



Legal and Social
Justice Services

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

BY EMAIL: AgedCareLegislativeReform@health.gov.au

RE: AGED CARE ACT SUBMISSION

About TASC National Limited

TASC Legal and Social Justice Service is a not-for-profit organisation that serves over 4,000 people per year across more than 400,000 square kilometers of Ipswich and Southwest Queensland. Now in our 41st year, TASC has developed from a small community legal center to a committed provider of high-quality legal advice, social justice, and advocacy services. TASC is one of the largest regional community legal and advocacy services in Queensland, where the community and staff work together in partnership to continue to enable justice and change lives.

Seniors Legal and Support Service

TASC provides the Seniors Legal and Support Service ("SLASS") which assists older persons who are experiencing or at risk of experiencing elder abuse.

SLASS is comprised of lawyers and social workers who work collaboratively to provide integrated legal and support services to elder abuse clients.

Elder Abuse

Elder abuse can be defined as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person".¹ Elder abuse can take various forms such as physical, psychological, or emotional, sexual, and financial abuse. It can also be the result of intentional or unintentional neglect.

Elder abuse is most often perpetrated by family members.² For a recent example involving the 2021-22 reportable year, the Elder Abuse Prevention Unit received 2,338 total abuse notifications with 1,875 of the alleged perpetrators being within family relationships.

¹ World Health Organisation Toronto Declaration on the Global Prevention of Elder Abuse

² Elder Abuse Statistics in Queensland Year in Review 2021-22 page4

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Formal decision-making arrangements were recorded in 26.7 per cent of cases. In more than three-quarters (78.1%) of these cases (where known), one or more decision makers were alleged to be perpetrating elder abuse against the principal. Decision makers were recorded as having acted to protect victims in only 21.3 per cent of these cases.³

Elder abuse clients often want to preserve their family relationships, and despite abuse problems they do not necessarily want to enforce their legal rights per se.

TASC's response to selected consultation questions Chapter 1

Question 1: Are the revised Objects, Statement of Rights and/or Statement of Principles clear and do they achieve their intent? If not, what changes are required?

The revised Objects are intended to be aligned with those specified by the Royal Commission in Recommendation 1 (3) of the Final Report into Aged Care Quality and Safety. Specifically, the objects aim to give effect to Australia's obligations under relevant human rights instruments including Convention of the Right of Person with Disabilities and the International Covenant on Economic, Social and Cultural Rights. The purpose being to ensure that the Bill focuses on older people, rather than aged care providers, placing older people at the heart of the Act.

The inclusion of the Statement of Rights and the Statement of Principles whilst a positive one is insufficient to achieve the intent of the Royal Commission recommendation. This is because the Bill fails to provide for any real enforceability of these rights and so little has changed where enforceability remains reliant on an individual making a complaint. A power imbalance remains between the older person and the care provider.

Recommendation: Whilst commending Bill's efforts to introduce a human rights-based approach, more needs to be done to ensure enforceability. Including a positive duty on the provider to uphold these rights would remove any power imbalance as the onus falls to the provider to deliver rights-based care. Consideration to ensuring appropriate penalty provisions are included within the Bill as a deterrence mechanism at both the provider and individual levels.

Question 2: Some First Nations stakeholders would also like to add a right to stay connected to Island Home in the Statement of Rights. This would be in addition to 'Country'. Do you agree? We would like to get feedback from First Nations people about whether we should include Island Home in the rights and in other parts of the new Act.

Yes, TASC agrees. The Bill currently has verbiage which recognises that First Nations people have the right to:

Part 3—Aged care rights and principles

Division 1—Aged care rights

20 Statement of Rights

(12) An individual has a right to opportunities, and assistance, to stay connected (if the individual so chooses) with:

³ Ibid page 3

(a) significant persons in the individual's life and pets, including through safe visitation by family members or friends where the individual lives and visits to family members or friends;

(b) the individual's community, including by participating in public life and leisure, cultural, spiritual and lifestyle activities; and

(c) if the individual is an Aboriginal or Torres Strait Islander person—community and Country.

Australia's First Nations people are two distinct cultural groups made up of Aboriginal and Torres Strait Islander persons. However, there is great diversity within these two broadly described groups exemplified by the over 250 different language groups spread across the nation.

