



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Dr Popple,

A New Aged Care Act: Exposure Draft Consultation Paper No. 2

Thank you for the opportunity to contribute to the Law Council's submission to the Department of Health and Aged Care in relation to the Exposure Draft Aged Care Bill 2023 (Bill) and accompanying document entitled 'A New Aged Care Act: Exposure Draft Consultation Paper No. 2' (Consultation Paper). The Law Society's Elder Law, Capacity and Succession Committee has contributed to this submission.

General comments

The objects of the Bill

The Law Society broadly supports the key principles which underlie the Bill, as set out in its objects. We note the legislation seeks to "give effect to Australia's obligations under the *International Convention on Economic, Social and Cultural Rights* and the *Convention on the Rights of Persons with Disabilities*".¹ We support the Bill's rights-based and consumer-focused approach, which aims to provide a framework for those accessing funded aged care services to exercise choice and control in the planning and delivery of those services,² and to participate in society on an equal basis with others in the community.³ We also support the object of ensuring that individuals accessing funded aged care services are "free from mistreatment, neglect and harm from poor quality or unsafe care."⁴

Nevertheless, the observations and suggestions in this submission are directed at identifying areas, which, in our view, may give rise to tension or inconsistencies between the Bill's rights-based and person-centred objectives, and limitations on the full exercise of those rights.

We also seek to draw attention to certain areas in which the Bill does not appear to strike an appropriate balance in the relationship between aged care recipients and providers, in terms of their rights and obligations.

¹ Clause 5(a).

² Clause 5(c).

³ Clause 5(b)(iv).

⁴ Clause 5(d).

Chapter 4 – Fees, payments and subsidies

Notably, the Bill does not currently include provisions in relation to fees, payments and subsidies, which the Consultation Paper notes, are still under development.⁵ As such, there is little detail available regarding the contractual arrangements to be undertaken between individuals and aged care providers. In our view, the contractual relationship between individuals and providers is fundamental, and requires a clear, common understanding of the relative rights and obligations of both parties.

The Bill does not clearly establish the details of this fundamental relationship, including:

- What services will actually be provided.
- The costs of those services.
- Who is liable to pay for the services.
- The extent to which other contractual matters, such as the consequences of a breach of contract and the relevant rights of third parties, will be regulated under the Bill.

Currently, the *Aged Care Act 1997* sets out the details of an approved provider's obligations in presenting an agreement to an individual for the provision of care services, in conjunction with the User Rights Principles, Quality of Care Principles and Fees and Payments Principles. Without a similar level of detail, which presumably will be provided in the forthcoming Chapter 4 and the Aged Care Rules (Rules) to be promulgated under the Bill, it is difficult to comment on the appropriateness of the relationship between parties established under the Bill. Accordingly, our comments will likely need to be revisited when the relevant contractual arrangements are more comprehensively explained. We would be happy to be consulted further on this aspect of the Bill in due course.

Chapter 1 – Introduction

Objects of the Bill

Chapter 1, Part 1 contains a range of preliminary matters including the objects of the Bill,⁶ which set out the overarching purpose of the legislation. As noted above, we support the objects of the Bill, which, in our view, are generally consistent with the recommendations of the Royal Commission into Aged Care Quality and Safety.

However, we note that the objects do not specifically refer to the role of the provider, or the relationship between the individual and the provider, save for cl 5(g) which refers to “sustainable funding arrangements for the delivery of funded aged care services by a diverse, trained and appropriately skilled workforce.”

We suggest consideration should be given to including an additional object recognising the need to ensure the sustainability of funded aged care services, in delivering the Bill's other objects. In our view, this would better reflect the fundamental nature of relationship between aged care providers and recipients, and balance the responsibilities of providers more appropriately with the rights of individuals under the Bill.

