6 March 2024

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

Sent by email to: AgedCareLegislativeReform@health.gov.au

Dear Sir /Madam

Exposure Draft Aged Care Bill 2023 (Exposure Draft)
Representatives' Provisions

As a values-based, not-for-profit provider of aged care services, Catholic Healthcare fully supports the objective of ensuring the delivery of high-quality care and services to all individuals accessing funded aged care services.

We also support the reform agenda that has flowed from the Royal Commission into Aged Care Quality and Safety and are grateful for the consultation that has been afforded to the Sector in relation to the many aged care reforms that have been released in recent years.

We are also grateful for this opportunity to provide comments on the Exposure Draft. This letter considers provisions relating to Representatives. We are concerned that, as discussed below, some of these provisions will have unintended consequences particularly when considered in light of other provisions within the Exposure Draft, the Aged Care Quality Standards and NSW State based law.

By way of explanation, this letter is divided into the following sections:

- The Powers of Representatives;
- Protections against Abuse of Power by Representatives;
- Issues Arising including:
    - A consideration of the situation where the individual accessing funded aged care services retains capacity;
    - A consideration of the enduring nature of Representatives' authority;
    - A consideration of the breadth of Representatives' Powers and what decisions might be beyond Power;
    - Questions arising when considering whether decisions or actions are under or for the purposes of the Act;

- Rights of Providers at the Present Time;
- Suggestions for consideration.

For completeness, I note that the substance of this letter was sent to two senior officers of the Aged Care Quality and Safety Commission, by letter dated 29 February 2024. This was at their request. Catholic Healthcare Chief Counsel is a signatory to a letter concerning the Statutory Duties and Compensation Pathways' provisions of the Exposure Draft dated 29 February 2024, cosigned by fourteen other Chief Counsel (or equivalent officers) of other Aged Care Providers.

Powers of Registered Representatives under the Exposure Draft

S 27 (1) provides that a registered representative (**Representative**), may (on behalf of the individual accessing funded aged care (**Individual)**) do anything that may be done or must be done by the Individual (including making decisions (S 27(3)) under, or for the purposes of the Act. S 27 (2) sets out an exception relating to the giving of consent to a restrictive practice.

S 27(4) provides that anything done by the Representative under/for the purposes of the Act has the same effect as if it were done by the Individual. S 27 (5) provides that if the Individual is required under, or for the purposes of the Act to do a thing, the Representative fails to comply with a requirement of the Act, this is deemed to be a failure of the Individual to comply with the requirement for the purposes of the Act.

S 28 (1) provides that a person must not make a decision on behalf of an Individual under or for the purposes of the Act unless they are a Representative.

S 28 (2) provides that the acts and decisions of the Representative prevail over even Tribunal and Court-appointed guardians and attorneys, except in relation to consent to restrictive practices.

This is extraordinary.

S 29 requires a provider to give the Representative any document/information that the provider is required to give to the Individual, and this information must be the same in every respect as the document/information given to the Individual.

This can be extraordinary if there are allegations of abuse, including sexual abuse of the individual against the Representative.

S 32 (1) protects the Representative from breach of their duties (see below) if, when they do a thing, the Representative reasonably believes that the Representative is doing the thing to comply with the Representative's duties. S 32 (2) contains a similar protection relating to the refraining from doing a thing when the Representative has the reasonable belief.

S 34 protects the Representative against liability (criminal or civil) for acts or omissions or anything done in good faith in their capacity as Representative.

Protections against Abuse of Power by Representatives

The System Governor appoints Representatives (S 376). In appointing an individual or individuals as Representatives, the System Governor:

- Must have regard as to whether there are any attorneys or guardians appointed for the Individual, and if they request to be appointed, the System Governor must (subject to some stated exceptions) appoint them;
- In other cases, the System Governor must be satisfied that:
    - the person is able to comply with the duties of Representatives;
    - The person consents to the appointment;
    - the System Governor takes into account the wishes of the Individual (but their consent is not required); and
    - any other requirements of the Rules are considered.

Under S 379, the System Governor must give notice of the appointment of Representatives to a range of persons including, the registered provider (current and future) and under S 380, the notice must contain details of how a person can apply for reconsideration of the decision. The details do not yet appear to be available.