Aboriginal people in general identify directly to their language groups and traditional country (a specific geographic location) however at large Torres Strait Islander people prefer to use the name of their specific home Island to identify themselves to outsiders or, in a broader context, as from Island Home.

As the Bill currently stands it could be seen as exclusionary to Torres Strait Islander peoples and ignores the sovereignty, they have over their Island Home.

Recommendation: The right to stay connected with Island Home be included in the Bill.

Question 5: *Are the proposed roles of supporters and representatives clear? Please tell us why or why not.*

In TASC's view the proposed roles are not clear. Further clarity is required on what a conflict of interest is. In the context of the requirements for a supporter and representative to inform the System Governor of any conflict of interest (ss 26(3) and 30(5)), it is unclear as to whether the s 7 definition of conflict of interest includes actual, perceived, or potential conflicts of interest. By expanding the definition of conflict of interest to include actual, perceived, or potential conflicts of interest, the term is made clearer to the older person, supporters, and representatives.

Recommendation 1: That the definition of "conflict of interest" be expanded to include actual, perceived, or potential conflicts of interest.

Recommendation 2: That the Act include examples of conflict of interests which may arise for supporters and representatives in the context of aged care/accommodation decisions similar to those examples of conflict transactions in s73(6) of the *Powers of Attorney Act 1998* (Qld).

Roles of jointly appointed Representatives. For Representatives acting jointly it is paramount that each appointed Representative has the ability to maintain a positive collaborative relationship with the other appointed Representative/s.

When considering whether to appoint 2 or more people as Representatives to act jointly the System Governor should seek from the individuals their ability to work collaboratively with the other appointed Representative/s.

Issues can arise if jointly appointed Representatives do not agree on a decision. The Act appears silent on what happens in such an instance.

Recommendation 1: That the s 31 *Duty to inform of matters affecting ability or capacity to act as supporter or representative* include the requirement to inform the System Governor of an anticipated inability to work jointly with any other representative.

Recommendation 2: That the Act include provision for the System Governor to intervene or require mediation in the event that jointly appointed Representatives do not agree on a decision.

Question 6(a): *Do you think it's okay that an older person can only have either representatives or supporters?*

TASC is conscious not to limit the older persons right to receive appropriate decision-making support and autonomy. Where possible the older person should decide whether they want a representative, a supporter or both at any given time.

To appoint a representative only is akin to assuming the person does not have capacity. If there issues around capacity and the older person has not nominated a supporter, then a representative could be appointed for decision specific matters using the supported decision-making model. Further the older person may want to nominate a representative for certain decisions but not for other decisions preferring to rely on supporters in the form of family and friends in those matters. This would accord with the presumption of capacity and retain the older persons autonomy.

TASC does not agree with an older person only having either a representative or a supporter.

Question 6(b): *Are there times when an older person, or their families and support networks, would want a representative and a supporter?*

Building on the preceding paragraphs, an older person may benefit from supported decision making from a representative and supporter in instances where a representative is at risk of breaching their obligations under the Act. In such an instance the supporter may be in a position to advocate strongly on behalf of the older person to ensure the Representative complies with their duties under s 30(2) and (3).

TASC is of the opinion there may be times that both a representative and supporter are required.

Question 7: *Providers will need to interact with supporters and representatives about a range of decisions that people using their aged care services can make. What support will providers need to move to these new arrangements?*

The use of supporters and representatives can be a valuable tool to ensure the person's aged care is managed according to the older person's wishes. However, it can also potentially be a tool that can be misused to facilitate elder abuse.

While providers are positioned to identify elder abuse, they may lack training in identifying indicators of elder abuse and conflicts of interest.

Recommendation: Aged care staff should receive information and training about how to identify conflicts of interest and recognise signs of elder abuse.

Further submissions:

1. Section 35: Offence for abuse of position as supporter or representative – Penalty Units

The Act proposes a penalty of 60 penalty units for abuse of position as supporter or representative.

The current value of a penalty unit is prescribed by the *Crimes Act 1914* (Cth) is \$313 for offences committed on or after 1 July 2023. This amounts to a penalty of \$18,780

It is TASC's submission that the penalty does not reflect society's view on the seriousness of elder abuse.

