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Department of Health and Aged Care – New Aged Care Act Consultation
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To the Aged Care Legislative Reform Team

Thank you for the opportunity to make a submission regarding the new Aged Care Act Exposure Draft. The new Act is welcome as it will address many of the recommendations from the Aged Care Royal Commission. It will realign aged care practices to a human rights focus, placing the aged care recipients at the centre of policy and practice.

As Public Advocate (PA) for South Australia, I am the guardian appointed by the South Australian Civil and Administrative Tribunal (SACAT) to make substituted decisions in relation to accommodation, lifestyle, and/or health matters for approximately 2050 adults with impaired decision-making ability. Of these, over 750 are 65-years-of-age or older with over 400 living in residential aged care. There has been a 100% increase in statutory guardianship appointments over the last five years which is partly attributable to more older people being affected by stroke or dementia.

Noting the broad scope of the Aged Care Bill, the following comments relate to important key topics relevant to the work of the Office of the Public Advocate (OPA) including the authorisation and use of restrictive practices, supported decision-making and the roles of representatives and supporters.

1. Restrictive Practices

I have an interest in the use and regulation of restrictive practices, as many people under my guardianship are subject to restrictive practices in aged care settings. OPA staff, under my delegation, consent to certain restrictive practices in aged care settings. I may also be appointed as guardian for the sole purpose of providing consent for the use of restrictive practices when no one else is available.

1.1 The Rules

Section 106 of the Bill notes that requirements relating to restrictive practices will be prescribed by the Rules. The discussion paper acknowledges that the Rules are currently being drafted based on the *Aged Care Act 1997, Quality of Care Amendment (Restrictive Practices) Principles 2022* (Cth). The Rules, as experienced with the evolution of the National Disability Insurance Scheme (NDIS), often provide specific details, along with requirements that may have compliance and other implications. The delay in drafting these Rules is a concern, considering the Act is expected to commence on 1 July 2024. This allows little time for proper consultation on important details and requirements from key stakeholders and for the sector to prepare for any new requirements.

Recommendation 1: That drafting of the Rules relating to the authorisation of restrictive practices is prioritised so that a proper consultation can be undertaken regarding specific requirements and details in the proposed Rules.

1.2 Education, awareness, and training

At the commencement of the *Aged Care Act 1997, Quality of Care Amendment (Restrictive Practices) Principles 2022* (Cth), I expected a significant increase in applications for statutory guardianship as providers became more aware of their obligations in relation to restrictive practices. This increase did not eventuate to the extent anticipated initially. This may have been due to South Australian law already having prescribed authorisations for directing a person where to live; for detention; and for the use of force in the *Guardianship and Administration Act 1993* (SA), as well as provisions under the *Consent to Medical Treatment and Palliative Care Act 1995* (SA) for chemical restraint. It may also have been due to a lack of understanding of restrictive practices and the requirements for consent or authorisation.

However, in the past year, there has been an increase in the number of guardianship orders for people over the age of 65 years, but it is not clear if that is in response to restrictive practices or the general ageing of the population, or both.

Nevertheless, increased education about what constitutes a restrictive practice and the requirements for authorisation in a residential aged care setting in necessary. Section 392 of the Exposure Draft relates to grants which the System Governor may enter into on behalf of the Commonwealth. Training in restrictive practices may fall under S392 (2) (b) which relates to grants to strengthen the capability of and raise awareness among registered providers and aged care workers about specialised complex needs of those accessing funded aged care services.

Recommendation 2: There is a need for further education for in the aged care sector and the community in relation to the use and authorisation of restrictive practices to ensure age care recipients' rights are protected.

1.3 Consent vs authorisation

The use of the term 'consent' in relation to restrictive practices in the Bill is problematic as it conflicts with the requirement for substitute decision makers to make decisions in line with the 'will and preferences' of the aged care recipient. In addition, there is the conundrum that once a

restrictive practice is consented to then it is, by definition, not a restrictive practice. Restrictive practices should be 'authorised' in line with applicable State laws.

Recommendation 3: That the use of 'consent' in relation to restrictive practices be replaced with "authorisation'.

The consultation report highlights that 'the government is working with states and territories on establishing clear arrangements for appointing a restrictive practice substitute decision maker under state and territory consent and guardianship laws.' South Australia has provisions for the authorisation of restrictive practices within existing legislation. The *Consent to Medical Treatment and Palliative Care Act 1995* (SA) provides a hierarchy of decision-makers, but not all restrictive practices (e.g. environmental restrictions in most instances) can be deemed to fall under the Consent Act. The *Guardianship and Administration Act 1993* (SA) (Section 32) enables the SACAT to authorise detention and/or the use of force with those orders being reviewed either 6 monthly or 12 monthly (compared to the usual 3 year guardianship order where those restrictive practices do not apply). SACAT can also authorise and direct a person where to reside or grant that authority to a guardian, including the Public Advocate. SACAT can also appoint the Public Advocate or other guardian to authorise other restrictive practices such as environmental or mechanical restraints.

Many people under statutory guardianship are also subject to restrictive practices in the disability sector. A consistent approach across both the aged care and the disability sectors would allow for a better understanding of restrictive practices as support recipients and workers move between the disability and aged care sectors. Families, carers, and guardians may also interact with both sectors.

Given there are state and territory decision making and consent laws in place, the authorisation of restrictive practices in the Aged Care Act needs to interact effectively and synergistically with those state laws.

