6 March 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.

The Public Advocate is a Victorian statutory appointee. The Office of the Public Advocate (OPA) is independent of government and government services and works to safeguard the rights and interests of people with disability. The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament.

The Public Advocate has functions under the *Guardianship and Administration Act 2019* (Vic), all of which relate to promoting the independence and human rights of people with disability and protecting people with disability from abuse, neglect and exploitation. To this end, OPA provides a number of services including the provision of guardianship, advocacy, and investigation services to people with cognitive impairment or mental illness. In 2022-23 OPA was involved in 2,079 guardianship matters (975 of which were new), 314 investigations and 282 cases requiring advocacy.[1] Of the 975 guardianship matters OPA received in 2022-23, 361 were related to represented persons over the age of 65.[2]

Under the *Medical Treatment Planning and Decisions Act 2016* (Vic), the Public Advocate has authority to make medical treatment decisions for Victorian patients when they are found to lack medical decision-making capacity, do not have an advance care directive, and do not have a medical treatment decision-maker. In 2022-23, 397 matters were received by the medical treatment decision team.

This submission addresses two key matters:

- Restrictive practices in aged care
- The Commonwealth decision-making model and interaction with state and territory guardianship and regimes.

[1] Office of the Public Advocate, *Annual Report 2022-2023* (2023) 31-33.
[2] Office of the Public Advocate, internal data analysis (March 2024).

1. Restrictive practices in aged care

Everyone, including older people with disability, has the right to live freely, with dignity and autonomy, and to receive the support they need to do so safely. OPA is deeply concerned by the high rates of restrictive practices across the aged care sector, the use of which are driven by inadequate resourcing of both staff-to-resident ratios and less restrictive alternatives for supporting resident safety. Concerted efforts and investment are required to reduce, and where possible eliminate, the use of restrictive practices in aged care as soon as possible.

Proposed provisions in Aged Care Act Exposure Draft and accompanying rules

A new Aged Care Act: exposure draft consultation paper No. 2 states:

> Restrictive practice requirements will mirror the current legislation with the exception of a hierarchy for a restrictive practices substitute decision-maker and the associated immunity provision … the [Commonwealth] Government continues to work with states and territories on establishing clear arrangements for appointing a restrictive practices substitute decision-maker under state and territory consent and guardianship laws. This process will inform if provisions are needed to address remaining gaps [within the temporary solution] between Commonwealth legislation and state and territory legislation.[3]

The Aged Care Act Exposure Draft (Exposure Draft) leaves the future regulation of restrictive practices to yet-to-be-made new rules. The Exposure Draft indicates that restrictive practices are to be 'a last resort to prevent harm to the individual or other person' and require that alternative strategies are used before a restrictive practice is used. The Exposure Draft makes provision for rules to be drafted for or in relation to the persons or bodies who may give informed consent to the use of restrictive practices.

If the person is considered unable to provide informed consent, it currently falls to family members, unpaid carers or prescribed others to consent on their behalf. It is noted that, under the Commonwealth's temporary decision-making hierarchy, the Public Advocate, when appointed as guardian with medical treatment authority, is occasionally the restrictive practices substitute decision-maker for aged care residents. However, to date the Public Advocate has not consented to restrictive practices for any aged care resident under these powers.

Options for restrictive practices substitute decision-maker under state and territory consent and guardianship laws: Flaws

One option possible for state and territory government as they seek to legislate a new framework could be to retain family members and potentially unpaid carers, and/or appointed attorneys, as restrictive practices substitute decision-makers for aged care residents. If this option were to be pursued, it puts those people in an invidious—and potentially conflicted—position of having to determine whether restrictions recommended or demanded by the service provider potentially for others' safety or the convenience of service providers, should be imposed against their loved one. It is unreasonable and unrealistic to expect family members to have the knowledge and confidence to scrutinise the proposed interventions, suggest less restrictive alternatives and ensure they are trialled first. Considering that legislation governing decision-making – like the Exposure Draft– increasingly requires substitute decisions to be made in accord with the 'will and preferences' of the individual, having relatives in this position becomes even more problematic.

If no family member can be identified as a restrictive practice substitute decision maker, a further arrangement could be pursued by state and territory governments, which could include identifying an attorney for personal matters or a guardian with relevant powers to consent to restrictive practices. However, OPA identifies significant issues with this option, specifically that:

[3] Australian Government, Department of Health and Aged Care, *A new Aged Care Act: exposure draft consultation paper No. 2*, December 2023, 19.

- restrictive practices are incompatible with guardianship;
- amending the *Guardianship and Administration Act 2019* (Vic) to incorporate restrictive practices would be inappropriate;
- incorporation of guardianship is impracticable.