It is unclear the qualifications of the persons making the decisions to appoint Representatives and the process. For example, in State Administrative Tribunals there are tribunal members who are legally qualified and members who are medically qualified. There are also requirements for those members such as Codes of Conduct and procedural rules at to the conduct of hearings.

S 30 sets out the duties of Representatives which include, the duty to:

- Inform the System Regulator of certain matters;
- act in a manner that promotes the personal, cultural and 1 social wellbeing of the individual;
- act honestly, diligently and in good faith;
- Apply best endeavours to maintain the ability of the Individual to make their own decisions;
- Refrain from doing a thing on behalf of the Individual unless satisfied that (a) it is not possible for the Individual to do/be supported to do the thing; (b) it is possible for the Individual to do the thing, but the individual does not want to do the thing themselves;
- Comply with the Rules (not yet available);
- If the Representative either does/refrains from doing a thing, then the Representative must:
    - Act in a manner that promotes the personal, cultural, and social well-being of the Individual;
    - Act honestly, diligently and in good faith;
    - Make reasonable efforts to ascertain the will and preferences of the individual or if this is not possible, their likely will/preferences;
    - Take reasonable steps to consult with other Representatives, (when appropriate), any person who assists the individual day-to-day with daily activities, (or if there is no such person) family members or other persons who have a close continuing relation with the individual;

- Act in accordance with the following principles:
  - The Individual's will and preferences (likely will and preferences) must be given effect:
  - The Individual's will and preferences can only be overridden if necessary to prevent serious risk to the Individual's personal, cultural, and social wellbeing;
  - The Individual's Rights under the Statement of Rights mut be promoted and upheld and actions taken on behalf of the Individual must be the least restrictive possible.

Again, this is extraordinary. Currently, Guardianship legislation refers to the 'best interests of the person' for example section 16 of *the Guardianship Act 1987 (NSW).*

What if the individual's will is illogical or could pose a risk to other individuals, for example, behaviours which could endanger other residents or staff.

Under S 33, the Individual does not commit an offence in relation to any act or omission of a person acting in that person's capacity as a Representative.

Under S 35, a Representative (or former Representative) commits an offence if he/she uses their powers as Representative to dishonestly obtain a benefit for the Representative or any other person, or dishonestly cause detriment to another person.

S 377 provides that the appointment of a Representative does not prevent the Individual from doing anything that the Individual may otherwise do under or for the purposes of the Act.

Issues Arising

Notwithstanding:

- the duties imposed on Representatives in S 30;
- the offences for breach of these duties in S 35;
- the preservation of the powers of the Individual under s 377;
- the inquiries that the System Governor must make under S 376 before appointing a person as a Representative,

the powers of Representatives are extremely broad; broader even than the powers of privately/publicly appointed guardians and attorneys (at least in NSW and Qld). The powers of the Representative also do not consider questions of the capacity of the Individual, the ability of the Individual to manage their own person, the ability of an Individual to revoke or change the appointment of an enduring guardian prior to losing capacity nor the understanding of the Individual as to the nature of the appointment, and (based on the sections of the Act that are currently available and S 28) they can override appointments by Courts or Tribunals i.e. those persons who may also be appointed but do not apply/consent to be a Representative, under and

for the purposes of the Act (except in relation to restrictive practices). This combination may lead to unintended consequences and raise questions as set out below.

Powers of Representatives when Individuals have Capacity/Are able to Manage their Own Person

Typically, under Private Appointments of Enduring Guardians Attorneys in NSW, appointments are expressed to commence when the Individual loses capacity. The Individual can elect otherwise, but typically this is the case. When this is the case, there is no question of the enduring Guardian/Attorney acting before capacity is lost. In the case of private appointments of enduring guardians in NSW, the appointment takes effect when a person is in need of a guardian i.e. is incapable of managing his person.

Under the Representatives scheme, there appear to be no such restrictions.

This may have an unintended consequence of disempowering the Individual and opening up opportunities for exploitation.

