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Our ref: [SS-EU]



Dr James Popple
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Dear Dr Popple

A New Aged Care Act: the foundations – Consultation paper No. 1

Thank you for the opportunity to provide feedback on the Commonwealth Department of Health and Aged Care's consultation paper, *A New Aged Care Act: the foundations – Consultation paper No. 1 (Consultation Paper)*. The Queensland Law Society (QLS) appreciates being consulted on this important paper.

This response has been compiled by the QLS Elder Law Committee, whose members have substantial expertise in this area. Our responses are grouped under the topics and questions raised in the Consultation Paper in addition to our general comments below. Please note that we have not commented on every question.

General comments

It is difficult to comment on a model that is only in descriptive form rather than in draft form. There is insufficient detail in the model for us to provide detailed comments. QLS would welcome further opportunities for consultation when the legislation is in draft form. Our views may differ from the views expressed in this letter after we have reviewed the draft legislation.

In particular, we are concerned that the new Act may be unnecessarily complex. Although we support the proposal for a single Act, in principle, a single Act will not necessarily simplify the legislation.

Further, we will be closely considering how the draft legislation interacts with human rights protections of older people. We are concerned that some elements of the proposed Act may water down those protections and do not provide older people with an active and meaningful role in decisions about their own human rights.

One significant concern is the loss of human rights resulting from the misapplication of an attorney's powers. Often, a service provider will act on the direction of the attorney or substitute decision-maker, which overrules the wishes of the principal/resident.

When a resident tries to access advocacy, the attorney intervenes and terminates the referral, and the aged care facility will block the resident's access to advocacy, as directed by the attorney. Additionally, the attorney may be assisted by solicitors to serve cease and desist letters on advocacy services. However, it is often the attorney that the older person is wishing to complain about, but they are left powerless and denied their human rights due to the incorrect application of the attorney's powers.

The model should recognise that a person's capacity to make a decision about a matter must be assessed on a case-by-case basis having regard to the circumstances at that particular time. Although a person may not have capacity to make certain legal decisions, they could still retain the capacity to seek independent advice about other matters.

As we have stated in our previous submissions, we urge the Law Council to reiterate its support for a Convention on the Rights of Older Persons, to ensure human rights issues in long term care have specific normative standards to which the Federal government must adhere.

We are also concerned about the interaction between any substitute decision making arrangements under a new Act and the existing State and Territory laws.

The structure, purpose, objects and constitutional basis of the new Act

1. Do you think the aged care legislative framework will be more accessible and transparent if there is a single piece of primary legislation and one set of Rules?

QLS agrees that a single piece of primary legislation and set of rules in subordinate legislation will make the aged care legislative framework more accessible and transparent. However, as a single piece of legislation will be lengthy, there may need to be subordinate legislation divided into separate parts, which may reduce the intended benefit of having a single piece of legislation.

2. Would you prefer to access separate topic-based subordinate legislation (like the current Quality of Care Principles 2014 and the Subsidy Principles 2014)?

In principle, QLS does not prefer separate topic-based subordinate legislation. However, it is difficult to give a view on this until we review the proposed legislation as it will depend on how well constructed the legislation is.

3. What else would you like to see included in the Objects of the new Act?

QLS would like to see the objects of the new Act include a statement that the consumer/older person retains all their human rights, regardless of their capacity.

4. Do you think it is a good idea to include a 'Purpose Statement' in the new Act, as well as objects provisions? What do you think the purpose of the new Act should be?

QLS supports including a purpose statement and objects in the new Act. The purpose statement should:

- ensure the older person has protection of, and access to, all their human rights;
- identify that it is the older person, not the attorney or substitute decision maker, to whom the aged care provider owes a duty;

- note the purpose of streamlining access and simplifying the legislative framework; and
- reflect the nature of the Act as a funding instrument, if that remains the intention of the Act.

However, we also acknowledge that including objects, a purpose statement, a statement of rights, a statement of principles, and a definition of 'high quality care' could complicate the legislation. We are concerned that the aim of the legislation could become lost in layers of detail.

5. Do you have any other feedback on the proposed structure of the new Act?

We suggest that security of tenure provisions are revised to ensure they are workable for the older person and the aged care provider.

The Statement of Rights

6. Do you support a Statement of Rights being included in the new Act?

QLS supports including a statement of rights in the new Act. However, we note that the current wording addresses harm by an aged care provider, but does not address harm by a substitute decision maker or attorney. In our view, the Act should make it clear that the aged care provider's obligation is to support the adult to access their rights, rather than to enforce an attorney's requests. That is, the attorney's views should not override the adult's rights.

7. Are there any rights that you think we have missed that should be included?

In our view, there should be some limits on attorney powers. For example, the attorney should not have the power to interfere with the adult's right to community, even if the adult has impaired capacity.

8. Are there any rights that you think should be worded differently?

Refer to our response to question 6 above.

9. We consider it critical that person-centred complaints pathways are available for older people to seek early resolution of concerns about their rights. This is because the ideal scenario is where the registered provider or if necessary, the Commission can address risks early, instead of using enforcement mechanisms after harm has already occurred. Do you think we have the balance right?

