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Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: community.affairs.sen@aph.gov.au

Submission on Aged Care Bill 2024

I write to make a submission on the Aged Care Bill 2024, which was recently referred to the Senate's Community Affairs Legislation Committee for consideration.

As Queensland Public Advocate, I have a statutory role to promote and protect the rights of adults with impaired decision-making ability.

I will devote my comments in this submission to two matters, about which I have previously expressed concerns: the supported decision-making and restrictive practices elements of the proposed new aged care legislation. While some changes have been made in the recent draft, there are still problems from my perspective.

Restrictive practices

While the detailed framework for the authorisation of restrictive practices will be contained in rules, the draft legislation continues to tie the Commonwealth to a consent based authorisation framework, by including in Clause 18(1)(f) the requirement 'that informed consent is given to the use of a restrictive practice in relation to the individual'. As I have previously argued (including in a number of articles in the publication *Australian Ageing Agenda*), the consent authorisation model for restrictive practice usage is sub-optimal for many reasons (a proposition agreed to by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability – final recommendation 6.35). It is not an effective safeguard.

In 2023, I had the opportunity to brief the Parliamentary Joint Committee on Human Rights on this issue, which subsequently reported (Report 3 of 2023 – Quality of Care Amendment (Restrictive Practices) Principles 2022, paragraph 1.35) 'that further consideration should ... be given to whether the consent model to the use of restrictive practices is the best approach to protect the rights of aged care residents.'

In a nutshell, the problems with the consent model can be simply stated.

The idea of a person consenting to their own restrictive practice conjures up odd scenarios such as a person's movement being restricted against their will on the basis that they have previously agreed to this restriction. Far more common is someone else consenting to a restrictive practice on behalf of the person. This can see family members or other supporters placed in invidious positions where they have neither the clinical skill nor the general wherewithal to object to the use of a restrictive practice (among other things, they may fear the person's placement in a residential aged care home being jeopardised). In addition, it is increasingly a requirement, informed by human rights developments, that any substitute decisions made for a person should accord with that person's 'will and preferences'. This again means that consent for a restrictive practice should only be given on a

person's behalf if the person themselves would have consented to it. Again, this is obviously problematic.

There is an alternative, which is a senior practitioner authorisation model according to which clinical expertise is at the forefront of any restrictive practice authorisation. I am happy to provide more details on this model should the committee desire it.

In terms of the current Bill, it would be relatively simple to remove the provision in Clause 18(1)(f) and make minor ancillary changes, including to Clauses 18(2), 27(3), and the immunity provision in Clause 163. This would thereby enable the rules to introduce a better authorisation model, or indeed for the rules simply to require compliance with state and territory authorisation frameworks (which would need to be established).

Supporters

The other main area of concern I have is in relation to the role of supporters. A previous draft of the Bill made provision for the appointment of aged care 'representatives', which as drafted would have caused considerable confusion with the roles of decision-makers under state and territory laws, such as adult guardians and attorneys under enduring powers of attorney (and similar instruments). The Bill now (Clause 28) clearly recognises the role of appointed guardians and representatives appointed under enduring powers of attorney and similar instruments.

However, the provisions concerning supporters raise questions about how supporters will be appointed, about what their roles are envisaged to be, and indeed about what exactly supporters are entitled to do.

I think it is very important for the new legislation to contain provisions concerning supporters. Among other things, this is an important human rights development that will, if implemented well, lead to more aged care recipients being supported to make their own aged-care related decisions.

But the Bill needs considerable tightening up in this regard.

As the Bill stands, under Clause 27 supporters are entitled to receive and communicate information, with the consent of the person concerned. This is unproblematic and indeed standard for people in such roles (Part 7 of Victoria's *Powers of Attorney Act 2014* contains similar roles and powers).

However, Clause 27(2) then states that the System Governor can determine that a supporter 'has decision-making authority', which entitles them to 'do any thing that may or must be done by the individual under, or for the purposes of, this Act'. According to Clause 27(3) and (4), 'doing a thing' includes making decisions, though not in relation to the use of restrictive practices.

There are three problems with this.

First, the making of decisions on behalf of an aged care recipient goes beyond the role of a 'supporter', in the ordinary understanding of that word. Should this legislation be enacted, there would be two classes of 'supporters'; those with, and those without, decision-making authority. This will be, self-evidently, confusing. Supporters, and those interacting with them, will need to know whether they are ordinary supporters or supporters with 'decision making authority'.

Second, the powers of supporters with 'decision making authority' will be unclear. Will their powers, for instance, include the ability to decide to place someone in a residential aged care home? Or to agree to use some of the person's own income to pay, in part, for a home care service?

Third, the legal empowerment of supporters to make decisions will reintroduce the confusion that surrounded the role of 'representatives' in the last draft of this legislation. If someone were to require the appointment of a formal decision maker, there would be two pathways here: a person could seek to be appointed under the aged care legislation as a supporter 'with decision-making

authority'. Or they could apply for a guardianship order under state and territory legislation. The existence of these multiple pathways will itself be confusing, and it is worth noting that these pathways are accompanied by quite different safeguards (state and territory guardianship legislation requires appointments to be made by independent tribunals).

My advice would be for the legislation to enable supporters to be appointed by aged care recipients, and for those supporters to have power to receive and communicate information. The role of supporters should generally be to support people in making and actioning their own decisions. That should be the extent of their role.

I do hope these comments are helpful. Please let me know if I can be of any further assistance to the Committee in the course of its inquiry.

Yours sincerely

John Chesterman (Dr)
Public Advocate (Qld)