While the powers of the Individual are preserved under S 377 and the duties of Representatives are set out in S 30, in our experience, many older people become increasingly passive as they age, and family members/representatives can become increasingly assertive. In the case of family members/representatives, this typically comes out of a desire to protect the Individual. However, even well-meaning family members/ representatives can act against the interests/wishes of the Individual, while at the same time acting honestly and in complete good faith, particularly when Individuals have become increasingly passive or have difficulty expressing their wishes. This can occur due to the personality type of the family member/representative, their lack of insight into the Individual/their conditions and needs, their lack of insight into/disregard of their own behaviours, the patriarchal nature of their culture and other factors.

The Enduring Nature of Representatives

Typically, under Private Enduring Appointments in NSW, the appointment is only authoritative when the enduring nature of the appointment is explained to the Individual and it is certified by their legal practitioner that the Individual understands this. In the case of public appointments, the Tribunal has had the opportunity to consider the needs and conditions (including where relevant, the capacity) of the Individual, the decisions to be made against the criteria of the Guardianship Act and case law under that Act, and the time frame during which the appointment should remain. While this sometimes results in longer-term appointments with plenary powers, frequently, appointees are appointed with limited functions and for limited terms.

Except in the case of Representatives who had previously been appointed as guardians or attorneys, this does not seem to be the case with Representatives. Representatives' powers seem to endure regardless of the Individual's knowledge and understanding of this fact and regardless of the decisions to be made.

What is beyond the decision-making Power of the Representative?

Regardless of an appointment (public or private), there are some things that a guardian/attorney cannot currently do/decide for persons who lack capacity or with sufficient types of disability.

Typically, these things are of an intensely personal nature and/or are coercive in nature, and in some cases even Tribunals and Courts may consider that the decisions/actions are beyond their powers even though they have the whole mechanism of the Court or Tribunal at their disposal.

Examples of these types of decisions/actions typically relate to persons lacking capacity/with a sufficient disability and include things such as the giving/withholding of consent to sexual relations, giving/withholding consent to marry, changing or creating an Advance Care Directive, voting, making, or changing a will, potentially, giving consent to special treatment (as defined in the Guardianship Act NSW), imposing/enforcing a coercive power/function.

Subject to questions whether a particular issue is under/for the purposes of the Act, Representatives could have some or many of these powers given that:

- They can make any decision the Individual could (S 27) (see further comments below);
- They are not fettered by issues of the capacity of the individual;
- Their powers endure;
- They have the extremely broad rights of the Individual by virtue of S 20 (under which the Individual has the right to, among other things, exercise choice and make decisions that affect the Individual's life, and take personal risks including in pursuit of the Individual's quality of life, social participation, and intimate and sexual relations);
- No one else can make decisions where the Representative is empowered to do so (S 28(1));
- The rights of Individuals under S 20 are also, in some cases, bolstered/supported by various provisions of the Aged Care Quality Standards, breach of which leaves providers open to civil penalty units (S 97). Breach of S 97 is also a breach of a condition of registration.

Further, where Representatives make decisions of this type and instruct providers to support or assist, where does that leave the provider and its staff?

Consider a circumstance where a Representative (acting in good faith) consents to sexual relations for a resident without capacity and instructs staff to assist or support that sexual relation to take place. It would appear that the Representative has the power to do this under the Act, given the rights of Individuals under S 20 and the powers of Representatives under S 27. However, under S 61I of the NSW Crimes Act 1900, non-consensual sexual relations between adults can form the crime of sexual assault. Sexual Assault is punishable by a term of imprisonment up to 14 years. Those who aid and abet (e.g. staff) can be punishable by a term of imprisonment also for 14 years, S 346, 347. The question then arises whether the Representative's consent under the Act would be sufficient to ensure that the sexual activity was consensual for the purposes of the NSW criminal

law. If not, the provider and its staff, while acting in accordance with the Act and being required to act in accordance with the Act by following the instructions of the Representative in a matter under/for the purposes of the Act (which they would be required to do under the Act) may also be guilty of a crime under the law of NSW.

Earlier in this section and throughout this document, reference has been made to S 27 (1) under which the Representative may, on behalf of the Individual, do anything that may or must be done by the Individual under the Act. In making comments about S 27, it has been presumed that a reference to the Individual's actions means their actions in the ordinary course unaffected by their characteristics, conditions, and capacity at the relevant time; otherwise, the Representative would be unable to act when the Individual could not. It may be helpful to clarify this.

