



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCSC:CBns130623

13 June 2023

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

By email: matthew.wood@lawcouncil.asn.au

Dear Dr Popple,

A new model for regulating aged care – Consultation Paper No. 2 – Details of the proposed new model

Thank you for the opportunity to contribute to the Law Council's submission regarding the Department of Health and Aged Care's Consultation Paper No. 2 (Paper 2), which provides details on the proposed new model for regulating aged care (the new model). The Law Society's Elder Law, Capacity and Succession Committee has contributed to this submission.

The regulatory framework

The foundational principles

The new model seeks to apply four foundational principles that underpin the regulatory framework, namely a rights-based, person-centred, risk proportionate and improvement-focussed approach. As noted in Consultation Paper No 1, the rights-based approach emphasises the "wants and needs of older Australians..." and "[protection] from harm, abuse and neglect when receiving aged care services".¹ The person-centred approach focuses on the "unique needs, goals, values and preferences of individual older Australians..."², and the risk proportionate approach aims at proactively preventing, detecting and correcting risk.³

While we support each of these principles, in our view the new model would be strengthened by providing further detail to assist providers to comply with their obligations under that model. In the context of residential aged care, for example, the implementation of an individualistic, rights-based approach can pose particular challenges, as, frequently, a resident's right to physical autonomy must be balanced with the rights of other residents to be protected from harm.

As noted in our previous correspondence, we suggest that consideration should be given to incorporating further detail about the rights of care recipients, and clarifying the principles of

¹ Department of Health and Aged Care, *A new model for regulating aged care – Consultation Paper No. 1*, (September 2022) 12.

² *Ibid*, 13.

³ *Ibid*, 14.

autonomy and supported decision-making that will inform the person-centred approach.⁴ We appreciate there may be an intention to expand on these matters as part of the ongoing development of the revised Aged Care Quality Standards.

Capacity

In relation to the person-centred approach, we note that Paper 2 states:

To achieve a person-centred approach, the new model will respect the autonomy and independence of older people to make decisions that are right for them. It will also empower them to exercise their rights outlined in the new Act.⁵

We support the empowerment of older Australians to make decisions about their own care. However, it must be acknowledged that even with appropriate support, some aged care recipients will nevertheless lack capacity to make certain types of decisions. The new model would be strengthened by providing practical guidance about how a person-centred approach should be implemented in those circumstances.

In considering a national model for regulating aged care, we note that various states and territories differ significantly in their legal conceptions of, for example, substituted decision making and supported decision making. Accordingly, it will be necessary for the new model to address the tension in these divergent regimes, and provide a clear mechanism for making decisions where capacity is challenged, without unduly exposing providers, workers or other aged care recipients to the risk of liability. More broadly, we support the harmonisation of Australia's power of attorney and guardianship laws as a matter of priority.

Business considerations

While we support a consumer-centred approach to regulation under the new model, due consideration must also be given to the business and financial viability of aged care providers. As noted in our previous correspondence, the new model for regulatory oversight must not create unsustainable administrative or cost burdens for providers, or unduly stifle competition and consumer choice in the aged care market.⁶ Such economic considerations are particularly important in relation to regional areas, where the availability, and therefore choice, of aged care is often limited.

Supporting quality care

Audit

We support the introduction of "graded assessment[s] against the strengthened Quality Standards"⁷ in the audit process, which in our view, provide a more sophisticated scheme for identifying issues of concern to providers, and improving service quality, than the current binary system.

⁴ Letter from Law Society of NSW to Law Council, 7 October 2022.

<https://www.lawsociety.com.au/sites/default/files/2023-03/Letter%20to%20Law%20Council%20of%20Australia%20-%20A%20new%20model%20for%20regulating%20aged%20care%20-%207%20October%202022.pdf>.

⁵ Department of Health and Aged Care, *A new model for regulating aged care – Consultation Paper No. 2 – Details of the proposed new model*, (April 2023) 14.

⁶ Letter from Law Society of NSW to Law Council, 5 August 2022.

<https://www.lawsociety.com.au/sites/default/files/2023-03/Letter%20to%20Law%20Council%20of%20Australia%20-%20Aged%20Care%20Amendment%20%28Implementing%20Care%29%20Reform%20Bill%20-%205%20August%202022.pdf>.

⁷ Above n 5, 18.

Monthly Care Statements

While we support, in principle, the introduction of Monthly Care Statements, we consider the current proposal would impose a significant and potentially onerous obligation on providers, particularly large providers. We suggest that further guidance and support may be required to assist providers in complying with their obligations in this regard.

Becoming a provider

Registration requirements for providers

We note that under the new model, non-corporations, including sole traders and partnerships, will be eligible to register to deliver in-home aged care services. We also note that registration requirements will be graduated based on risk. Paper 2 provides that:

...a declaration may be sufficient to meet the evidentiary requirement for certain categories while others may require more stringent assessments and higher evidentiary requirements.⁸

In our view, broadening the scope of eligible entities has the potential to encourage competition and consumer choice, particularly in rural and regional areas. However, we support a rigorous, and largely standardised, registration process to minimise the risk of entities abusing the system and reduce the enforcement burden on the Aged Care Quality and Safety Commission (Regulator). Consideration should be given to implementing an education and training regime as part of the registration process, to assist new entities, including sole traders, to understand and comply with their obligations as registered providers.

Aged care worker registration scheme

We note that “minimum English language proficiency” is a key element of the proposed worker registration scheme. It is vital that aged care recipients can communicate easily with workers responsible for their care. However, a blanket English proficiency requirement for all workers in the aged care sector has the potential to exacerbate the chronic labour shortages in the sector. Australia currently has a shortage of nurses and care workers, and relies to a large degree on sourcing workers from non-English speaking countries to staff and resource the aged care industry. A blanket requirement for English language proficiency will not necessarily achieve the objective of ensuring that older Australians are able to communicate with staff as many aged care recipients are themselves non-English speaking.

