

# The new Aged Care Act's representatives regime

## What we know so far

Among the many proposed changes in the new Aged Care Act is an entirely new 'nominees' regime which appears to override the existing state-based system for substitute decision-makers.

While details of the regime have not been finalised, it is clear the changes will be significant for aged care providers and older persons.

Critically, under this system an 'Aged Care Act nominee' will be the sole decision-maker for decisions relating to the Act for a person who lacks capacity.

### The two types of nominees

The proposed Act has two types of nominees who are appointed by the System Governor:

- **'Supporter'**. Someone nominated by the older person to support them in making decisions. Critically a supporter cannot make decisions *for* the person, their role is one of assistance.

For example, the supporter can access relevant documents that an aged care provider holds about that person.

- **'Representative'**. Nominated by the individual or others to make decisions on behalf of the individuals relating to the Act.

While the proposed Act is similar to the current NDIS nominee model, there are some key differences including that a person cannot make a decision for an individual unless they are appointed as a representative.

This means providers would no longer be able to rely on a family member's statutory appointment (e.g. as a responsible person).

Similarly, an enduring power of attorney won't be sufficient if the decision relates to something under the proposed Act and the attorney has not also been appointed as a representative.

A key issue is what decisions will be within the ambit of a representative's authority and where does their authority start and end – this will be particularly critical if the representative is not the same person as the attorney.

For example:

- Is a decision about what medication the person receives a decision for a medical treatment decision-maker or medical power of attorney, or a representative?

- Is a representative able to make decisions about who can visit the older person if there is conflict within the family about this? Or is this type of decision outside the Act?

Clarification of the scope of the representative's authority will be important, not only for providers but also for older persons who may be currently considering appointing a power of attorney or guardian.

### How is a nominee appointed?

A person can be appointed at the request of the individual or a body (or for the case of a Representative, at the System Governor's own initiative).

The System Governor must be satisfied that the individual is able to comply with the relevant duties.

### Duties of Supporters and Representatives

Once appointed, both Representatives and Supporters have a range of duties (e.g. a "duty to act honestly, diligently and in good faith").

A nominee will not be liable or penalised if they have acted in a way that they reasonably believe satisfies their duties, however it is an offence for a nominee to wilfully breach their duties or abuse their power.

A nominee can have their role suspended or their nomination cancelled if they do not comply with these duties.

### More detail to come

There is a good case for replacing the confusing patchwork of state-based substitute decision-making regimes with a nationally consistent regime, which clearly stipulates who can make decisions for older persons when it comes to their care.

However, given much of the detail will be in the Rules, which have not been released, it is not clear how the scheme will work in practice or how much of a role providers will have.

Providers should follow developments in this space to ensure they and their staff are prepared for a whole new system.

Likewise, older persons and their advisors will require time to consider and prepare for the changes.

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