When is an action/decision under/for the purpose of the Act?

The decisions of Representatives are only authoritative when they are under/for a purpose under the Act. As noted above, given clauses in S 20, this can include a broad range of matters including sexual relations, marriage, voting etc.

In other cases, when are decisions under/for the purposes of the Act?

Consent to restrictive practices is specifically carved out of Representatives' powers under S 27(2). Presumably, this is to avoid any confusion as to whether consent to restrictive practices is a matter under/for the purposes of the Act; because of S 27(2) we know that it is not. Where does that leave other matters that would usually be specifically conferred by a Tribunal or might be set out in private appointments.

For example, is healthcare decision making, a decision under/for the purposes of the Act? Standard 1 Expectation Statement for Older People (Latest Exposure Draft of Strengthened Aged Care Quality Standards) states "I make decisions about my care and services, with support when I want it." The Outcome Statement for Outcome 1.3 states, "Older people have independence and make decisions about their care and services with support when they want it." Outcome 3.2 states, "Older people get safe and quality care and services that meet their needs, goals and preferences." On this basis, where Individuals have Representatives, healthcare decision-making would also fall within the powers of Representatives.

From time to time, providers (having observed Individuals and others) form views that substitute decision-makers are not acting in the best interests of the Individual. This does not happen frequently, but it does happen. This does not mean that the substitute decision-maker is acting dishonestly or in bad faith or trying to cause harm to the Individual or acting or personal gain. Sometimes the substitute decision maker lacks insight either into themselves or into the needs/conditions of the Individuals, sometimes they are too busy and there could be other factors. Some examples of this happening in the healthcare domain include substitute decision-makers wanting residents with dysphagia, on modified diets and at risk of choking, to have 'real food' because it would be more enjoyable; a substitute decision wanting a resident with dementia,

variable capacity and at high falls risk to walk unaided so as to strengthen their legs; substitute decision-makers calling ambulances to take residents on end-of-life pathways to hospital for the administration of intravenous fluids on the basis that the hospital will be able to do things that the residential aged care home cannot.. All these decisions were against GP/other clinical advice and may not be in the best interests of the resident.

If this were to occur under the Representatives scheme, what would the provider do? It appears that these sorts of decisions are under/for a purpose under the Act and within the Representatives' powers (S 27), assuming presumptions about S 27 (mentioned above) are correct. They do not appear to in breach of the Representatives' duties (S 30). They are not decisions relating to restrictive practices and do not fall within the exception in S 27(2). The decisions of the Representative prevail over Court and Tribunal appointments (S 28 (2)) (and could even prevail inconsistently against specific Court or Tribunal orders made by a Judge or Tribunal member) and no one other than the Representative can make this decision (S 28(1)).

Even so, in following such instructions real questions arise whether the provider would be acting in breach of their common law duty of care or be in contempt of Court. Such questions could become live if the resident died and there was an inquest or if a common law action for personal injury was brought by other family members. Also, if the resident died or suffered serious injury, would the provider have breached the Aged Care Quality Standards (e.g. Outcome 5.4 relating to Comprehensive Care or Outcome 5.5 Care at the end of life) and be liable to civil penalties (under S 97) and could the provider be guilty of an offence under S 120 for breach of a Statutory duty (which can be a personal liability) and would the compensation pathway be available to the Individual under S 127?

These types of conundrums (whether a decision is under/for the purposes of the Act or not) could arise in relation to medical and dental decisions, access, accommodation, payment of invoices and other matters. They could also occur where the behaviour of the Representative is such that it presents a real risk of psychological/physical injury to staff.

It should also be remembered that persons other than providers are frequently involved in care/ service delivery, together with providers e.g. GPs, hospitals etc. Regardless of whether a decision/action is under/for the purposes of the Act so far as the provider and Representative are concerned, these other persons are not subject to the Act, and decisions of the Representative will not be authoritative in relation to them because they will be acting in accordance with State law or other legal requirements that are applicable to them.

