

Department of Health and Aged Care - New Aged Care Act Consultation
Via email: AgedCareLegislativeReform@health.gov.au

To Whom it May Concern

SUBMISSION REGARDING THE AGED CARE BILL 2023 EXPOSURE DRAFT

Given the intersection of the *Aged Care Act 1997* (Cth) with the *Guardianship and Administration Act 1990* (WA), the Public Advocate (Western Australia) has provided the following feedback in relation to the *Aged Care Bill 2023 (Exposure Draft)* (**Bill**), for your consideration.

At the outset, we observe that there is no general statement in the Bill explaining to how the provisions of the Bill are intended to operate in relation to State laws. There are specific provisions in proposed sections 125, 126 (relating to Chapter 5, Part 3) and in proposed section 361 (relating to Chapter 7, Part 5), which deal with the concurrent operation of State and Territory laws. However these provisions are narrow in their operation. In our view, there is ambiguity as to how State laws are intended to operate in light of the other provisions in the Bill. We invite you to consider including, for the sake of clarity, an express provision dealing with the interaction of the Bill as a whole with State and Territory laws.

Part 4 – Supporters and representatives

Part 4 of the Bill raises the most significant concern for the Office of the Public Advocate, as it is unclear how supporters and representatives will interact with substitute decision-makers appointed under the *Guardianship and Administration Act 1990* (WA).

In WA, the State Administrative Tribunal (**Tribunal**) can appoint guardians and administrators for persons who lack decision-making capacity, where there is a need for a formal appointment. Individuals with decision-making capacity can also appoint enduring guardians and attorneys, whose authority then endures beyond the person's loss of capacity.

More specificity is required about how guardianship and administration orders, and/or enduring power of guardianship and enduring power of attorney documents will operate if a supporter or a representative is appointed under the new aged care Act, and which role will take precedence, particularly in cases where conflict arises.

Proposed section 28 (role of guardians etc.) states that where such people have been appointed (i.e. guardians, enduring guardians, administrators, attorneys), they cannot make decisions under the new aged care legislation unless they are appointed as a representative under section 376 of the Act.

At best, this requirement seems to create a duplication of processes, if the same person is required to be appointed in both roles. There is also an administrative burden presumably placed on guardians/enduring guardians and administrators/attorneys to apply to the System Governor to be appointed as representative.

In addition, proposed section 30 (duties of representatives) in Part 3, includes the need for representatives to apply a will and preferences model in their substitute decision-making, whereas WA's guardianship and administration legislative framework requires substitute decision-makers to apply a best interests model. It's unclear how representatives who are appointed under the State regime and the new Commonwealth regime will operate – which system will take precedence?

At worst, proposed section 28 seems to create the potential for conflict where different people are appointed to the two roles.

For example, a family member could be appointed as enduring guardian and attorney with the authority to make decisions regarding where the person lives, what services they access, what medical treatment they receive and how their money is managed. This person was appointed by the older person when they had capacity and made their choice of who they would like to make decisions on their behalf in the event that they lost capacity. The enduring guardian/attorney could have been fulfilling their obligations as substitute decision-maker appropriately, and making decisions in the older person's best interests. However, the older person who has now lost capacity, is not happy with the decision that was made on their behalf to move into aged care and they are now asserting that they do not wish for their family member to be appointed as their representative (in addition to their role as enduring guardian/attorney).

In this situation, if the System Governor appoints a different person under the new aged care legislation, it is the Public Advocate's understanding that the representative is then authorised to make decisions under or for the purposes of the new aged care Act, with the enduring guardian/attorney having no decision-making authority under the new legislation. This is likely to cause confusion for those people appointed as enduring guardian/attorney who have been making decisions regarding accommodation, services and health care for example. There could also be conflict if these two people have differing views about decisions. If the representative's decisions take precedence, as it appears they would under the new legislation, it seems to remove the legal authority that was given to the enduring guardian/attorney by the older person themselves, at a time when they had capacity to plan for their future decision making. It is unclear what recourse would be available to substitute decision-makers to resolve disputes with representatives regarding decisions.