We suggest consideration be given to restricting the proposed English language proficiency requirement to managers or key staff based on their specific duties and/ or level of responsibility within an organisation. At a minimum, we suggest further clarification is required regarding the types of workers that would be subject to the proposed requirement, and the level of English proficiency that would apply.

Holding providers accountable

Penalties

The new model contemplates enhanced enforcement powers, including increased civil penalties, and the possibility of criminal offences for breaches of, or non-compliance with, aged care legislation.

⁸ Above n 5, 26.

We suggest that further clarification should be provided regarding the extent to which these penalties may apply to ‘key personnel’, in light of the Royal Commission’s recommendations concerning accessorial liability.⁹ If accessorial liability is to be attached to key personnel, we suggest that further consideration should be given to clarifying the specific responsibilities of key personnel that may attract liability (as distinct from those of the provider), and include appropriate defences.

Compensation and class actions

Paper 2 contemplates the possibility of developing a compensation scheme for older people who are negatively affected by registered providers that fail to meet their legal obligations, in accordance with Recommendation 102 of the Royal Commission. It notes:

Compensation could be sought via a private right of action (already possible under the common law). Subject to further consultation and consideration, it could also be claimed with the assistance of the Regulator, including on behalf of a class of impacted individuals.¹⁰

In our view, there is some ambiguity in what is meant by ‘with the assistance of the Regulator’ in this context. If it is intended that individual or group claims will be funded or supported by the Regulator, this may raise further questions as to whether the balance of power between the parties is appropriate.

We also note there may be some difficulty in incorporating class actions into the new model, as these claims rely upon common sets of facts and circumstances amongst the complainants to demonstrate a systemic failure. The recent class action litigation involving retirement village provider Aveo Group, which was ultimately withdrawn, highlights the difficulty in maintaining class actions in the context of aged care, given the wide variety of contracts, contracting parties and relevant terms involved.¹¹

Whistleblower protections

A key component of the proposed reforms to the complaints model is “ensuring effective whistle-blower protections, including new penalties for providers who retaliate against complainants.”¹² We support the need for effective whistleblower processes and protections, which should empower residents and their representatives to raise complaints without fear of retribution, in accordance with the recommendations of the Royal Commission.¹³

In considering how whistleblower protections might be enhanced under the new model, further detail would assist regarding:

- How the current complaints system has failed to adequately protect whistleblowers that have raised concerns; and
- What further protections could be implemented, noting the sanctions that currently exist.

We also consider reforms to the current complaints system should include mechanisms to strike out or otherwise deal with vexatious complaints, as well as timely and effective processes for finalising complaints.

⁹ Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (April 2021) Vol 1, 273 [Recommendation 101].

¹⁰ Above n 5, 63.

¹¹ See Lauren Croft, ‘6 year class action withdrawn, \$11m settlement reached’, *Lawyers Weekly* (Online, 28 March 2023), <https://www.lawyersweekly.com.au/wig-chamber/36993-6-year-class-action-withdrawn-members-to-receive-11m-settlement>.

¹² Above n 5, 57.

¹³ Above n 9, 273 [Recommendation 99].

Complaints and feedback mechanisms

We note that the new model seeks to implement a number of restorative justice principles, in addition to formal investigative and enforcement powers. In the context of the complaints system, Paper 2 notes:

A sincere apology up front for how an older person is feeling, even when no mistake has been made, can resolve issues before they become complaints.¹⁴

Notwithstanding the utility of a restorative approach to complaints handling in some circumstances, we query whether providers will choose to ‘apologise’ in this context, given the significant legal implications associated with potentially admitting responsibility or guilt. The status of such apologies may require further clarification.

Regulator’s enhanced powers

The new model proposes to enhance the Regulator’s monitoring, investigative and enforcement powers. As Paper 2 explains:

The Regulator’s powers will include the power to request documents and information, undertake site visits, interview older people, workers, and others, at any time...¹⁵

In considering the Regulator’s broad proposed powers to gather information “at any time”, we suggest consideration be given to implementing a threshold level of seriousness or risk involved in a particular matter, for the Regulator to exercise these powers.

Moreover, Paper 2 notes:

It is expected that the Regulator will also have the power to enter and remain in a premises at any time without warrant or consent, to exercise their monitoring and investigation powers.¹⁶

In our view, this broad power, which would permit the Regulator to enter premises without notice in order to exercise monitoring and investigation powers, represents a significant expansion of the current law. Accordingly, we suggest consideration should be given to limiting this power to situations where the Regulator considers that a material risk to the safety, care or wellbeing of care recipients exists. This would better enable the Regulator to investigate and address serious risks, without imposing an undue compliance burden on providers and intrusion upon the lives of care residents.

Specific conditions

We note that under the new model, the Regulator will also be empowered to apply specific conditions on individual providers “based on any additional risk factors that may be present at registration, re-registration or identified through risk-based monitoring activities.”¹⁷ These conditions would apply in addition to the conditions and obligations that apply to all providers, as well as category-specific conditions.

In considering the Regulator’s broad discretion to impose specific conditions, we suggest consideration should be given to implementing a mechanism for providers to dispute or seek review of the specific conditions imposed under this power.

¹⁴ Above n 5, 59.

¹⁵ Ibid, 56.

¹⁶ Ibid.

¹⁷ Ibid, 39.

If you have any further questions in relation to this letter, please contact Nathan Saad, Policy Lawyer on (02) 9926 0174 or by email: nathan.saad@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The letters are cursive and fluid, with the first letter 'C' being particularly large and prominent.

Cassandra Banks
President