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9 September 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: janina.richert@lawcouncil.au

Dear Dr Popple,

Response: A new Aged Care Act exposure draft consultation feedback report

The Law Society of NSW writes to you to convey our views regarding the report, *A new Aged Care Act: exposure draft consultation feedback report* (the **Feedback Report**), published on 30 May 2024 by the Department of Health and Aged Care. The Law Society's Elder Law, Capacity and Succession Committee contributed to this submission.

The Law Society is of the opinion that the Feedback Report, which is designed to identify emerging themes and insights in response to the Exposure Draft of the Bill for the New Aged Care Act (the **Exposure Draft Bill**) does not adequately address key concerns raised by the Law Society. Of particular concern are the provisions relating to "supporters" and "representatives"¹ contained in the Exposure Draft Bill, and their interaction with existing State and Territory legislation relating to the appointment of "substitute decision-makers".²

The concerns raised by the Law Society were outlined in a submission made by the Law Council of Australia and are included below.³

Lack of transparency in appointment of representatives and supporters

On the request of a person (including the individual)⁴ or body, and in the case of a representative, on the initiative of the System Governor⁵ (the Secretary of the Department of

¹ Exposure Draft Bill, Chapter 1, Part 4 & Chapter 8, Part 4.

² *Powers of Attorney Act 2003* (NSW); *Guardianship Act 1987* (NSW); *Powers of Attorney Act 1998* (Qld); *Guardianship and Administration Act 2000* (Qld); *Powers of Attorney Act 2003* (ACT); *Guardianship and Management of Property Act 1991* (ACT); *Powers of Attorney Act 2014* (Vic); *Guardianship and Administration Act 2019* (Vic); *Powers of Attorney and Agency Act 1984* (SA); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1990* (WA); *Powers of Attorney Act 1980* (NT); *Guardianship of Adults 2016* (NT); *Powers of Attorney Act 2000* (Tas); *Guardianship and Administration Act 1995* (Tas).

³ Law Council of Australia, Response to the Department of Health and Aged Care on the Exposure Draft of the Bill for the New Aged Care Act, 13 March 2024.

⁴ Exposure Draft Bill cls 374(2), 376(2)(a).

⁵ Ibid cl 376(2)(b).

Health and Aged Care), the System Governor may appoint a supporter(s) or representative(s) for an individual.⁶

Where a guardian, enduring guardian, financial manager, enduring attorney, or NDIS or Centrelink nominee (a **substitute decision-maker**)⁷ requests to be appointed as a representative of the individual, the System Governor **must** appoint that person as a representative, provided that the System Governor is satisfied that the substitute decision-maker meets certain requirements, and a supporter has not been appointed for the individual.⁸

The instruction that the System Governor must not appoint a person or body as a representative for the individual where a supporter has been appointed for that individual does not operate, in our view, to adequately safeguard the appointment of substitute decision-makers.

The Law Society also notes:

- the Exposure Draft Bill does not require the System Governor to notify a substitute decision-maker where a person or body has applied to be appointed as a representative
- the Exposure Draft Bill does not require the System Governor to be satisfied that a substitute decision-maker has not been appointed, before appointing a representative for the individual
- the Exposure Draft Bill appears to assume that a substitute decision-maker will be aware of the requirement to apply to be appointed as a representative, so as to make decisions on behalf of the individual “under, or for the purposes of the Act”⁹
- in addition, the Exposure Draft Bill appears to assume that the substitute decision-maker will be aware of the purported fetter on their power to make decisions on behalf of the individual, under, or for the purposes of the Aged Care Act, unless they also hold an appointment as representative of the individual.

Potential to undermine the right to appoint a substitute decision-maker

In all States and Territories of Australia, adults have a statutory right to appoint another person to make decisions about their personal and financial affairs.¹⁰ Those appointments generally come into effect when the appointor loses capacity to make decisions about their personal and/or financial affairs. The provisions in the Exposure Draft Bill governing the appointment of representatives have the potential to undermine that right.

