



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: ELCS:JWsh030921

3 September 2021

Mr Michael Tidball  
Chief Executive Officer  
Law Council of Australia  
GPO Box 1989  
Canberra ACT 2601

By email: [sarah.swan@lawcouncil.asn.au](mailto:sarah.swan@lawcouncil.asn.au)

Dear Mr Tidball,

### **Evaluation of the Aged Care Quality Standards**

Thank you for the opportunity to contribute to Law Council advocacy in relation to the Department of Health's evaluation of the Aged Care Quality Standards (**Standards**).

We note that, following recommendations in the Final Report of the Royal Commission into Aged Care Quality and Safety (**Final Report**), the Australian Government has committed to developing a new aged care framework which would include a new Aged Care Act and associated principles and standards. As stated in our submission on the Final Report, our view is that legislation should be the primary means to set out and clarify the parameters for future aged care governance and accountability obligations, and we look forward to the opportunity to provide feedback on a draft bill. The Standards should support these statutory obligations and act as practical guidance alongside the substantive, legislative obligations. We support the evaluation of the Standards, as one element of a framework that sets out consumer rights and obligations, provides processes for lodging complaints about breaches, and provides accessible causes of action and remedies.

We are concerned that the existing Standards are confusing and impractical in that they impose multiple, potentially conflicting obligations on organisations. The Standards also confer potentially conflicting rights on consumers and obligations on organisations, without providing guidance as to how such conflict might be resolved. A further concern is the need to clarify how decisions are made by or on behalf of consumers in the aged care system, in the context of relevant state and territory legislation.

### **Multiple standards for organisations**

The Standards that apply to organisations are expressed in various ways. These variations are not merely semantic differences, but impose multiple standards of conduct and service to which organisations will be held, and which a consumer is entitled to expect. In the experience of our members, the differences add unnecessary complexity and potential confusion to the organisation's task of compliance and to the consumer's opportunity to enforce their rights.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney  
ACN 000 000 699 ABN 98 696 304 966

[lawsociety.com.au](http://lawsociety.com.au)

T +61 2 9926 0333 F +61 2 9231 5809  
E [lawsociety@lawsociety.com.au](mailto:lawsociety@lawsociety.com.au)



Law Council  
OF AUSTRALIA  
CONSTITUENT BODY

For example, in Standard 3 (personal care and clinical care) the standards that apply to organisations are variously expressed as follows (emphasis added):

Consumer outcome:

- (1) I get personal care, clinical care, or both personal care and clinical care, that is *safe and right for me*.

Organisation statement:

- (2) The organisation delivers safe and effective personal care, clinical care, or both personal care and clinical care, *in accordance with the consumer's needs, goals and preferences to optimise health and well-being*.

Requirements:

- (3) The organisation demonstrates the following:
  - (a) each consumer gets safe and effective personal care, clinical care, or both personal care and clinical care, that:
    - (i) *is best practice; and*
    - (ii) *is tailored to their needs; and*
    - (iii) *optimises their health and well-being;*
  - (b) *Effective management of high-impact or high-prevalence risks* associated with the care of each consumer;
  - (c) *the needs, goals and preferences of consumers nearing the end of life are recognised and addressed, their comfort maximised and their dignity preserved.*
  - (d) *deterioration or change of a consumer's mental health, cognitive or physical function, capacity or condition is recognised and responded to in a timely manner;*

While we recognise that the Standards are intended to apply to a range of clinical and other forms of care provided by organisations, we suggest there is a need for greater consistency in their expression.

### **Conflict between consumer rights and organisation obligations**

We note the Standards are predicated on a principle that:

The Quality Standards focus on outcomes for consumers and reflect the level of care and services the community can expect from organisations that provide Commonwealth subsidised aged care services.<sup>1</sup>

Each of the Standards is expressed in three ways:

1. a statement of outcomes for the consumer;
2. statement of expectation for the organisation;
3. organisation requirements to demonstrate that the standard has been met.

In our view, the Standards give rise to the potential for conflict as between the rights of consumer and the obligations of organisations.