While the rights of individuals and responsibilities of providers are further explained in the Statement of Rights at Part 3 Division 1 and Statement of Principles Part 3 Division 2, we note that these provisions are not enforceable.⁷ It is important that individuals seeking to assert their rights under the Statement of Rights understand that enforcement will occur through

⁵ Department of Health and Aged Care, *A new Aged Care Act: exposure draft Consultation Paper No.2*, (December 2023), 66.

⁶ Clause 5.

⁷ Clauses 21(3) and 23(3).

regulatory oversight of providers under the registration process and/ or complaints system, if this is the intention of the Bill.

Definitions

The definitions are contained in cl 7 of the Bill.

We note that the definition of a ‘carer’ refers to, and excludes, a person who provides care services “in the course of doing voluntary work for a charitable, welfare or community organisation.” This means that a person who does voluntary work for a for profit or other non-charitable enterprise is considered a carer under the Bill, but a person who does the same work for a charitable organisation is not. The reason for this distinction in the Bill is not clear and requires further explanation.

We also note there may be some tension caused by the definition of a carer, which excludes persons who provide care “as an aged care worker of a registered provider,” and the definition of aged care worker, which includes volunteers and employees engaged by a registered provider.⁸ As a result, a person (including a volunteer) who may be considered a carer within the ordinary meaning of the word, would not be considered a carer if they work or volunteer for a registered provider, but would nonetheless be considered an aged care worker under the Bill.

An important aspect of the Bill, reflected in the Statement of Rights, is to recognise the autonomy of the individual and to respect and acknowledge the “role of persons who are significant to the individual, including carers”.⁹ As such, there may be some tension between the obligations on aged care workers under the Bill (and the duties on registered providers to ensure compliance) and the obligation on registered providers to respect the special relationship between individuals and carers in accordance with the Statement of Rights. We suggest consideration be given to clarifying the nature of the relationship between registered providers and volunteers that may present as carers, including the providers’ duty and ability to control the actions of such volunteers as aged care workers.

Division 2 – Key Concepts, cls 8-10

We note that cls 8-10 are currently incomplete, as the only registration category specified is ‘residential care’. As noted in the Consultation Paper, other registration categories are in the process of being finalised and are expected to be released shortly.¹⁰ Accordingly, it is not possible to comment on the appropriateness of the range of proposed categories at this stage.

Clause 8 effectively proposes that the Rules, which are yet to be released, will prescribe a list of services for which funding may be payable, and describe relevant services in terms of:

- What specific activities are being delivered.¹¹
- The ‘service type’ that applies,¹² such as domestic assistance (e.g. house cleaning, shopping, laundry) or accommodation (e.g. individual room and communal furnishings, personal laundry, meals and refreshments).¹³
- The ‘service group’ that applies.¹⁴ Service groups are broken down into various categories in cl 8(3).

⁸ Clause 10(4)(a).

⁹ Clause 20(11) Statement of Rights and clause 10(4).

¹⁰ Above no 5, 17.

¹¹ Clause 8(1)(b).

¹² Clause 8(1)(c).

¹³ Above no 5, 15.

¹⁴ Clause 8(1)(d).

Clause 9 sets out the settings in which funded aged care services can be delivered, including a home or community setting, a residential care home, or both.

In effect, the Rules will determine the types of services that can be delivered, their 'service type', and their relevant group, as well as the settings to which they may apply.¹⁵ Clauses 8(5)-(6) specify a range of services that must be delivered in a residential care home setting.

However cl 8(7) provides:

- (7) The Minister must ensure that:
- (a) for each service group (other than the transition care service group)—all service types that the Minister specifies under paragraph (1)(d) as being in the group are service types that are delivered in the same setting and not a mix of settings; and
 - (b) for the permanent residential care and residential respite care service groups—the setting for the purposes of paragraph (a) is a residential care home.

While we note that much depends on the Rules to clarify and expand upon these matters, in our view, an issue arises for both aged care recipients and providers, in understanding whether multiple individuals, living in a single mixed setting environment (such as a serviced apartment), can access different funded care services in the same physical setting.

