person'; and
- there is no significant contention about the appointment among people with a genuine interest in the wellbeing of the person.

Further engagement with state and territory guardianship agencies could also lead to the identification of additional improvements.

Restrictive Practices

Regarding restrictive practices, I have on previous occasions identified that the regulation of restrictive practices in aged care settings is sub-optimal, and I note that the exposure draft leaves the future regulation of restrictive practices to new rules that will be made. Although the exposure draft indicates that restrictive practices are to be 'a last resort', I note that the Act will still employ a consent-based model for restrictive practices.³

As I have recommended previously, the Act should require restrictive practices to only be used where they are authorised according to the 'applicable law of the state or territory in which the care recipient is provided with aged care' services. Attention can then shift to the adequacy of the processes in each of those jurisdictions, where further work is now needed. On this score, I advocate strongly for a state and territory based senior practitioner authorisation model, which is superior to a consent-based model.

In addition to the primary concerns detailed above, I would also like to raise a series of additional issues associated with the exposure draft.

Implementation/adherence to legislation

The various failings of the aged care system identified by the Royal Commission into Aged Care Quality and Safety suggest that many aged care providers are not complying with existing legislation.

Although a new, rights-based Aged Care Act is a positive step, unless there is compliance, people receiving aged care services will continue to receive substandard care. Therefore, any new laws must be accompanied by mechanisms to monitor how aged care providers are complying with the legislation.

The new System Governor included in the exposure draft is intended to monitor and ensure compliance with the new legislation and its standards, however there is room for the introduction of additional mechanisms to assist with this.

Those best placed to voice whether quality care is being provided are the recipients themselves, as recognised by the Royal Commission.⁴ This means that a robust, accessible and independent complaints and monitoring system must be in place to ensure that the people receiving care are able to voice any concerns they hold via a variety of means and methods.

The following suggestions could assist in enhancing the complaint system proposed in the Bill, so that the system can monitor as well as respond to complaints. The introduction of these measures will also allow for incidents that involve violence, abuse or neglect of aged care service recipients to be more readily identified, as opposed to a more traditional complaint system which is focussed on service dissatisfaction.

³ Aged Care Bill 2023 (Cth) cl 17.

⁴ *Royal Commission into Aged Care Quality and Safety* (Final Report, February 2021) vol 3B 14.3.1 496.

Accessibility of complaints mechanisms

The vast majority of people residing in residential aged care facilities (and potentially those receiving home care packages) have or are experiencing some degree of cognitive decline that accompanies the ageing process. For those in residential aged care facilities with a form of dementia, this decline can be significant, often resulting in people not being able to communicate confidently, either verbally or via written correspondence.

In these circumstances, and particularly if a person with dementia is not supported or visited regularly by family and friends, the ability to complain about the quality of services received or any incidents that may occur is limited.

The accessibility of complaints mechanisms for aged care residents experiencing cognitive decline should therefore be a key factor in the design of any new complaint system.

One possible mechanism to improve accessibility and safeguarding for those unable or unwilling to make complaints or register incidents would be the introduction of a Community Visitor Scheme into the aged care system.

Community visitor programs (similar to the community visitor program that operates under the *Public Guardian Act 2014* (Qld)) monitor the treatment and services provided to vulnerable people living in defined types of accommodation. They provide an on-going presence of external visitors, with a complaints and inquiry function,⁵ which can assist with identifying and raising issues for people with vulnerabilities and progressing them to resolution.

Independent advocates can perform similar functions to community visitors, although engaging their services generally requires proactive effort that may be beyond the capabilities of some aged care residents.

The current Commonwealth-funded aged care volunteer visitors scheme has the potential to reduce the incidence of elder abuse in residential aged care. At present, the scheme links volunteer community members with aged care residents for the purpose of companionship and friendship.⁶ It is unclear, however, whether these volunteers would have the skills or inclination to identify and address the mistreatment of residents appropriately and effectively.

In contrast, the Queensland community visitor program employs community visitors to undertake regular announced and unannounced visits to specified accommodation sites for the purpose of monitoring service delivery.⁷ Queensland community visitors have legislative authority to undertake functions such as lodging and resolving complaints on behalf of residents with impaired decision-making capacity, talking with staff and residents to clarify issues and concerns, and reviewing documentation and programs relating to residents' support and care.⁸ Community visitors can lodge reports with the Office of the Public Guardian⁹ that also provides the reports to service providers for their information and follow-up action.¹⁰

While the introduction of a community visitor scheme for aged care services was not specifically noted in the recommendations of the Royal Commission, it was recommended¹¹ that enhanced

⁵ *Public Guardian Act 2014* (Qld) s 41.

⁶ Commonwealth Government Department of Health, Ageing and Aged Care: *Review of the Commonwealth Aged Care Advocacy Services* (20 February 2016) <<https://agedcare.health.gov.au/support-services/national-aged-care-advocacy-framework-consultation>>; See also *Aged Care Act 1997* (Cth) ch 5 pt 5.6 div 82 s 82-1(1)(a)(b)(c). Accessed online February 2019.

⁷ Office of the Public Guardian (Queensland), *Community Visitors*, Office of the Public Guardian <www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>. Accessed online April 2019.

⁸ *Ibid.*

⁹ *Public Guardian Act 2014* (Qld) s 47(1).

¹⁰ *Ibid* s 47(3).

¹¹ Royal Commission into Aged Care Quality and Safety (Final Report, February 2021) recommendation 106.

advocacy be provided to support aged care service recipients. In addition to individual advocacy services, this recommendation also referred to systemic advocacy, a role that could be incorporated into a community visitor scheme for the sector, potentially reporting to the Inspector-General of Aged Care, and thereby contributing to the systemic advocacy functions associated with this role.

To further ensure that meaningful complaint mechanisms are a focus of the new Aged Care Act, additional clarity could be provided around the provision of supports and advocacy for individuals and their supporters to make complaints.

Although the concepts of accessibility and building the capability of individuals to make complaints are mentioned in the exposure draft,¹² a much more specific set of requirements detailing what assistance can be provided by the Aged Care Quality and Safety Commission should be considered for inclusion. This would provide an enforceable mechanism to ensure that such supports are provided to people who lack the ability to voice their complaints.

Independence of complaints

The Royal Commission found that people are reluctant to make complaints for various reasons, including the perceived independence of any complaint system.

Under the proposed new Act, it does not appear that an independent Aged Care Quality and Safety Authority will be established to replace the Aged Care Quality and Safety Commission as recommended by the Royal Commission (Recommendation 10).

The separation of a Complaints Commissioner role from the Aged Care Quality and Safety Commission may therefore assist in providing additional confidence to people that their complaints will be handled independently, without any perceived threat of retribution or other issues that may arise from the complaint being addressed by members of the collective aged care system.

The Royal Commission also recommended that the Inspector-General of Aged Care be responsible for reviewing complaints at the request of either party, following consideration by the independent Complaints Commissioner.¹³ It is currently unclear, according to this exposure draft and the current *Inspector-General of Aged Care Act 2023* (Cth), whether this will occur. Further clarity around the implementation of this recommendation is therefore requested.

Thank you again for the opportunity to provide feedback on the exposure draft.

Should you wish to discuss any of the matters I have raised in this submission further, please do not hesitate to contact my office via email public.advocate@justice.qld.gov.au or phone 07 3738 9513.

Yours sincerely

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John Chesterman (Dr)
Public Advocate

¹² *Aged Care Bill 2023* (Cth) cl 144

¹³ *Royal Commission into Aged Care Quality and Safety* (Final Report, February 2021) vol 3B 14.4.2 512.