OPA appreciates that state and territory governments are tasked with identifying a legal framework for appointing restrictive practices substitute decision makers if the Commonwealth Government pursues its proposed consent-based restrictive practices requirements. As such, OPA's comments here are limited to those Victorian specific headlines, which have been expressed in more detail to the Victorian Government.

Proposal of a Senior Practitioner authorisation model

The Public Advocate considers that the Commonwealth's consent-based model, which requires the person themselves or someone on their behalf to 'consent' to the restrictive practice, is not an appropriate model for the authorisation and regulation of restrictive practices. Restrictive practices, by definition, are often imposed contrary to the person's will or wishes in order to control or limit their volitional movement. The idea that the person themselves could or should meaningfully consent to restrictive practices is at best odd and often disingenuous.

At present, the Exposure Draft continues the inadequacies of the current Quality of Care Principles. The Commonwealth Parliamentary Joint Committee on Human Rights recently cautioned that in simplifying consent arrangements, there may be a 'risk that… this instrument has the effect of *facilitating the use of restrictive practices*, which is inconsistent with Australia's obligation to minimise, and ultimately eliminate, the use of restrictive practices'.[4] (emphasis added).

A July 2023 report, commissioned by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Restrictive practices: A pathway to elimination,* stated:

> it is debatable whether 'consent' is possible for coercive and non-consensual measures, such as restrictive practices. Certainly, this appears as a site of contention in relation to the human rights of people with disability.[5]

Rather than a consent-based model, the Public Advocate supports a Senior Practitioner model for the authorisation and regulation of restrictive practices in residential aged care.

Victoria was the first jurisdiction to establish a Senior Practitioner to oversee the use of restrictive practices in disability services. The strengths of this model include:

- A statutory responsibility for ensuring that the rights of persons who are subject to restrictive practices are protected and that appropriate standards are complied with.
- A single body that enables system oversight and identification of trends through centralisation of data, in order to evaluate and monitor the use of restrictive practices and to recommend practice improvements.
- Transparency and accountability, with the requirement on service providers to report to and seek authorisation from the Senior Practitioner.
- Scrutiny of the proposed restrictive practices and behaviour support plans by the Senior Practitioner's staff, who are knowledgeable, experienced and independent of the person and the service provider.
- Ongoing, independent monitoring and review of the implemented practices.
- The provision of rights-informed clinical guidance and education to service providers, in both specific matters and more generally, to identify and implement less restrictive alternatives and work towards the elimination of restrictive practices across the sector.

[4] Parliamentary Joint Committee on Human Rights, *Report 3 of 2023 – Quality of Care Amendment (Restrictive Practices) Principles 2022*, 15 March 2023, [1.34]

[5] Dr Claire Spivakovsky (The University of Melbourne) Associate Professor Linda Steele (University of Technology Sydney) Associate Professor Dinesh Wadiwel (The University of Sydney) *Restrictive practices: A pathway to elimination*, July 2023, 36.

- Mechanisms to challenge or appeal authorisation decisions.

A Senior Practitioner model for restrictive practices in residential aged care would provide a central, rights-based and clinically grounded source of information and guidance, and a single, transparent authorisation process with robust safeguards. This is much more likely to increase compliance by service providers and drive meaningful reduction – and hopefully elimination – of restrictive practices than a hybrid consent-based model ever could.

A Senior Practitioner model as it currently operates for disability is not compatible with Commonwealth consent requirements under the Exposure Draft. OPA supports the call of the Queensland Public Advocate, Dr John Chesterman, that the Aged Care Act simply require that restrictive practices can 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".[6] services. If this reform is pursued, it would enable the Victorian Government to utilise its restrictive practice authorisation model already in place—a model which is increasingly accepted to be superior to a consent model (a stance supported by the Disability Royal Commission and implemented successfully in Victoria). This Senior Practitioner model could be replicated for, or ideally expanded to cover, restrictive practices in residential aged care.

2. The Commonwealth decision-making model and interaction with state and territory guardianship and regimes

The Queensland Public Advocate and former Victorian Deputy Public Advocate recently published a piece applauding numerous initiatives in the Exposure Draft and raised questions regarding the interaction with state and territory guardianship and related decision-making laws and practices, advocating that better integration with state and territory systems is required. More consultation is needed to ensure that new aged care legislation and substitute decision-making arrangements at the state and territory level will operate effectively and I support the arguments presented by Dr Chesterman in several articles he has written on this reform, and refer the consultation team also to his office's submission.

Thank you for the opportunity to respond to this important consultation. I would be happy to discuss the contents of this letter with you further.

Your sincerely,

[redacted]

[redacted]
Public Advocate

[6] For helpful commentary on the Aged Care Bill and restrictive practice regulation see Queensland Public Advocate, Dr John Chesterman, 'More work needed on aged care bill' - Australian Ageing Agenda', Australian Ageing Agenda.