

13 February 2024

Our ref: [SS:EL]

Email: [REDACTED]

Dr James Popple
Chief Executive Officer
Law Council of Australia
Level 1, MODE3
24 Lonsdale Street
BRADDON ACT 2612

By email: [REDACTED]

Dear Dr Popple

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

Thank you for the opportunity to provide feedback on the Commonwealth Department of Health and Aged Care's consultation on the exposure draft of the Aged Care Bill 2023 (the **draft Bill**). The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation.

This response has been compiled by the QLS Elder Law Committee, whose members have substantial expertise in this area.

In this response, we focus on two discrete areas of concern relevant to aged care in Queensland: the interaction between the proposed supported decision making regime and State and Territory-based attorney and guardianship legislation, and the use of restrictive practices in aged care.

Interaction with State and Territory-based attorney and guardianship legislation

QLS supports the comments made by Dr John Chesterman, the Queensland Public Advocate in his article published in Australian Ageing Agenda on 22 January 2024.¹ QLS is equally concerned about the interaction between the supported decision making arrangements under the draft Bill and the existing State and Territory-based attorney and guardianship legislation.

We are concerned that the system of representatives and supporters proposed under the draft Bill in addition to the State and Territory-based attorney and guardianship legislation is complex. 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 accessing other services, for example if they are admitted to hospital.

¹ Chesterman, J., 'More work needed on aged care bill', *Australian Ageing Agenda*, January 22, 2024.
<https://www.australianageingagenda.com.au/executive/more-work-needed-on-aged-care-bill/>

These complexities may create conflicts between decision-makers, including conflicts between family members and friends who have different roles. In such instances, complexity and conflicts may drive decision-making underground and potentially result in aged care providers not seeking guidance and consent from substitute decision makers, particularly if a decision needs to be made quickly. This may have significant adverse impacts on the older person's human rights.

We support the requirement for an existing attorney under an enduring power of attorney or guardian to be appointed as the older person's representative under the draft Bill. However, we do not support this appointment being subject to the restrictions under proposed subsections 376(6) and (7) as this impedes on the rights of attorneys and guardians under State and Territory legislation. We also note that subsection 376(6)(d) states that the System Governor must take into account any other matters prescribed by the aged care rules, yet those rules have not been drafted at this stage. We would welcome the opportunity to provide further comments after the proposed rules have been released for consultation.

Having regard to these concerns, the interaction between the Commonwealth and State and Territory based legislation needs further consideration and clarity. In our view, state and territory based appointments must prevail.

Restrictive practices

QLS supports the comments made by Dr John Chesterman, the Queensland Public Advocate in his article published in Australian Ageing Agenda on 22 January 2024 in relation to restrictive practices.²

We have significant concerns about the use of restrictive practices in residential aged care settings. Our members have reported that restrictive practices for older people are subjected to less rigour and scrutiny than for younger people with disabilities.

In our view, states and territories are best placed to regulate restrictive practices. States and Territories are experienced in the implementation of the schema surrounding guardianship, administration, healthcare and substitute decision-making.

However, as the proposed aged care rules regulating restrictive practices under the draft Bill are yet to be drafted, it is unclear how restrictive practices in aged care are to be regulated and whether the States and Territories will play a role. QLS considers that the use of a restrictive practice presents a serious restriction on a person's liberties, which demands an equally serious oversight, scrutiny and review mechanism. Again, we would welcome the opportunity to provide detailed comments after the proposed rules have been released.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully

[REDACTED]
President

² Ibid.