The same sort of issues can be seen with regard to the authority of an administrator appointed under State legislation to make financial decisions for an individual, where the System Governor appoints a different person as representative for an individual who accesses funded aged care services. It is not abundantly clear from proposed section 376 (appointment of representatives) what criteria is to be applied by the System Governor to assess suitable representatives? For instance, will the representatives have the same checks and balances that the Public Trustee has when they are appointed as administrator? If there is conflict between a representative and an administrator appointed by SAT when making a financial decision about funding for aged care, it appears that the representative's decisions, rather than the administrator's decision would take precedence. Again this is likely to cause confusion and where there is conflict, it is unclear what recourse would be available to substitute decision-makers to resolve disputes with representatives regarding decisions.

Similarly, there may be instances where the Tribunal has appointed a guardian with services, accommodation and treatment authority, but the System Governor appoints someone else as representative. Once again, if the Public Advocate's understanding is correct, in that the representative's decisions will take precedence, this seems likely to cause confusion and there could be instances of conflict between the two. It's difficult to see how this arrangement will operate on a day-to-day basis where guardians are often required to make immediate decisions. A guardian having to consult with a representative will cause delays in decision making where immediate decisions are required and there is the potential for this to be unworkable on a practical level. Again, it is unclear what recourse would be available to substitute decision-makers to resolve disputes with representatives regarding decisions.

The potential for conflict between supporters and guardians/enduring guardians or administrators/attorneys is also of concern. There could be a situation where an individual has been deemed to lack capacity to make decisions regarding a particular area of their life and therefore a substitute decision-maker is making those decisions, however the person is still making decisions in other areas of their life, such as their accommodation and services. This situation could see the System Governor appoint a supporter under the new aged care legislation, as the person has capacity to make these decisions, but requires support. It is unclear how these two roles would then interact and what would happen if there was conflict between the supporter and guardian/enduring guardian or administrator/attorneys.

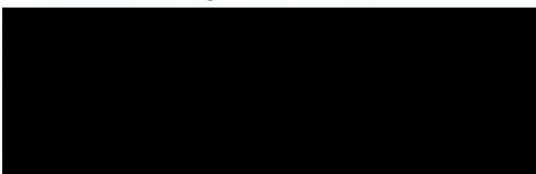
The Public Advocate's view is that where a guardian/enduring guardian is appointed with the relevant authority, they should automatically take on the authority of representative without having to make any request to the System Governor (as compared to the process set out in proposed section 376(4)). Consideration also needs to be given to the potential automatic authority of administrators/attorneys.

It is unclear whether the Bill takes into account advance health directives (AHDs), and how these may affect the decisions that a representative is permitted to make. Greater clarity is needed to understand how an AHD would be interpreted in an aged care facility if a person had included decisions about their healthcare that would come into effect in an aged care context. It is vital that decisions made in a person's AHD take precedence over any decisions of representatives (as is the case for the precedence of decisions in an AHD over the decision of guardians/enduring guardians), because the decisions contained in an AHD are the person's own treatment decisions that they expressed when they had capacity.

Proposed section 25 (giving information and documents to supporters) is also problematic given the confidentiality provisions under section 113 of the *Guardianship and Administration Act 1990* (WA). Again it is unclear how this provision of the Bill is intended to interact with State laws. This could lead to conflict where family members and friends may be appointed as supporters, but independent appointments of guardian have been made due to family conflict. These supporters may then insist on being provided with copies of documents under proposed section 25 which the guardian is unable to provide due to the confidentiality provisions of the *Guardianship and Administration Act* (WA).

Thank you in advance for considering this feedback, and I would welcome an opportunity to discuss this feedback further if required.

Yours sincerely



Pauline Bagdonavicius PSM
PUBLIC ADVOCATE

15 February 2024