For example, in Scenario 1 in the Annexure to this submission, at a time when Mary had capacity to appoint an enduring guardian and attorney, she decided to appoint Peter to those roles. However, after Mary lost capacity to make decisions about her personal affairs, the System Governor appointed Amanda as Mary’s representative without the knowledge of Peter. The appointment of Amanda, and the decisions Amanda makes on behalf of Mary, may be inconsistent with Mary’s will and preference.

⁶ Ibid cls 374, 376.

⁷ Exposure Draft Bill cl 28(2).

⁸ Ibid cls 376(6), 376(7).

⁹ Ibid cl 28.

¹⁰ See n3 above.

Potential for conflict between decisions made by representatives and substitute decision-makers

The Exposure Draft Bill creates the potential for conflict between the authority exercised by a representative and that exercised by a substitute decision-maker. This is likely to result in decision-making uncertainty.

First, a representative who is not the individual's substitute decision-maker will be authorised to make decisions on behalf of the individual "under, or for the purposes of the Act."¹¹ Under the terms of their appointment, a substitute decision-maker may be authorised to make the very same decisions. The Exposure Draft Bill provides no guidance on how the potential for conflict between decisions made, or purported to be made "under, or for the purposes of the Act" by a representative and a substitute decision-maker will be resolved.

In Scenario 1, Peter (Mary's enduring guardian and attorney) and Amanda (Mary's representative) each purport to have authority to enter into an agreement with an aged care provider on Mary's behalf, to the exclusion of the other. As acknowledged in the Feedback Report, this potential conflict could cause delays and complications in decision making for older people.¹²

Second, the Exposure Draft Bill appears to assume that where a substitute decision-maker has been appointed as a representative of the individual, they are authorised to make "all decision(s) under, or for the purposes of the Act" on behalf of the individual. However, it is uncommon for an individual, court or tribunal to give a substitute decision-maker authority to make decisions about all matters relating to the individual's personal affairs. For example:

- an individual may appoint an enduring guardian to make decisions about where they live, but not the types of services they receive
- an individual may appoint (i) an enduring guardian to make decisions about their personal affairs, including where they live and the services they receive and, (ii) an attorney to make decisions about their financial affairs, which would include payment of fees for aged care services and accommodation
- a court or tribunal may appoint a person to make decisions about a person's personal affairs and a different person to make decisions about that person's financial affairs.

In addition, NDIS and Centrelink nominees, who are deemed by the Exposure Draft Bill to be substitute decisions-makers, have limited authority to make decisions on behalf of an individual.

Third, registered providers may be left without a remedy where they have entered into an agreement with a representative who makes a decision on behalf of an individual under, or for the purposes of the Act, and the substitute decision-maker challenges that decision.

For example, in Scenario 1, Amanda enters into an agreement with an aged care provider to provide Mary with in-home services, relying on her authority as Mary's representative. Peter, as Mary's attorney, refuses to authorise payment for those services. The protections afforded to representatives under Chapter 1, Division 2 of Part 2 of the Bill, would appear to leave the registered provider without a remedy to recover fees, provided that Amanda entered into the agreement in good faith.

¹¹ By cl 27 of the Exposure Draft Bill "a representative of an individual may on behalf of an individual do anything that may or must be done by the individual under, or for the purposes of the Act", except "in relation to a restrictive practice".

¹² Department of Health and Aged Care, *A new Aged Care Act: exposure draft – Consultation feedback report* (May 2024) 32.

Removal of a supporter or representative

The Exposure Draft Bill at Chapter 8, Part 4, Division 2 provides a mechanism by which an individual, supporter, or representative may request cancellation of an appointment.¹³

The grounds available to the System Governor to suspend or cancel the appointment of a representative, do not include where, unbeknownst to the System Governor, there was a substitute decision-maker already appointed for the individual at the time they appointed a representative for that individual. Nor does the Exposure Draft Bill give a substitute decision-maker a right to request the System Governor to cancel the appointment of a representative, where they learn of that appointment after it was made.

