CPSA COMBINED PENSIONERS & SUPERANNUANTS ASSOCIATION

Submission to the Department of Health

Consultation – Foundations of the new Aged Care Act

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Combined Pensioners & Superannuants Association of NSW Inc (CPSA)

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CPSA receives funding support from the New South Wales and Australian Governments

CPSA is a non-profit, non-party-political membership association founded in 1931 which serves pensioners of all ages, superannuants and low-income retirees. CPSA's aim is to improve the standard of living and well-being of its members and constituents. CPSA receives funding support from the NSW Government Departments of Communities & Justice and NSW Health.

CPSA appreciates the opportunity to make a submission to the Australian Government's consultation concerning new aged care legislation. The submission consists of two sections: (1) Eligibility or entitlement system; (2) Statutory Duty of Care.

CPSA is concerned that key, foundational recommendations are being ignored or are being considered for implementation in a spirit contrary to what the Royal Commissioners intended.

Eligibility or entitlement system

CPSA is of the view that the consultation process for the new Aged Care Act shows a bias to keeping things, as much as possible, the way they are under the Aged Care Act 1997, which the Royal Commission wanted replaced because of undue focus on funding.

CPSA's basic criticism of what is being proposed in *A New Aged Care Act: the foundations, Consultation paper No. 1* is that the Government does not propose a fix for the old Act's explicit bias to rationing aged care, which in the Aged Care 1997 was tied up with assuring the Australian Government's ability to fund aged care.

There is not a single reference in this consultation paper to an eligibility approach making way for an entitlement approach, which is a fundamental change championed by the Aged Care Royal Commission in its final report.

This is what the Royal Commission's final report says must be the purpose of the new aged care system:

"The purpose of the aged care system must be to ensure that older people have an entitlement to high quality aged care and support and that they must receive it. Such care and support must be safe and timely and must assist older people to live an active, self-determined and meaningful life in a safe and caring environment that allows for dignified living in old age".[1]

The only conclusion can be that in the Government's view the change in approach is not desirable. However, rather than declaring its position on this very essential and fundamental element of the aged care legislation it proposes, the Government simply ignores it and does not discuss it.

The first object of the new Act proposed in the department's consultation paper (p11) is that the new Act "gives effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities, the International Covenant on Economic, Social and Cultural Rights, and other relevant instruments".

Compliance with the UN Convention on the Rights of Persons with Disabilities as an object is a curious inclusion among the proposed legislated objects of the proposed new Aged Care Act.

[1] Final Report Volume 3A, page 14.

Curious, because Australia has two systems to care for persons with disabilities: one for people aged under 65 (the National Disability Insurance Scheme) and one for people aged over 65 (no specific name and generally referred to as 'the aged care system'). These two systems are differently structured, which is not necessarily a problem, but they produce very different outcomes, where older people draw the short straw, and this is likely to continue if the new aged care act is introduced as envisaged in the consultation paper.

The Convention on the Rights of Persons with Disabilities is predicated on equality of people with and without abilities. Implicitly, the UN Convention on the Rights of Persons with Disabilities extends that equality to people with different disabilities. The convention would, surely, not countenance inequality of rights *between categories* of people with disabilities.

However, Australia currently continues to distinguish (on the basis of age) between two categories of people with disabilities, accords different rights to them and has set up the two systems in such a way that the younger category ends up receiving more and better care than the older category.

The new Aged Care Act provides a unique opportunity to fix this contravention of the UN Convention on the Rights of Persons with Disabilities. Obviously, this is not done by merely invoking the UN Convention on the Rights of Persons with Disabilities.

The primary distinction between the NDIS and the current aged care system is that the NDIS is an entitlement system and that the aged care system is an eligibility system. Generally, an entitlement system means a right to something subject to eligibility, whereas an eligibility system means a right to something subject to eligibility *and* availability. The latter may be restricted due to deliberate rationing as occurs currently under the Aged Care Act 1997. The difference between an entitlement system and an eligibility system is potentially huge, as Australians experienced when the waiting list for Home Care Packages numbered more than 100,000 people, who were waiting years. Tens of thousands of people died while waiting on the waiting list, never receiving the care they needed.

The current waiting list for Home Care Packages may be much shorter (although this is relatively speaking), and residential aged care may run at an occupancy rate which allows it to comfortably meet current demand. However, there is no certainty that demand for residential and home care will be easy to accommodate into the not-so-distant future. In fact, it is certain that this will be very difficult. The first baby boomers are starting to need aged care, and a tsunami is coming.

We repeat, there is not a single reference in the Government's consultation paper to an eligibility approach making way for an entitlement approach, which is a fundamental change championed by the Royal Aged Care Commission in its final report.

This omission cannot be an oversight. It is intentional.

Clearly, in the Government's view the recommended change in approach recommended by the Royal Commission is not desirable. However, rather than declaring its position on this very

essential and fundamental element of policy, the department simply ignores it and does not discuss it. It confines itself to an inappropriate invocation of the UN Convention on the Rights of Persons with Disabilities.

Not even the Statement of Rights, proposed to be included in the primary aged care legislation, tells older people whether they can expect to receive aged care services as an entitlement once they have been assessed as eligible for these services in a timely manner, that is, soon after their assessment, and as a right.

The Statement of Rights should clearly state whether access to aged care services is subject to availability of services and whether timely receipt of aged care services is a right. Apart from clarifying what sort of aged care system Australia runs, it will also clarify if the Statement of Rights lists the rights of all older Australians or only of the older Australians who are receiving aged care services, excluding those who are waiting to receive aged care services.

Do older Australians have a right to aged care service, or do they have a right to be on an aged care waiting list?

By default, the Government's consultation paper proposes the continuation of the waiting list approach, and this is not only the wrong approach, but also a fundamental rejection of what the Royal Commission envisaged as the basis of the aged care system and the new aged care act.

Statutory duty of care

CPSA is concerned that introducing a statutory duty of care for providers in a way that "only serious failures to act in a manner consistent with the duty will amount to a breach of that duty" will effectively be no different to not introducing a statutory duty of care.

The statutory duty of care is covered in recommendations 14 and 110 of the Aged Care Royal Commission's final report.

After stating (without providing any evidence) that the statutory duty of care cannot be for high quality care because high quality of care "cannot be defined with sufficient legal clarity", the Government's consultation paper proceeds to whittle down the requirement even further: "It is intended that the new Act will provide that only serious failures to act in a manner consistent with the duty will amount to a breach of that duty. [..] penalties will also only apply where a failure to take reasonable steps results in a risk of actual serious illness, injury or death of an individual to whom the duty is owed."

The Government appears to be contemplating a duty of *basic* care, which apparently *can* "be defined with sufficient legal clarity", but the Government wants this duty to be imposed in a way where "only serious failures" will amount to a breach: serious illness, injury or death. Effectively, the statutory duty of care the Government proposes is a statutory duty not to maim or kill aged care recipients. Soon the Government may find itself embroiled in a turf war with the theatre of the absurd.

Is the Government really going to embarrass itself by including a provision in the new Aged Care Act by introducing a statutory duty of care, which can be freely broken unless it’s broken in a big way?