In these circumstances, the following is quite foreseeable: the hospital or general practitioner takes instructions from the Tribunal-appointed guardian, but the aged care home takes instructions from a Representative who is not the Enduring/Tribunal-appointed Guardian. If the instructions of the Representative and State based substitute-decision maker differed or were at odds, would this conflict lead to good care outcomes for the Individual, or would the ensuing confusion create real risks and challenges for the individual, the provider, the Representative, State based authorities and others involved in the Individual's care?

Additionally, it should be noted that staff in residential aged care and home and community services are, typically RNs, EENs, ENs, AINs, PCAs, allied health professionals, pastoral carers, diversional therapists, kitchen, and maintenance personnel. They are very busy and practical individuals, concerned with the welfare of residents and clients. Their activities do not include enquiries as to whether decisions/actions are under/for the purposes of the Act, nor do they extend to trying to resolve conflicts between Federal and State based laws and authorities. Arguably, nor should these workers be concerned with such questions given that it would take time and attention away from their caring and service-delivery duties. This means that consideration of these questions is likely to fall to legally qualified individuals. While some providers will have in-house legal, many will not. Even in cases where providers have in-house counsel, the potential penalties that could be brought home to a provider under the new Act will mean that in-house counsel will be extremely cautious in expressing opinions and this will inevitably lead to expensive legal outsourcing.

Rights of Providers at the Present Time

While the current system is far from perfect, currently, providers have a range of options in dealing with substitute decision makers that cause concern either in terms of the welfare of residents/clients or in terms of the smooth operations of a service. These include:

- Approaching the Guardianship Tribunal for review of appointments (public or private);
- Approaching the Guardianship Tribunal for new appointments or revocation of appointments;
- Approaching the Guardianship Tribunal for urgent consent to medical treatment;
- Approaching the Supreme Court in its protective jurisdiction in relation to a range of matters;
- Referring matters of concern (particularly in the community in NSW) to the NSW Ageing and Disability Commissioner;
- Also, in relation to matters of concern in the community, requesting the police to undertake welfare checks;
- In relation to abuse/suspected abuse (of Individuals or Staff), supporting individuals to seek/renew apprehended violence orders or requesting the police to do so;
- In the case of fraud/suspected fraud/theft, referring to the police for prosecution;
- Issuing banning notices (total or partial) in NSW under the *Inclosed Lands Protection Act 1901*, or in Qld where there is no such Act, relying upon common law owner/occupiers powers to do something very similar;
- Enforcing Visitors' Codes of Conduct;
- Working with other family members in relation to any of the dot points above;
- Cautiously and acting reasonably restricting access to the extent necessary.

However, questions will arise under the Exposure Draft as to which of the above powers will remain effective.

As noted above, Guardianship appointments per se will make no difference to the powers of Representatives until they are de-registered. Will Tribunal urgent consents to medical treatment be effective against a Representative who is acting/making a decision under/for the purposes of the Act? Providers seem to have no protections or powers under the Exposure Draft. Will a provider still be able to ban a Representative or advocate and not breach the Act even when State law would permit them to do so? Can providers work with other family members given the Representatives' powers and S 28? Will providers be put in a position where, in complying with instructions of Representatives under/for purposes of the Act, they or their staff could end up committing a crime under State or other Federal law or otherwise being in breach of such law? Will some the care of some Individuals be compromised because of disagreement between decision makers and the inability of the aged care home to work seamlessly with entities/persons subject to State-based law e.g. hospitals and GPs

Will the System Governor have the qualifications and resources to undertake judicial responsibilities, in some cases which are required on an urgent basis?

I imagine that, in an appropriate case, a provider could seek a declaration from the Federal Court on a particular point. However, such applications would be almost prohibitively expensive, very time consuming, and the Court would want to limit its determination to the precise factual situation (assuming that it had jurisdiction) so such cases may not form the basis for broader precedence.

Having said the above, it is worth noting that applications to the Guardianship Tribunal can take many months to come to hearing and delays in the Tribunal seem to have increased since it has been necessary for providers to approach the Tribunal for clarity around substitute decision making and consent to restrictive practices where a restrictive practices function is not already in play.