That is, in light of cl 8(7), if a couple lives together in a serviced apartment in a retirement village and one of the members of that couple needs to access services in a residential care setting, and the other member needs to access home care group services, can the two individuals living together in the same apartment access aged care services in the single physical setting? Or must the person who needs to access residential care home funded services move to a specific approved setting? In our view, the Bill does not presently account for this scenario, which is important both in relation to the physical environments individuals may access and what providers may provide.

It is also relevant to the development of service support environments in retirement villages. Operators are developing mixed independent living/higher care support environments (i.e. the serviced apartment model or low care support), and the question that remains unclear is whether the Bill allows couples to live in those environments and access the different service groups.

Where funded services are delivered

Under cl 9, the Bill clarifies the locations in which funded aged services may be delivered, namely "an approved residential care home or a home or community setting, or both."¹⁶ However, we also note that the Bill allows for the Aged Care Quality Standards (Standards) to specify "the physical environments in which funded aged care services are required to be delivered."¹⁷

Accordingly, we suggest further clarification may be required in relation to:

- The effect of the Standards on environments where care services are currently being provided, particularly if they do not meet the Standards upon commencement.
- How the prescriptions regarding 'settings' under cl 9 and the reference to 'physical environments' in cl 14(2)(c) will impact an individual's ability to choose the environment in which their care is delivered. As noted in the Consultation Paper, it is intended that the Bill supports flexibility to adjust approved service types and services to address an individual's

¹⁵ Clause 8.

¹⁶ Above no 5, 17.

¹⁷ Clause 14(2)(c).

needs.¹⁸ This suggests that, as a matter of policy, the setting for a recipient to receive aged care services should be separate and distinct from the aged care services themselves.

Clause 9(2) provides the definition of a 'residential care home.' This is then clarified by cl 9(3), to include "a place within a retirement village that has been converted to a place described by subsection (2)". In our view, a number of issues arise in relation to this definition which may require clarification:

- 'Retirement village' is not defined in the Bill. It may be useful to clarify whether the intended meaning attaches to that contained in different states' respective retirement villages legislation. There is a question as to whether other forms of communal seniors living environments that commonly support the delivery of care, such as manufactured homes, constitute a 'home setting' under the Bill.
- The word 'place' is referred to in the definition, but is itself ambiguous. Does a 'place' refer to a single room, a collection of rooms, a section of a building, or something else?
- In relation to the word 'converted', does this refer only to future changes to premises or does it also apply to environments already in place prior to the commencement of the Bill? Such issues may need to be covered in transitional provisions, including whether the act of 'conversion' is a function of the registration process to be undertaken under the Bill.

Furthermore, it is not clear what is to occur in terms of the transition of already built retirement villages. For example, if a provider has built an environment that allows for couples to live in a single independent living unit with differing funded care service group needs (e.g. one person requires residential care home support and the other requires home care) the Bill should clarify whether this constitutes 'more than one setting' and would disentitle the delivery of one of those care service groups in the one setting.

Who delivers funded aged care services

Clause 10 sets out who may provide funded aged care services under the Bill. We note that this clause contains several references to 'associated providers' of registered providers, including cl 10(6) which provides:

- (6) If an entity (an associated provider) engages in conduct under an arrangement with a registered provider relating to the registered provider's delivery of funded aged care services, this Act applies in relation to the registered provider as if the registered provider had engaged in the conduct.

More broadly, we also note that cl 6 provides:

A set of key obligations apply to registered providers and apply even where registered providers subcontract the delivery of 2 services to associated providers.

In relation to associated providers, we suggest that further consideration be given to what rights, if any, a registered provider has to seek an indemnity from an associated provider, that is, whether the Bill seeks to limit contractual rights of indemnity. We also suggest clarifying whether the reference to 'an entity' in cl 10(6) refers only to corporations, or whether it also applies to an individual provider such as a contracted cleaner operating as a family partnership.

