



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [matthew.wood@lawcouncil.asn.au](mailto:matthew.wood@lawcouncil.asn.au); [john.farrell@lawcouncil.asn.au](mailto:john.farrell@lawcouncil.asn.au)

Dear Dr Popple,

### **A new model for regulating aged care**

Thank you for the opportunity to contribute to a Law Council submission providing feedback on the Department of Health and Aged Care's Consultation Paper No. 1 regarding a new model for regulating aged care.

We note that consultation on the proposed model is at an early stage and that the Consultation Paper is drafted in very general terms, outlining the key features of the proposed model. Accordingly, our comments are also general in nature. In addition to concerns about the proposed key features, we focus on features that are lacking.

### **Foundation 1 - Rights-based approach**

Foundation 1 (Rights-based approach) refers to the rights of care recipients, without specifying what rights are contemplated or the legal source of those rights, other than to say that "the wants and needs of older Australians are valued, and that they are protected from harm, abuse and neglect when receiving aged care services" (p. 12). It would be helpful to providers and care recipients to incorporate further detail about the rights of care recipients in the foundation of the model.

There is no indication of the extent or limit of the rights of care recipients, and correspondingly, the extent and limit of the obligations on providers. We appreciate there may be an intention to express these in the Standards. However, at this stage it is not possible to assess the practicality of the approach.

We are also concerned that the proposed model provides little detail about legal mechanisms for the enforcement of rights. If the main mechanisms for enforcing rights are complaints processes and processes for reporting non-compliance with the Standards, the rights of care recipients must be clearly expressed in the Standards. Additionally, as discussed further below, complaints processes must include benchmarks for responses, and be capable of delivering swift and effective remedies to care recipients.

We note also that the model gives no indication that existing civil causes of action enabling a recipient to obtain injunctive or compensatory relief against a provider will be preserved.

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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

## **Foundations 2 and 3 - Balancing a Person-centred approach with a Risk-based approach**

Foundation 2 (Person-centred approach) focuses on the needs, goals, values and preferences of the individual older person. Foundation 3 (Risk-based approach) focuses on the prevention, detection and correction of risk.

It would be impossible, and undesirable, to prevent risk in aged care absolutely. It is vital that the new model clearly strikes a balance between risk-based measures and measures to preserve and respect autonomy, and the supported exercise of choice and independence, including support for exercising risk. We note these principles are expressed in Standard 1 of the current Aged Care Quality Standards.

We have concerns that the language used in Foundation 2 does not clearly express the principles of autonomous and supported decision-making and the dignity of making decisions about risk, and that, as a result, the model may not strike the appropriate balance. While we appreciate it may be intended to include such language in the new Standards, in our view these principles should be clearly expressed as a Foundation of the new model.

We suggest the model should also directly require that providers have the capacity to facilitate autonomous or supported decision-making wherever appropriate.

### **Foundation 4 – Continuous improvement**

We note Foundation 4 places an emphasis on continuous improvement through positive measures such as recognition, incentivisation and encouragement. It would be helpful to provide further clarity as to what types of recognition and incentives are contemplated, and how they might be delivered to the market.

### **Provider registration**

At this stage there is no indication that provider registration will involve demonstrating the financial security of the provider or what standards of financial security would be required. While specific benchmarks may be incorporated in the new Standards, we suggest that the financial security of providers is fundamental to a robust aged care system and should be contemplated at the outset.

### **Worker registration**

We note that provider registration, and re-registration, will depend on providers maintaining appropriate levels of registered workers. This in turn will depend on various factors including workers having access to training, favourable employment conditions, legal protections for workers, and favourable local housing and cost of living conditions. The current shortage of aged care workers suggests that, in practice, reliance on market forces may not be sufficient to ensure that providers are consistently staffed, able to meet Standards and therefore able to retain their registration. This issue is not addressed in the proposed model.

### **Enforcement**

We would support a model in which the Regulator's approach to non-compliance is proportionate, with an emphasis on education, remediation and accountability. We would support the monitoring of non-compliant providers to ensure that breaches are remedied, particularly in the context of market oversight, with a view to maximising choice and flexibility of care. It would also be important to enforce compliance at the point of service delivery, for

example working with an individual service provider or facility rather than merely penalising a corporate parent provider.

## **Complaints**

We suggest further clarity is required around the complaints process. For example, it is unclear what degree of seriousness of complaint will warrant investigation, what process will be followed in investigating the complaint, and whether procedural fairness will be afforded to the complainant, the recipient and the provider. Benchmarks for responding to and resolving complaints are also key. It is also vital that complaints result in swift, appropriate remedies for care recipients. In our view the model should include these aspects as high-level principles.

## **Provider reporting and monitoring**

As noted above, we support the approach of monitoring providers in response to identified non-compliance. However, in terms of prevention, we suggest that an approach that combines complaints, provider reporting in relation to incident management and risk-based monitoring may not be sufficient. We suggest the use of proactive random monitoring would also be required to ensure provider compliance.

If you have any further questions in relation to this letter, 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 'Sue Hunt', written over a white background.

*pp.*

Sonja Stewart  
**Chief Executive Officer**