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5 March 2024

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

Via email: AgedCareLegislativeReform@health.gov.au

To Whom It May Concern

Thank you for the opportunity to comment on the exposure draft Aged Care Bill 2023 (the Bill).

The Office of the Public Guardian (OPG) in Queensland is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity, and children and young people in the child protection system or staying at a visitable site.[1]

Relevant to this consultation, the Public Guardian can make decisions about personal matters for adults with impaired decision-making capacity if appointed by the Queensland Civil and Administrative Tribunal (QCAT) pursuant to the *Guardianship and Administration Act 2000*, or as attorney by the adult under an enduring document pursuant to the *Powers of Attorney Act 1998*. OPG applies a structured decision-making framework to maximise the adult's participation in decision making as a fundamental aspect of their inherent dignity.

Having had the benefit of reading the Queensland Public Advocate's submission of 9 February 2024, I write to support and reinforce the Public Advocate's concerns with the Bill. I strongly support the Public Advocate's feedback relating to the decision making, restrictive practices and complaints components of the Bill. I also support the Western Australian Public Advocate's feedback relating to the Bill's concurrent operation with state and territory laws, including potential conflicts arising from proposed sections 25, 28 and 376 regarding confidentiality and the interaction between supporters, representatives and state and territory-based decision makers, as discussed in their submission of 15 February 2024.

The Bill is a positive and progressive reform which places the rights of aged care recipients at the forefront and centre of the aged care system. This consultation provides an important opportunity to address the complexity, duplicative processes, administrative burden, and potential conflict the Bill appears to create between the aged care legislative framework and relevant state and territory laws.

I support the Queensland Public Advocate's proposal to introduce a national community visitor scheme for aged care, modelled on the current community visitor and advocacy function of OPG. A fully funded national community visitor scheme with legislated authority would allow for instances of abuse, neglect and exploitation of persons in aged care to be readily identified and addressed. Such a scheme would need to be properly resourced by the Australian Department of Health and Aged Care,

[1] Visitable sites for children and young people include youth detention centres, police watch houses, authorised mental health services and residential care.

with legislated powers afforded to the community visitors to monitor, inquire, complain and advocate on behalf of aged care recipients.

Thank you again for the opportunity to comment on the Bill. I trust this information is of assistance. If you require further information, please contact Ms Kelly Unsworth, Principal Policy Officer, OPG, at [redacted] or on [redacted]

[redacted]

Shayna Smith
Public Guardian

Enc. Queensland Public Advocate submission 9 February 2024
Western Australia Public Advocate submission 15 February 2024

The Public Advocate
Influencing change to transform lives

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.

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[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 Guardian[9] 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 recommended[11] that enhanced

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[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

[redacted]

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.

Government of **Western Australia**
Department of **Justice**

Office of the PublicAdvocate

Department of Health and Aged Care - New Aged Care Act Consultation
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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.

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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 (**AHD**s), 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 contain 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 confliect. 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

[redacted]

Pauline Bagdonavicius PSM
PUBLIC ADVOCATE

15 February 2024