Recommendation: Strengthened penalties should apply for abuse of position as supporter or representative.

2. Failure to declare a conflict of interest.

Scenario: Rose is cognitively impaired and is a resident in an aged care facility. Rose's son Rodger is her appointed representative. Rodger is also Rose's Enduring Power of Attorney. Rodger wants Rose to exit the aged care facility and reside with him in his home (Rodger organises informal care arrangements and/or access to professional support for care at home for Rose). Rose likes this idea and moves in with Rodger. Ultimately Rodger, as Enduring Power of Attorney, perpetrates elder financial abuse and depletes Rose's refundable accommodation refund and other assets.

In the context of the above scenario, a representative's failure to declare a conflict of interest opened a pathway to elder financial abuse.

In relation to s 35 Offence for abuse of position as supporter or representative, the Act at s 319 draws upon Chapter 2 of the *Criminal Code Act 1995* (Cth) ("The Code").

The Code defines dishonesty by reference to the standards of ordinary people. A person is taken to be dishonest if they *know* their conduct to be dishonest according to those standards: CC s130.3 *Dishonesty*. The fault element in dishonesty is, accordingly, knowledge.

Recommendation 1: Representatives be provided with clear and unambiguous explanations of their responsibilities with clear written examples of a conflict of interest in the context of accommodation/aged care decisions.

Recommendation 2: Given the potential serious implications of failing to declare a conflict of interest, the Act should include a stand-alone penalty for failing to declare a conflict of interest regardless of whether or not the Representative obtained a benefit or caused detriment to the older person.

3. Section 374 and 376 – Appointment of Supporters and Representatives

Scenario: Rose is currently in aged care. Rose's son Rodger has been attempting to isolate Rose from her other family members with the intention of influencing Rose to support him financially. Rodger exerts undue influence over Rose so that she agrees to appoint him as her representative. Rodger then exerts pressure on Rose to move to an alternative aged care facility closer to his home making travel to the new facility difficult for other family. Rose, being socially isolated is even more vulnerable to elder abuse and is ultimately financially exploited by Rodger.

We note section 382(2) provides that the System Governor may suspend the appointment of a person as a supporter or representative if the System Governor believes that the supporter or representative has caused, or is likely to cause, physical, sexual, financial, psychological, or emotional abuse or neglect to the individual.

However, the Act is silent on safeguards to ensure that the older person has freely, voluntarily and without undue pressure appointed a supporter or representative in the first instance.

Recommendation: That the Act incorporate the requirement for the System Governor to consider answers to screening questions for undue influence as part of the application process prior to the appointment of a Representative.

4. Independence of the Complaints Commissioner

It is posited that the Complaints Commissioner must have independent statutory authority and functions. The Complaints Commissioner should not report through, or be responsible to, the Aged Care Quality and Safety Commission. The Complaints Commissioner should have powers to compel information, have active participation in the complaints process and be able to certify enforceable undertakings. This would echo the model used by the Australian Human Rights Commission that has multiple independent commissioners.

Recommendation: The complaints section of the Act should be rewritten to provide more details on the scope of authority of the Complaints Commissioner and the responsibilities they undertake.

5. Enforcement Powers

The Regulator is proposed under the Act to have the power to issue two notices being a Requirement for Action Notice and, if non-compliance of the Requirement for Action Notice is observed, then a further power to issue a Compliance Notice. Non-compliance with this subsequent notice could attract more significant consequences including civil penalties and potentially criminal offences if the breach is significant in nature.

It is queried as to what extent the new Compliance Notice would improve the range of actions the Regulator can currently undertake and whether these would provide a more punitive basis to a breach. It is noted however that civil penalties, and potentially criminal provisions, are currently under discussion but transparency of these penalties, and their extent, would be optimal at this stage so an objective assessment can be made of their fundamental usefulness in terms of preventative non-compliance. It is further noted that clearer information needs to be given pertaining to the application of how these enforcement powers and penalties apply to individual personnel within an organization rather than just the provider.

Further clarification regarding the power to enforce compensation pathways also needs to be addressed in the circumstances where an individual suffers harm arising from a breach of the provider's obligations.

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