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Regulatory Strategy Section | Harmonisation and Regulatory Strategy Branch
Department of Health and Aged Care
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A new model for regulating Aged Care Consultation Paper No.2: Details of the proposed new model

Thank you for the opportunity to provide feedback on the Department's ongoing consultation into the development of a new model for regulating aged care, and to respond to the issues raised in Consultation Paper 2 (the **Consultation Paper**). Aged and Disability Advocacy Australia (**ADA**) appreciates being consulted on the development of a new framework.

About ADA Australia

ADA is a not for profit, independent, community-based advocacy and education service with more than 30 years' experience in informing, supporting, representing and advocating in the interests of older people, and persons with disability in Queensland.

ADA also provides legal advocacy through ADA Law, a community legal centre and a division of ADA. ADA Law provides specialized legal advice to older people and people with disability, including those living with cognitive impairments or questioned capacity, on issues associated with human rights, elder abuse, and health and disability legal issues related to decision-making.

ADA advocates and legal practitioners work with identified First Peoples advocates through the Aboriginal and Torres Strait Islander Disability Network Queensland (**ATSIDNQ**), a network established to support mob with disability and provide individual advocacy services for Aboriginal and Torres Strait Islander people with disability.

ADA has reviewed the Consultation Paper and provides the following for the Department's consideration.

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ADA Australia acknowledges the Traditional Custodians of this land and pays respect to Elders, past and present.

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Regulatory interventions

ADA welcomes the progression of improved regulation through this consultation. The final report of the Royal Commission into Aged Care Quality and Safety (the **Royal Commission**) noted the regulatory shortcomings in the current system, stating:

“The regulatory framework is overly concerned with processes, not focused enough on outcomes, and does not provide enough safeguards to protect older people.....”¹

Legislative reform is the key factor in improving regulatory oversight and interventions. It is critical that a new act to replace the current *Aged Care Act 1997* (the **Aged Care Act**) is urgently progressed, and that the new instrument takes the form recommended by the Royal Commission. Doing so will ensure that the new act embeds a human rights-based framework.

We note that a draft of the proposed Statement of Rights and Principles, to be incorporated into the new act and to guide its operational provisions, is yet to be provided. ADA urges the government to provide a draft statement as soon as possible, so that comprehensive consultation can be undertaken with adequate time to integrate the statement into the new Aged Care act.

ADA also supports the current inquiry by the Parliamentary Joint Committee on Human Rights on a federal Human Rights Act. Introduction of this legislation will support and promote the adherence to rights as set out in a new Aged Care Act.

Role of the Regulator and Department

ADA supports the proposed revision of oversight, inspection and monitoring powers and functions by the Aged Care Commission (the **Commission**), to be carried out by a specialised team. As described in the Consultation Paper, the proposed expansion would appear to facilitate a more comprehensive and thorough model for these critical functions, including an improved understanding within the regulator about systemic or broader risks in the sector. These changes, if appropriately resourced, will play an important role in identifying and reducing issues of concern at both an individual and systemic level.

Enforcement Powers

Encouragingly, the Consultation Paper states that the regulator’s enforcement powers will be strengthened, broadened, streamlined, and more flexible. However, it does not provide sufficient detail about the use of any expanded powers. Particularly, more detailed is needed to consider if the proposals are appropriately clear and directive so as to be effective.

Whilst the reference to the enforcement powers in the *Regulatory Powers (Standard Provisions) Act 2014* is indicative of possible responses which may be available to the regulator, the Consultation Paper does not indicate the intended use of these – only stating that ‘*Actions will be proportionate to the related non-compliance and according to principles of natural justice and procedural fairness.*’

¹ Aged Care Royal Commission, *A summary of the final report*, (2021) 76, <https://www.royalcommission.gov.au/system/files/2021-03/final-report-executive-summary.pdf>.