Under cl 10(4)(a) 'aged care worker' is defined as "an individual employed or otherwise engaged (including as a volunteer) by the registered provider." This definition is very broad, and covers both volunteers, and employees of registered providers that are not directly involved with aged care work.

¹⁸ Above no 5, 38.

We are concerned that this expansive definition, which effectively subjects volunteers to the same requirements under the Bill as employed carers, is too onerous and may discourage volunteers from working with registered providers, and providers from engaging volunteers. This has the potential to undermine the viability of the sector. In this regard, we draw particular attention to cl 118 of the Bill, which imposes significant penalties on aged care workers for failure to comply with the Aged Care Code of Conduct, which may not be reasonable to impose on volunteers.

Meaning of ‘responsible person’

Clause 11 deals with the definition of ‘responsible person’ in the context of a registered provider. We note that this definition extends, inter alia, to:

- Any person who is responsible for the executive decisions of the registered provider; and
- Any other person who has authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the registered provider.¹⁹

In our view, this definition is unclear, overly broad, and could capture a variety of middle management positions that influence or contribute to a registered provider’s decisions. For example, a director of nursing, catering manager, or cleaning manager could all arguably be deemed responsible persons under the Bill, particularly if they influence a provider’s decisions to expend funds or develop operational processes. This broad definition is particularly problematic in light of the very significant civil and criminal penalties associated with breaches of the responsible persons’ duties under cl 121 of the Bill.

Accordingly, we suggest that the definition of responsible persons be more narrowly defined, by excluding from its scope managers with limited authority or control over the provider.

Meaning of high quality care

As a broad observation, we note that the descriptions of high quality care under cl 19 are often ambiguous and lack an objective basis. For example, cl 19(a), which obliges providers to ‘put the individual first’ is vague, and arguably superfluous in light of cl 19(b) which obliges providers to uphold “the rights of the individual under the Statement of Rights.”

Furthermore, cl 19(c) lists 11 items that the provider is required to ‘prioritise’. From a provider’s perspective, and as a function of interpretation, it is unclear whether a registered provider:

- Is expected to give equal priority to each item ahead of any other element.
- Is to determine the priority between these factors continually as circumstances change.
- Is to prioritise the items listed over any other obligation of the provider.

The issue of prioritisation is also complicated by the question of who will pay for the delivery of the priority services. For example, cl 19(c)(x) refers to the provision of bilingual aged care workers and interpreters. We suggest further clarification is required regarding:

- Whether the priorities are to be provided as part of the funded aged care services, or at the provider’s, or the resident’s, expense.
- The role of the contractual relationship in addressing the prioritisation of the elements.
- If such services are unavailable, whether the provider would be in breach of the Bill. We note that a registered provider must not act in a way that is incompatible with the Statement of Rights, “taking into account that limits on rights may be necessary to balance competing or conflicting rights and the rights and freedoms of other individuals.”²⁰

¹⁹ Clause 11(1)(a)-(b).

²⁰ Clause 21(2).

Guardianship and Powers of Attorney

We discuss below the interaction between the ‘supporters’ and ‘representatives’ framework under the Bill, and the provisions of the *Guardianship Act 1987* (NSW) and *Powers of Attorney Act 2003* (NSW). While the issues are framed from the perspective of NSW, we suggest that the issues are of national significance, as similar considerations arise across all Australian jurisdictions, despite the differences in approach taken by the states and territories to guardianship and power of attorney laws.

Supporters and representatives: overview of the proposed framework

Chapter 1, Part 4 of the Bill establishes the legislative framework for legally appointed supporters and representatives, including their roles and duties in respect of supported decision-making.

