

The New Aged Care Act

Supporters and Representatives

Series update



MinterEllison.

WHAT HAS CHANGED?

The *Aged Care Act 1997* (Cth) (**Current Act**) does not provide for the formal appointment of substitute decision makers for care recipients (referred to as '*Individuals*' in the Exposure Draft of the Aged Care Bill 2023 (**New Act**)), except for restrictive practices. This has historically meant that approved providers, particularly those operating across multiple jurisdictions, are left with a somewhat uncertain and non-uniform approach.

Generally, under the Current Act, decisions are made in one of three ways: by the individual themselves, by representatives in certain limited circumstances, or by substitute decision makers formally appointed under state-based legislation, such as an enduring power of attorney.

In a small part, the Current Act (and associated legislative principles) contemplates the concept of '*representative*'. For example:

- section 96-5 of the Current Act permits a representative to enter into an agreement on behalf of the care recipient; and
- the *Quality of Care Principles 2014* (Cth) require approved providers to respond to incidents, amongst other things, by involving representatives. In these circumstances, it falls to the provider to be satisfied that the representative has sufficient '*connection*' to the care recipient.

The New Act seeks to clarify the existing position by creating two formal categories for the purpose of making decisions in an aged care context - '*supporters*' and '*representatives*'.

Supporters

The New Act creates a new category of supporter. With consent of the Individual, the supporter's role is to provide support to the Individual including in communicating information and requesting, accessing or receiving information and documents.

Duties

In carrying out their role, supporters and representatives are required to, amongst other things:

- promote the will, preference and personal, cultural, and social well-being of the Individual; and
- act honestly, diligently, and in good faith.

Consistent with its rights-based approach, the New Act requires supporters and representatives to act only to the extent necessary for the Individual in the circumstances. They must preserve, as far as possible, the Individual's ability to make their own decisions. This duty reflects the Statement of Rights and Objects of the New Act and ensures the Individual's autonomy is protected and promoted.

Interestingly, there are no enforcement mechanisms for breach of these duties.

Representatives

In addition to doing all the things that a supporter can do, a representative is permitted to do anything or make any decision that may, or must be made or done, on behalf of an Individual. However, a representative is prohibited from consenting to restrictive practices.

Appointment

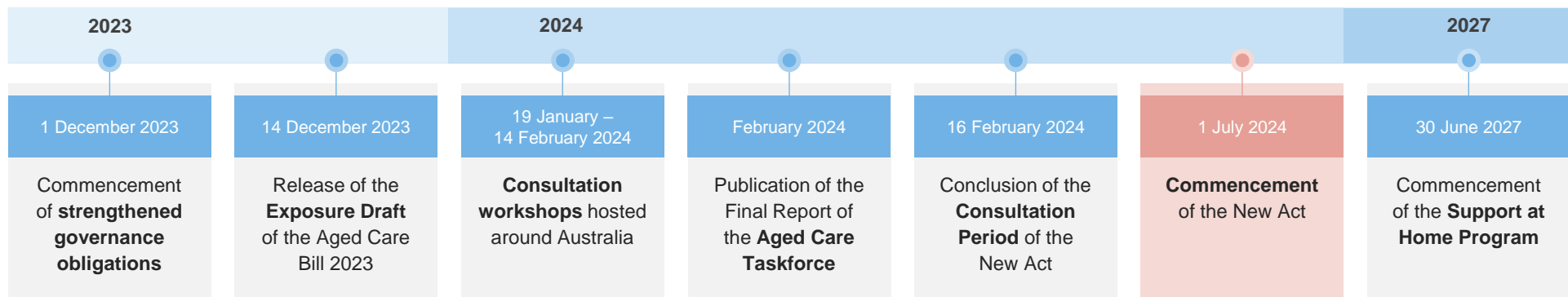
A person must be formally appointed as a supporter or representative in order to carry out the role of the respective positions. Relevantly, in the case of representatives, an appointment must be made even where the person is appointed under state-based legislation as a Guardian or Enduring Power of Attorney.

The System Governor will only appoint a person as a supporter or representative either upon application by any person or body, or in the case of representatives, on the System Governor's own initiative.

In determining whether to make an appointment, the System Governor must consider the matters prescribed by the New Act such as whether the person has consented to the appointment or whether the person is otherwise appointed under state-based legislation.

An Individual may have multiple supporters or representatives, but they cannot have a supporter and a representative simultaneously.

REFORM TIMELINE



Key issues

How will the roles interact with representatives appointed under state-based laws? >

While we know that a person who has been appointed as a substitute decision maker in accordance with state-based laws will also be appointed as a representative or supporter under the New Act unless there is a reason not to, this appointment is not automatic. We are yet to see how the interaction (or intersection) of the Commonwealth and State or Territory regimes will be operationalised.

Appointment process and emergency situations >

Other than the considerations previously noted, the New Act does not set out further detail as to how the System Governor will appoint supporters and representatives. For example, it remains unclear whether the System Governor will appoint (or have adequate resources to appoint) representatives in emergency situations.

Restrictive practices >

Representatives cannot make decisions in relation to restrictive practices. The interim hierarchy for decision makers in relation to restrictive practices is set to expire on 1 December 2024. It remains unclear how consent to restrictive practices will operate under the new regulatory framework.

What's next?

We expect that more information about the function of supporters and representatives will be released under the New Rules.

How can we help?

We are working with our clients to help navigate them through the changes. Our dedicated team would be delighted to assist you, if you have any questions or concerns.

UPCOMING EVENTS

Our team will be running a series of webinars to discuss the operation and impacts of the New Act.

Please join Penelope Eden and Virginia Bourke, Chair of Mercy Health, on

Tuesday, 13 February at 12:30pm - 1:30pm AEDT

where we will be discussing the implications of the new Aged Care Act for governance and directors' duties, and answering any questions you may have.

Please [register here](#).



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