We note the Standards focus on meeting the expectations of the consumer by respecting the consumer's right to make informed choices, to understand their options and to be as independent as they wish. This is expressed particularly in Standard 1, as a consumer's right to live the life they choose. The presumption is that consumers, or their representatives, have the capacity to understand choice, decision and consequences, and that all decisions are rational and made in the consumer's best interests. This is expressed in the concept that a consumer has a right to make decisions about their care and services as well as a right to take

---

<sup>1</sup> Aged Care Quality and Safety Commission, *Guidance and resources for providers to support the Aged Care Quality Standards* (2021) 2.

risks. In applying the Standards, organisations are encouraged to take a balanced approach to managing risk and respecting consumer rights. In relation to Standard 1:

If a consumer makes a choice that is possibly harmful to them, then the organisation is expected to help the consumer understand the risk and how it could be managed. Together they should look for solutions that are tailored to help the consumer to live the way they choose.<sup>2</sup>

At the same time, the organisation has a positive obligation under Standard 5 to provide an environment that is safe and comfortable that promotes the consumer's independence, function and enjoyment. This obligation gives rise to a duty of care, which we note the Final Report recommends be made a statutory duty under the proposed new Aged Care Act.<sup>3</sup>

Our members report that conflicts can arise between the consumer's right to make informed choices, and the organisation's obligation to support that right on the one hand, but also to ensure the environment remains safe for the consumer on the other.

Our members report the conflict can arise in situations where:

- the consumer seeks to follow a path which may result in harm, possibly due to lacking capacity to do so; or
- there is doubt as to whether a substitute decision-maker is making an informed decision, and is acting in the consumer's best interests.

In these situations, the organisation must decide whether to deny the consumer's wishes on the basis that it may breach the organisation's contractual obligation, statutory obligation and common law obligations to provide quality care and services and not to allow the consumer to suffer harm or damage as a result of neglect.

We note that the Royal Commission's recommended approach to revising the Aged Care Quality Standards, expressed in Recommendation 13 of the Final Report and accepted by the Government, is to give effect to characteristics that include "diligent and skillful care" and "safe and insightful care" on the one hand, and "empowering care" on the other. This formulation, we suggest, retains the inherent conflict outlined above and would not necessarily overcome the difficulties described.

Options for consideration, whether expressed in the new Standards, or expressed elsewhere in the framework and reflected in the new Standards, include:

- clarifying the extent of the organisation's obligation to be satisfied that the consumer or their decision-maker is making an informed decision;
- clarifying the circumstances (if any) in which an organisation is permitted to deny a request that may be a breach of the organisation's contractual, statutory or common law obligations; and
- indicating when an issue should be referred to the relevant state Tribunal.

## **Representatives**

We note Standard 1(3)(c) provides that each consumer is supported to exercise choice and independence, including to make decisions about their own care and the way care and services are delivered. The Standards do not address how this is achieved where supported or substitute decision-making are involved. However, the *Quality of Care Principles*, which underpin the Standards, define 'representative' broadly to mean a person nominated by the consumer to be told about matters affecting them, or who, in the organisation's view, has a

---

<sup>2</sup> Ibid, 8.


<sup>3</sup> Final Report, Recommendation 14.

sufficient connection with the consumer.<sup>4</sup> This provision can be at odds with the state and territory legislative frameworks that govern decision-making via enduring guardianship, enduring powers of attorney and advance care directives. In our experience, this inconsistency can cause confusion to consumers and organisations. In circumstances of conflict where a decision-maker is not acting in the best interests of the consumer, an organisation may be left with the options of ignoring their wishes or seeking clarification from a Tribunal.

We suggest, in the Standards, the new Aged Care Act or elsewhere in the new aged care framework, it would be helpful to acknowledge and clarify the relationship between decision-making under the new Aged Care Act and under state and territory law.

If you wish to discuss these issues or require further information, in the first instance please contact Sue Hunt, Principal Policy Lawyer, on (02) 9926 0218 or by email: [sue.hunt@lawsociety.com.au](mailto:sue.hunt@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J Warner', followed by a horizontal line extending to the right.

Juliana Warner  
**President**

---

<sup>4</sup> *Quality of Care Principles 2014* (Cth) s 5.