The Bill permits the System Governor to appoint supporters²¹ or representatives²² for an individual. An application for the appointment of a representative can be made on the request of a person (including the subject individual) or a body, or on the initiative of the System Governor.²³

Under cl 28(1), a person cannot make a decision for an individual under, or for the purpose of, the Bill unless they are appointed as a representative for the individual. This applies even where there is an existing arrangement for a person to make decisions on the individual’s behalf under other laws.²⁴ For example, a guardian,²⁵ enduring guardian,²⁶ financial manager,²⁷ enduring attorney,²⁸ and NDIS nominee.²⁹

We note that the scope of powers granted to a representative under cl 27 of the Bill is very broad, and permits a representative on behalf of the individual, to “do any thing that may or must be done by the individual” under, or for the purposes of, the Bill, except in relation to a restrictive practice. This would appear to include the power to make an application for funded aged care services on behalf of an individual, and, to undergo an aged care needs assessment, under cls 37(a) and (c) respectively.

Under cl 27, it would appear that the representative is able to, among other things, decide that the individual enter residential age care, and/or obtain aged care services. These are types of decisions a guardian/ enduring guardian is typically empowered to make.

While we again note that Chapter 4 of the Bill, relating to fees, payments and subsidies, is yet to be provided, the Consultation Paper appears to suggest that entering into an agreement with a registered provider is something “that may or must be done by the individual under, or for the purposes of the Act”, and, would in turn, fall within the scope of the representative’s powers. The Consultation Paper states:

²¹ Clause 374.

²² Clause 376.

²³ Clause 376(2).

²⁴ Clause 28(2).

²⁵ Clauses 28(2)(a) and (b).

²⁶ Clause 28(2)(a).

²⁷ Clause 28(2)(b).

²⁸ Clause 28(2)(c).

²⁹ Clause 28(2)(d).

Once a person is advised that they are now able to access funded aged care services, they can find and make an agreement with a registered provider(s) to provide them with services...”.³⁰

An attorney appointed under a power of attorney, or a financial manager appointed under a financial management order, would typically be empowered to enter into an agreement with a registered provider(s).

Interaction between the representative provisions in the Bill and the *Guardianship Act 1987* and *Powers of Attorney Act 2003*

By the combined operation of cls 27 and 28, the representative may do “any thing that may or must be done by the individual under, or for the purposes of the Act” on behalf of the individual, including where:

- the individual has appointed a person(s) to make decisions on their behalf in relation to their personal and/or financial affairs, in the event that they lose the ability to make those types of decisions.³¹
- a court or tribunal has found that the individual lacks the ability to make decisions about their personal and/or financial affairs and has appointed a person(s) to make decisions about the individual’s personal and/or financial affairs.³²

In our view, the operation of cls 27, 28 and the associated provisions in the Bill are problematic in several respects.

The Bill permits a representative to make decisions under, or for the purposes of the Act, on behalf of an individual, in circumstances where a substitute decision-maker has been appointed by the individual, or a court or tribunal to make decisions of that type on behalf of the individual, under state or territory legislation. By virtue of cl 28, the powers given to the representative under the Bill trump those given to a substitute decision-maker, except in relation to restrictive practices.

Clause 376(4) requires the System Governor to appoint a substitute decision-maker who seeks to be appointed as a representative, providing that the Systems Governor is satisfied that the substitute decision-maker meets certain requirements,³³ and a supporter has not been appointed for the individual.³⁴ However, that requirement does not safeguard the powers given to the substitute decision-maker for the following reasons:

- The substitute decision-maker will not necessarily be aware of the fetter on their power to make decisions under, or for the purposes of the Bill, on behalf of an individual, nor the requirement to apply to be appointed as a representative, to make such decisions on behalf of the individual.
- The Bill does not require the System Governor to notify a substitute decision-maker where a person has applied under the Bill to be appointed as a representative for the individual.
- The Bill does not require the System Governor to be satisfied that a substitute decision-maker has not been appointed for the individual, before appointing a representative for the individual. Under cl 376(5) the System Governor must merely have regard to whether a substitute decision-maker has been appointed for the individual.
- The Bill prohibits the appointment of a substitute decision-maker as representative for the individual where a supporter has been appointed for the individual. While the System Governor must not appoint a person as supporter for the individual unless the individual

³⁰ Above no 5, 34.