QLS considers that easy and supported access to independent advocacy (both legal and non-legal) is an essential aspect of a rights-based approach, which needs to be stated in each of the four parts of the diagram on page 19 of the Consultation Paper. Further, it should be made clear that a lack of capacity cannot remove an adult's right to independent advocacy, even if the adult's attorney purports to prohibit it.

We also suggest that further detail of restorative practices are needed to ensure this can be appropriately and sustainably resourced.

Statement of principles

10. Do you support a Statement of Principles being included in the new Act as well as a Statement of Rights?

Yes, QLS supports including both a statement of principles and statement of rights in the new Act.

11. Are there any principles that you think we have missed that should be included?

QLS considers that the statement of principles should clarify attorney obligations and clearly state that there are limits on attorney's powers. In particular, the statement of principles should state that attorneys are not permitted to refuse or prevent independent advocacy for the older person.

Definition of high quality care

13. Are there any changes you would make to the proposed definition of high quality care?

QLS would like the definition of 'high quality care' to include a clear statement that it is the aged care provider's obligation to support the older person to access all their rights, including independent advocacy (legal and non-legal).

However, as stated above, care should be taken not to create too many layers of complexity between the statement of rights, statement of principles, objects, purpose statement and the definition of 'high quality care'.

14. Outside of the new regulatory model, are there any other initiatives that you would like to see addressed in the new Act to encourage registered providers to aim higher and deliver high quality care?

QLS would like the new Act to address sustainable funding and a regulatory approach that supports innovation.

A duty of care and compensation pathways

15. Do you support inclusion of the new statutory duty of care in the new Act?

QLS supports including the new statutory duty of care in the new Act.

16. Do you think the new duty could result in any unintended consequences?

One unintended consequence that may arise from the new duty could be a conflict of obligations.

17. Do you support related duties being placed on responsible and governing persons of aged care providers?

QLS supports the new Act including a separate duty on responsible and governing persons provided that the duty is subject to appropriate parameters to ensure the system is balanced and encourages rather than discourages individuals from participating in governing positions, which is essential for sustainability of the sector.

18. Do you think a related duty should be placed on aged care workers?

QLS does not support placing a related duty on aged care workers. Our members report that most aged care workers are undertrained and they often have to choose between pressing responsibilities due to understaffing. A worker should not be held responsible for an aged care provider's management and financial decisions regarding staffing etc.

19. Do you think a separate duty should be placed on organisations that provide enabling services and/or facilitate access to aged care workers? What should be the extent of such a duty?

We consider that obligations could be placed on these organisations but not necessarily a separate duty for all organisations. Any duty or obligation needs to be proportionate. For example, there could be a higher standard duty for government funded organisations versus a reduced standard obligation for non-funded service providers.

20. Do you have any further feedback on the proposed approach to compensation?

The sustainability of the sector is an important consideration. Compensation should arise only from very serious conduct and where there is a clearly defined obligation.

The proposed approach to compensation should also include a clear statement about not prioritising safety over risk and the right to choice. That is, risk should be considered, but cannot be eliminated, only mitigated where possible. There should also be recognition of third party rights such as those of aged care workers.

Disclosure protections for whistleblowers

22. What other barriers are there to people disclosing information about what they observe in the aged care system, and how can these best be overcome?

Concerns about the disclosing person's identity being provided to the registered provider can be a barrier to disclosure, as this could create a high potential for retaliation.

Supported decision-making arrangements

23. What are your views on the proposed nominee framework?

QLS is in favour of supported decision making provided that it is at the discretion of the older person. In this respect, we have concerns with the first and fifth bullet points in the table on page 40 of the Consultation Paper in relation to the arrangements for authorised representatives.

We are also concerned that a decision making framework specifically for aged care may result in a situation where a person has alternative decision makers depending on whether they are receiving aged care or they are accessing other services, for example if they are admitted to hospital.

24. What challenges could there be with the proposed framework, and do you have any proposed solutions?

In relation to authorised representatives, the fifth bullet point in the table on page 40 of the Consultation Paper is alarming. It essentially means that the older person cannot have a private conversation with My Aged Care, including in situations where the representative is the person of concern or exerting unwanted power.

In our view, this point should be reversed. That is, the authorised representative cannot have a private conversation with My Aged Care without the older person being present, unless the older person chooses not to participate.

25. Are there any other duties or obligations you think should be put on appointed nominees?

QLS considers that the older person must always have access to independent legal and non-legal advocacy, which cannot be removed by the nominee or representative. Further, the nominee or representative must be required to use substituted judgment.

26. When do you consider a supporter nominee would be most useful to a recipient of aged care services? For example, to convey decisions, understanding processes, receiving and explaining correspondence in a way which is understood by the older person.

We consider a supporter nominee would be useful in all of the situations noted in the question above. Additionally, a supporter nominee would be useful for gathering information, working through details, and spending more time with the older person than the My Aged Care representative can.

27. What kind of information do you think support nominees should receive?

A supporter nominee should be entitled to receive all of the information that the older person wants them to receive.

28. Are there any categories of information that support nominees should not receive?

It should be up to the older person to decide what categories of information the supporter nominee should not receive.

If you have any queries regarding the contents of this letter, please do not hesitate to contact

Yours faithfully

Chloé Kopilovic
President