The Exposure Draft Bill permits the System Governor to suspend the appointment of a person as a supporter or representative if they reasonably believe that that person has not complied with their duties under the Act,¹⁴ or has caused, or is likely to cause, physical, sexual, financial, psychological or emotional abuse or neglect to the individual.¹⁵ However, the Exposure Draft Bill does not give a registered provider, or any person with a genuine concern for the individual, to apply to the System Governor to cancel or suspend the appointment of a supporter or representative on those grounds. Nor does the Exposure Draft Bill provide a mechanism for determining allegations that the appointed person has failed to comply with their duties under the Act,¹⁶ or that the appointed person has, or is likely to cause, physical, sexual, financial, psychological or emotional abuse or neglect to the individual.¹⁷

For example, in Scenario 2, John is appointed as Paul's representative, notwithstanding he had been found by NCAT to be an unsuitable person to act as Paul's guardian. John then proceeds to make a series of decisions on behalf of Paul, which trouble the operators of the aged care facility where Paul is residing.

Further, the Exposure Draft Bill does not provide a mechanism for resolving conflict between a supporter and a substitute decision-maker. For example, in Scenario 3, after being appointed as Michael's supporter, Alice makes several requests and directions to the care service for goods, services, and activities for Michael. Alice's decisions have led to the care service incurring costs which are not covered by the home care agreement entered into by Tom (Michael's substitute decision-maker).

Assessment of individual's capacity to consent to the appointment of a supporter

A further area of uncertainty in the Exposure Draft Bill is the process by which a supporter may be appointed for a person. The System Governor must not appoint a person as supporter for an individual unless that individual consents to that appointment.¹⁸ However, 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 the capacity to consent to the appointment of a supporter, nor testing conflicting claims made about the individual's capacity.

For example, in Scenario 3, Michael is losing his capacity to make decisions, but is still able to manage to live at home, supported by his daughter, Alice. There is conflicting evidence about Michael's capacity to consent to the appointment of a supporter. The Exposure Draft Bill

¹³ Exposure Draft Bill cls 385, 386, 387.

¹⁴ Exposure Draft Bill cl 382(3).

¹⁵ Ibid cl 383(2).

¹⁶ Ibid cl 382(3).

¹⁷ Ibid cl 383(2).

¹⁸ Ibid cl 374(4)(b).

is silent about the process that will be employed by the System Governor in considering Alice's application to be appointed as supporter, and obtaining and evaluating evidence about Michael's capacity to consent to that appointment.

Thank you for considering our views. If you have any further questions in relation to this letter, please contact Mimi Lee, Policy Lawyer on (02) 9926 0174 or by email: mimi.lee@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', with a stylized flourish at the end.

pp.
Brett McGrath
President

ANNEXURE

Scenario 1

In 2011, Mary appointed her son, Peter as her attorney and enduring guardian.

In 2016, Mary was diagnosed with dementia. Since then, Mary's health and cognition have progressively declined. By 2021 Mary was no longer capable of making decisions of any significance about her personal affairs.

By March 2022, Mary had become increasingly feeble and unable to care for herself. Peter arranged for Mary to move to residential aged care.

Mary and her sister, Amanda, have been estranged for over a decade. Amanda disagreed with Peter's decision that Mary move to aged care.

Following a request made by Amanda, in April 2022 Amanda was appointed as Mary's representative under s 376 of the *Aged Care Act 2023* (Cth). That appointment was made without Peter's knowledge. Amanda does not disclose that Mary has appointed Peter as her attorney and enduring guardian.

Acting as representative, Amanda made a series of decisions on behalf of Mary, including that:

- Mary be provided with a vegetarian diet (Mary had not previously been a vegetarian)
- contrary to medical advice, that Mary participate in all excursions arranged by the facility
- Mary commences seeing a new GP.

The aged care facility implements these decisions. Three months later, Peter discovers that Amanda made those decisions. He instructs lawyers to write to the facility asserting that Amanda lacks authority to make those decisions. Amanda's lawyers write to the facility asserting that as representative she is authorised to make those decisions. In addition, she asserts that those decisions fall outside the scope of the authority given to Peter as enduring guardian.