³¹ Clauses 28(2)(a) and 28(2)(c).

³² Clause 28(2)(b).

³³ Clause 376(6).

³⁴ Clause 376(7).

consents to that appointment,³⁵ the Bill does not require the System Governor to be satisfied that the individual has capacity to consent to that appointment. Nor does the Bill provide a mechanism for determining whether the individual has capacity to consent to the appointment of a supporter, in circumstances where there is a dispute about that issue.

The Bill also does not appear to provide a mechanism for removing a representative in circumstances where the substitute decision-maker learns of a representative's appointment after it was made and wishes to be appointed as the representative.

Furthermore, the Bill appears to mistakenly assume that where a substitute decision-maker has been appointed for an individual, but for cl 28, that substitute decision-maker would be authorised to make all "decision(s) under, or for the purposes of the Bill" on behalf of that individual. It is not uncommon for an individual, court or tribunal to appoint more than one substitute decision-maker to manage different aspects of an individual's personal and/or financial affairs. For example:

- A person may appoint an enduring guardian to make decisions about where they live, but not the types of services they receive.
- A person may appoint an enduring guardian to make decisions about where they live, and a different enduring guardian to make decisions about the types of services they receive.
- A court or tribunal may appoint a person to make decisions about a person's personal affairs (including accommodation and services), and a different person to make decisions about that person's financial affairs.

By cl 376(4), subject to cls 376(6) and 376(7), the System Governor would be obliged to appoint an attorney (appointed to make decisions about the individual's financial affairs), providing that attorney applied to be appointed as representative for that individual. As a consequence of that appointment, the representative-attorney would be authorised to make all decisions under, or for the purposes of the Bill, including those relating to the individual's personal affairs. The individual may have considered the attorney unsuitable to make decisions about their personal affairs and appointed a different person as their enduring guardian to make those types of decisions.

Where two or more representatives are appointed jointly and severally and one of those representatives is a substitute decision-maker, there is the potential for conflict between decisions made by the representative and the representative-substitute decision-maker, where the latter is exercising functions in relation to the Bill.

The Bill would also appear to leave registered providers without a remedy where they have entered into an agreement with a representative who purports to do a thing on behalf of the individual under, or for the purposes of, the Bill. For example, a representative may enter into an agreement on behalf of the individual with a registered provider for the provision of care and/or accommodation services. Unless also appointed as the individual's attorney or financial manager, the representative will lack authority to authorise third parties to make payments for the provision of those services. The protections afforded to representatives under Division 2 of Part 2 of the Bill, would appear to leave the registered provider without a remedy to recover fees, providing the representative entered into the agreement in good faith.

Further, the Bill does not appear to provide registered providers with a right to:

- Be informed of any failure or defect in the appointment of a supporter or representative.
- Challenge the appointment or actions undertaken by an appointee.
- Seek a remedy against a supporter or representative where their actions cause a loss to the registered provider, for example, incurring costs for the delivery of services.

³⁵ Clause 374(4)(b).

Notwithstanding the operation of cl 28(2), which effectively grants primacy to a representative under the Bill over a guardian or attorney under state law in respect of aged care, in our view there is significant potential for confusion and dispute between various appointees, particularly where their respective roles and functions may be seen to overlap.

Accordingly, we suggest further clarification is required to explain how the Bill can address the situations outlined above. In our view, these are significant practical difficulties that may undermine the ability of individuals to make informed appointments under one or more of the regimes, as well as lawyers' ability to advise their clients effectively in this regard.

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, appearing to read 'Brett McGrath', with a stylized flourish extending to the right.

Brett McGrath
President