Whilst this is understandable, some indication of likely enforcement actions relating to the type of non-compliance (for example low risk and 'once off' versus high risk and sustained non-compliance) may improve public confidence in the regulator's capacity and intention to respond proportionately.

It would be useful if examples were provided, indicating the type of enforcement action that would be undertaken in those circumstances.

It is concerning that referral pathways are not mentioned as a result of any investigation and enforcement functions being underway or completed by the regulator, such as to police as may be appropriate or required.

Proposed Aged Care Complaints Commissioner

ADA welcomes the establishment of the Aged Care Complaints Commissioner. Further detail regarding the scope, powers and obligations of this role are required to consider the likely practical application of this office and its effectiveness, including, the proposed pathway between complaint investigation and resolution, and enforcement action.

For example, it is unclear if it is intended that, were a risk to be identified as a result of a complaint having been made to the Commissioner, if that risk would be referred to the appropriate team within the regulator to investigate and consider compliance aspects and enforcement actions that may be appropriate in association with that complaint.

Role of providers, professional associations, advocacy groups, volunteers and community groups

ADA strongly recommends the inclusion of a statutory recognition of the right to advocacy in the new Aged Care act, to be available whether or not decision-making capacity is in question. A legislative provision to this effect will be in alignment with other human rights instruments, including the *Human Rights Act 2019* (Qld) and the Convention on the Rights of Persons with Disabilities (**CRPD**).

Further, we suggest a mirroring provision that imposes a positive obligation upon aged care providers to facilitate access and not impede opportunity of a person to seek and receive advocacy services.

Cultural change

In addition to aforementioned statutory reform and a federal human rights-based framework, ongoing education programs and awareness campaigns targeting aged care providers, health care providers and the community are required to inform about increased standards of practice, improved oversight and functions of the Department and the Regulator, and the need for a holistic human-rights based approach to be developed and delivered in policy and in practice.

Supporting quality care

ADA supports the stated objective to work with providers and help the sector to lift the quality and safety of aged care service delivery. The stronger responsibility on providers to continuously improve quality of care and services is important. Appropriate and regular oversight of this obligation will be

required. There is significant work to be done in this space, particularly with respect to the use and management of restrictive practices. The implementation of star ratings is a welcome and important step in improving information about aged care and assisting people to make informed decisions.

As the Consultation Paper identifies, the upskilling and improved training of aged care workers is a critical step. The recent increase in worker compensation is an important part of this improvement. ADA agrees that worker registration is necessary, and a further opportunity to improve care and reduce harm.

To support the objective of continuous improvement, ADA recommends that the regulatory model should include a requirement for residential aged care facilities to facilitate and undertake education sessions led by external advocacy organisations. The network of community advocacy organisations that are associated with the Older Persons Advocacy Network, of which ADA is a member, are funded to provide educations to the sector but currently residential facilities are not required to run them. It would be appropriate to introduce a requirement to have an advocacy organisation provide an education session at least once every 3 years, and for compliance to be tied to accreditation of the provider.

Models – registered and unregistered providers

ADA is cautious about the proposal that unregistered providers would continue to operate under Australian consumer law. A specialised program of education would be needed to ensure that older persons are informed about the different regulatory framework which would apply.

Responsibilities of a provider

ADA supports the imposition of obligations upon providers in the form of conditions of registration, in addition to the 'overarching conditions'.

We suggest that an additional overarching obligation is included with reference to the obligation to recognise, support and uphold the human rights of an individual who receives aged care, in accordance with the requirements of relevant laws.

An obligation to this effect will promote a human rights practice across the sector, and assist in adherence to the new Age Care act and other domestic and international instruments.

Thank you again for the opportunity to comment. ADA would be pleased to further assist the Committee with its inquiry. Should you wish to discuss this submission, please do not hesitate to contact Vanessa Krulin, Solicitor and Senior Policy and Research Officer [REDACTED]

Yours faithfully



Geoff Rowe
Chief Executive Officer