This area is not well understood. It seems that the Legal Team in Catholic Healthcare speaks with a suburban solicitor about the requirements nearly every week and, when time permits, we intend to write to the President of the NSW Law Society about this. We are also aware that many GPs do not understand the requirements and, since we have been making applications to the Tribunal, we have observed that the requirements of the Tribunal to support applications have changed and increased. This is quite difficult for providers, families, GPs, and solicitors. Some relief in this area would be very welcome.

Suggestions for Consideration

I do hope it is not too presumptuous to offer some suggestions in relation to this challenging area. Respectfully, the following is offered for consideration:

- Where Representatives are appointed at a time when the Individual has capacity/can manage their person, the powers of the Representative do not commence (unless the

Individual otherwise elects) until the Individual loses capacity/is unable to manage their own person;

- Where Representatives are appointed at a time when the Individual has capacity/can manage their person, and the person to be appointed has not already been appointed under an enduring instrument. the potentially enduring nature of the appointment is explained to the Individual;
- The ability of the Representative to act on behalf of the Individual is expressly stated to continue even if the Individual is unable to do so (if this is the intention);
- The powers of Representatives do not extend to include the intensely personal matters and other highly sensitive matters noted above, nor other similar matters. The matters mentioned in the body of this document all relate to decision- making relating to Individuals without capacity or with a sufficient disability, and concern consent to sexual relations, marriage, voting, creating/changing an Advance Care Directive, creating/changing a will, coercive functions, consent to Special Treatment. Including a list of such beyond-power matters in the Act would be very helpful.
- That if the Individual has expressed a preference prior to losing the capacity (for example, limiting the powers of an enduring guardian to override an advance care directive), that the Representative cannot over-ride that decision;
- The Act specifies when an action/decision is under/for the purposes of the Act and when it is not;
- The Representative cannot over-ride a Court or Tribunal Order;
- A mechanism should be created to resolve potential differences of opinion between Representatives instructing providers and those persons (not being Representatives) who may instruct/consult with hospitals and GPs;
- The representative should act in the best interests of the person to whom they are appointed Representative;
- A pathway is created by which providers and other persons concerned with the welfare of an Individual can raise concerns about the decision-making/actions of Representatives. It is noted that under S 380, the notice of appointment of a Representative will include how a person may apply for reconsideration of that appointment – however, details do not appear to be available as yet. The pathway would need to be able to:
    - accommodate different perspectives and evidence;
    - provide guidance and decision-making very promptly when it is needed on an urgent basis (e.g., in the same way that a process exists within the Guardianship Tribunal for urgent medical decision making. It would be beneficial if such urgent pathways existed in relation to other topics as indicated in this document);
    - Give providers/other concerned persons an option not to follow the instructions of the Representative (or one of the Representatives if there were multiple representatives) when the decision-making/actions are in dispute or, on reasonable grounds considered not to be in the best interests of the individual;
- The Act contains a provision stating that nothing in the Act requires a provider to follow the instructions of a Representative when to do so creates in the provider, a reasonable apprehension that by following the instructions of the Representative, the provider, its responsible persons or aged care workers will be in breach of a law of the Commonwealth

or of a State in which the provider delivers funded aged care services or a Court or Tribunal Order;

- Providers' rights and powers under statute and common law are specifically preserved including their rights as owners and occupiers of premises;
- Consideration be given to alternate pathways for the obtaining of consent in relation to restrictive practices. It is acknowledged that this may require consultation with States,

We do suggest that the Government reconsider substituting the State Guardianship Tribunals with the System Regulator and that the System Regulator appoint the Representative where there is a gap, for example, when no enduring guardian or Tribunal appointed guardian has been appointed and the Commonwealth and the State work on consistency on guardianship and financial management laws across the nation, not just for aged care funded under the Act.

Thank you again for receiving these comments. Please do not hesitate to contact me if you have any questions about this document on 0409 241 160.

[redacted]

Kind Regards
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Catholic Healthcare acknowledges the Traditional Owners and Custodians of the lands on which we work and provide our services. We support the Uluru Statement from the Heart to achieve justice, recognition and respect for Aboriginal and Torres Strait Islander People.