Amanda has entered into an agreement with an aged care provider (different to the aged care facility where Mary resides) to provide Mary with in-home services. Peter's lawyers write to that provider and claim that Amanda lacks authority to enter into that agreement and Peter will not authorise payment for those services.

Scenario 2

In 2022, 88-year-old Paul was admitted to hospital following a fall. The hospital lodged an application to NCAT for a guardianship order to be made in respect of Paul. Paul's son, John, opposed that application, claiming that Paul continues to be able to make his own decisions with family support.

NCAT found that Paul lacked capacity to make significant decisions about his personal affairs and exercised the discretion to make a 12-month guardianship order.

In addition, the Tribunal decided not to appoint John as Paul's guardian. The Tribunal found that John was not suitable to be appointed as guardian because of a conflict between his interests and those of Paul. The Tribunal found that John's stated opinion that Paul was not cognitively impaired, and his opposition to Paul moving to residential aged care was largely motivated by self-interest and John's wish to remain living in Paul's home. In addition, the Tribunal found that John had intimidated Paul and sought to isolate him from other family members. The Tribunal appointed the NSW Public Guardian.

The Public Guardian concluded that it was no longer safe for Paul to remain living at home and decided that he should move to residential aged care.

In 2023, NCAT decided to permit the guardianship order to lapse.

Two months later, following a request made by John, he was appointed as representative for Paul under s 376 of the *Aged Care Act*.

John proceeded to make a series of decisions on behalf of Paul, including that family members not be permitted to visit Paul and that he returns to live with John. John entered into an agreement with an aged care provider to provide Paul with in-home services.

The aged care facility where Paul currently resides is concerned that John is not acting in Paul's best interests.

Scenario 3

In 2021, Michael lives in a large home by himself receiving a level 3 home care package of support. Over time, Michael is losing his capacity to make his own decisions but can still manage to live at home with support from his daughter Alice, who lives close by to Michael and visits very regularly. Michael can express his 'preferences', with Alice's help, about what he likes.

Michael's son Tom holds the appointment of enduring guardian and enduring attorney. Michael has meagre savings and receives the pension. All bank accounts are controlled by Tom, and he regularly pays invoices as they arise. Tom lives some distance from Michael but visits from time to time and is in regular contact with the care service in terms of case management.

Michael's daughter, Alice, is generally present when home care services attend and 'hovers' over the home care staff to the services provided, enquires as to the care being provided, requests copies of the care plan, seeks to direct the care to be provided under the care plan and requests a range of services.

The staff at the home care service have acquiesced to the regular requests and directions issued by Alice and, as a result, the range and costs of services have changed and increased, which Tom has arranged to pay both from Michael's money and his own. The funds are however depleting at a rate that further extra costs cannot be incurred without proper management.

Alice applies to the System Governor to be appointed as Michael's 'supporter' under s 374 of the *Aged Care Act*. Alice does not tell Tom of the application and does not inform the System Governor that Tom is Michael's enduring guardian and attorney.

Alice continues to make regular requests for information and provides direction to the care service as to the services to be provided in her role as supporter.

The care service is concerned that the constant requests and directions made by Alice as supporter are moving more to 'entertainment' and social support activities, contrary to the arrangements made in consultation with Tom acting in his capacity as enduring guardian and attorney that addressed Michael's clinical needs. As a result, the care service reaches a point in which it has incurred costs in responding to Alice's requests, in particular providing goods, services and additional activities to manage Michael's preferences, that are recoverable against Michael under the home care agreement.

Tom then learns of Alice's role as supporter and tells the care service that those costs are unauthorised, and that Alice as supporter has no authority to direct the change in activities and

expenditure to be incurred, even though they appear to be what Michael likes and prefers. Michael now owes the care service \$5,000 for additional activities and goods. This amount is too small to sue over, but still a significant amount for both Michael and the care service.