Recommendation 4: The Aged Care Act should interact effectively with state and territory laws and empower them to develop a restrictive practices authorisation regime in aged care as occurs in disability services under the National Disability Insurance Scheme (NDIS).

2. Supported decision-making

Exercising choice and control over one's life is a fundamental right. The PA supports the inclusion of supported decision-making principles in the Exposure Draft, noting this is a move to align principles and practices with human rights and with the disability sector. However, the implications need to be understood and resourced to enable the principles to be enacted, meaningful and realised.

The consultation paper notes the principles are based on recommendations of the Australian Law Reform Commission (ALRC) and the research report released by the Royal Commission into Abuse Neglect and Exploitation of People with Disability. Representatives and supporters must comply with these principles.

The OPA has undertaken several projects to facilitate supported decision-making practices when working with people under statutory guardianship. Although I am appointed under the *Guardianship and Administration Act 1993* (SA) as a substitute decision-maker, the OPA acknowledges supported decision-making principles within its work wherever possible. In practice however, supporting a person through a process of engagement requires time and resources which may not always be available, particularly for urgent decision making or within the legislated framework that currently establishes statutory substitute decision-making.

Supported decision-making requires time, resources and skills when done properly. It should be an expectation that all aged care staff work to the supported decision-making principles, and that this is not just a requirement of supporters and representatives. This should be embedded in Section 22 Statement of Principles

In line with the UN Convention on the Rights of Persons with Disability (UNCRPD) Article 12, funding to access supported decision-making services should be made available in an aged care plan. This would enable a person to access objective support in exercising the person's legal capacity and avoid the need for the appointment of a substitute decision maker.

Section 392 relates to grants which the System Governor may enter into on behalf of the Commonwealth, and there may be scope to embed supported decision-making principles through grants within this section.

Recommendation 5: The Aged Care Act is amended to require aged care staff and service providers to work to the supported decision-making principles.

Recommendation 6: The Aged Care Act to include provision for grants for education and training about supported decision-making for workers in the aged care sector, supporters, representatives, and guardians.

Recommendation 7: My Aged Care plans provide funding for people to enable access to supported decision-making services in the community.

3. Guardianship

3.1 Recognition of Existing Guardians

Section 28 of the Exposure Draft details the role of the guardian and notes that they will still be required to be appointed as a representative. This is an additional administrative barrier for statutory and private guardians to undertake their role. It also sets up a secondary authorising arrangement over those already existing in states and territories, which could result in persons being appointed as a representative under the Aged Care Act when there is already a guardian appointed under state legislation.

The OPA has experienced similar challenges when dealing with the National Disability Insurance Agency (NDIA) for NDIS participants under statutory guardianship. The Public Advocate and delegates are not recorded as a nominee for NDIS participants and the NDIS Act is silent on the role of statutory guardians appointed under state legislation. This has stalled the information sharing agreements between the NDIA and the OPA pending the outcome of legal advice being sought by the NDIA.

Section 376 relating to the appointment of the statutory guardian as a representative under the Act could be problematic as the System Governor has to take the wishes of the individual into consideration when making the appointment. The appointment of a statutory guardian often is not the wish of the client. The guardian is appointed by the SACAT as they have deemed that the person has impaired decision-making ability and there is no other suitable person who is able to assist.

The increase in guardianship appointments in South Australia over the past five years is partly attributable to the age-related conditions. An increase in appointments has also been evident since the commencement of the NDIS. The Aged Care Act should avoid measures which result in more people unnecessarily coming under statutory guardianship and should ensure avenues are in place for representatives outside of statutory guardianship.

Recommendation 7: The Aged Care Act recognise statutory guardianship appointments under state/ territory legislation as a representative and not require an additional process to be appointed as a representative. Where there is no statutory guardian, and a representative is required the appointment proceeds in line with Section 376.

The consultation paper seeks an opinion on whether it is appropriate for an older person to be able to have either a representative *or* a supporter. It also asks whether there are situations where an older person, or their families and support networks, might want *both* a representative and a supporter.

A representative should only be appointed where the person is no longer able to make their own decisions and should occur only as a last resort. Under state legislation a statutory guardian can only be appointed where the person has impaired decision-making ability (mental incapacity). The final report from the Royal Commission into Abuse Neglect and Exploitation of People with Disability makes similar recommendations relating to the appointment of representative as a last resort.

3.2 Adequate Funding for Supported Decision Making

Section 30 of the Exposure Draft provides comprehensive details about the duties of the representative and how they should act on behalf of the individual. These align with maintaining the person's rights, respecting their will and preference, and observing the principles based on the recommendations of the ALRC. For statutory guardians, these principles are recognised and supported; however, the capacity to implement this approach is not currently available or funded.

Recommendation 8: Decision-making supporters and representatives should have comprehensive training as they must comply with supported decision-making principles. This will go some way to ensuring the rights, wishes and preferences of the support recipient are upheld.

Recommendation 9: Where a statutory guardian is appointed, and there is a requirement to follow supported decision-making principles and practices, appropriate funding and resources are required to enable implementation.

Thank you for the opportunity to provide feedback on the consultation paper and Exposure Draft. I recommend the alignment of practices and processes where possible across the aged and disability sector. These practices are underpinned by a human rights framework (UNCRPD). This will ensure consistency of practice allowing for the smooth transition of support recipients and workers in these human service sectors.

If you would like further information, please do not hesitate to contact me.

I look forward to seeing the resulting legislative amendments.

Yours sincerely

Anne Gale
Public Advocate