



4 April 2011

Mr Mike Woods
Deputy Chairman
Productivity Commission
PO Box 1428
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By email: agedcare@pc.gov.au

Dear Mr Woods

LAW COUNCIL OF AUSTRALIA SUBMISSION TO PRODUCTIVITY COMMISSION CARING FOR OLDER AUSTRALIANS DRAFT REPORT

The Law Council of Australia is pleased to provide comments to the Productivity Commission on the Caring for Older Australians Draft Report (the Draft Report). The Law Council commends the work of the Productivity Commission and, particularly, the recognition afforded to the importance to the Australian community of an efficient framework for meeting the care needs of older Australians.

In 2009, the Law Council established a National Elder Law Working Group (the Working Group) in order to recognise elder law as an emerging area of specialisation for the legal profession. Laws affecting older Australians have national implications due to Commonwealth regulation and the acknowledged need for harmonisation of State and Territory legislation, as demonstrated by the decision of the Standing Committees of Attorney General (SCAG) to place powers of attorney on their agenda.

The Law Council recognises that elder law will continue to develop rapidly due to Australia's ageing population. The elderly have unique and complex legal needs, including substitute decision-making, guardianship, aged care, retirement villages, wills, probate, superannuation, financial planning and criminal law relating to fraud and financial abuse.

Comments provided below are the result of considered debate by the Working Group, aimed at assisting the Productivity Commission in drafting its final report to government.

Complaints

The recognition of different "levels" or "degrees" of complaint and the endorsement of varying pathways for their resolution in the Draft Report is commended. The Law Council is aware of dissatisfaction within the sector in relation to particular instances of complaint, the profile of which is, on occasion, perceived to advance political interests. Distancing the complaint process from the Department of Health and Ageing through the Australian Aged Care Regulation Commission (AACRC) might assist in this regard.

The Law Council recommends the formation of an advisory group to oversee the revised complaint process to ensure that the new system is achieving its goal, as noted in Chapter 12 of the Draft Report, to resolve disputes quickly and efficiently. In order to balance competing views the advisory group should include provider and consumer representatives from the aged care sector.

AACRC Conflicts

The Law Council notes the conflict of interest present as a result of the relationship between the Australian Standards and Accreditation Agency Ltd (the Agency) and the Commonwealth Government as outlined in the Draft Report.

Integrating the Agency and complaints under the proposed AACRC, as suggested above, will go some way to alleviating conflicts of interest. However, residual concerns about conflicts of interest remain and will need detailed consideration. For example, access to information, and whether information gathered in relation to a complaint will be available to the Agency and protections in place to ensure procedural fairness.

Financial Advice

It is acknowledged within the Draft Report that there is considerable complexity in the assessment and management of financial arrangements, both in preparation for entering into care and thereafter. The changes proposed will not diminish that complexity.

The financial planning sector is experiencing growth with the changing demographic of the Australian community and it would seem appropriate that aged care financial planning could be acknowledged as a specific skill set for that sector. The Law Council is conscious that while financial planning for entry into aged care is becoming increasingly important, prospective care recipients are often not aware of advisers with expertise in the area to whom they can turn. Additionally, general understanding within the financial planning sector of the aged care financial framework is limited. The Law Council considers that greater attention to this issue is required.

Security of Tenure

The Law Council supports the observations and concerns expressed in the Blake Dawson submission and referred to on page 401 of the Draft Report in relation to the potential conflicts between the mandatory "security of tenure" constraints imposed by the *Aged Care Act 1997* (the Act) and duty of care obligations.

The limited bases upon which termination of occupancy may occur are well recognised in the sector. So too are the unacceptable anomalies, for example the necessity for a resident to inflict "serious injury" before termination steps can be taken to relocate a resident into a more appropriate environment, irrespective of the risks upon the resident remaining in their current environment. A response that mandates greater supervision fails to take account of the availability of staff and resources. With increasing rates of dementia this issue will continue to grow.

Bond/Charge Requirements

When introduced in 1997 the Act reflected a prevailing view that care recipients paying an accommodation payment could be considered as paying an extra contribution for which some extra services or superior accommodation might be provided.

The present paradigm is that these payments are a further contribution to "standard" services and accommodation based on a capacity to pay. The Law Council recommends amending the Act, removing references which convey any expectation or entitlement to additional services in consideration of bond or charge payment. Interpreting bonds or charges in the current way is outdated in Australia's present care framework.

Charter of Resident Rights and Responsibilities

The Charter contains both rights and responsibilities. It is well recognised that denial of a resident's rights may lead to sanctions. By contrast, there is no sanction for residents who fail to act in accordance with the responsibilities outlined in the Charter.

The Law Council suggests consideration is given to extending responsibilities under the Charter to address the conduct of family members and other invitees to an aged care facility.

Respite Agreements

The Act draws limited distinction between residential care service agreements for permanent occupancy and for respite care. It thereby imposes unnecessary complexity in the context of relatively limited occupancy durations.

The Law Council recommends a review of the requirements for occupancy agreements in relation to respite care to improve simplicity and ease of access.

Accommodation Bond Refunds on Death

Presently interest accrues (at a prescribed rate) in relation to refunds of accommodation bonds pending a grant of representation to the intended payees. Instances have occurred in which the statutory interest rate has been superior to that which estate representatives could then achieve in the general commercial environment. It cannot be expected that estate administrators will expedite applications for a grant of representation and claim repayment in that context.

The Law Council suggests that consideration is given to a statutory repository for bond refunds. Payment to the repository would enable cessation of the imposition of interest and the repository could then invest funds at a market rate for the benefit of the estate. Payment to the repository would discharge the obligation of a provider in relation to repayment to the resident. Depending on resourcing, the repository (possibly a Public Trustee) could also be responsible for sighting the relevant grant of representation and making payment accordingly. This would reduce the strain incurred on aged care facilities in dealing with estates and ensure that a more experienced and better resourced body takes care of such matters.

Alternatively, that responsibility could remain with the provider who would then authorise payment from the repository upon being satisfied as to the identity and entitlement of the payees.

Australian Seniors Gateway Agency

The Law Council supports draft recommendation 8.1 in establishing the Australian Seniors Gateway Agency (the Gateway Agency). Centralising administration and resources has the potential to greatly assist both care providers and consumers. Given the central role

that it is designed to play in the revised aged care framework, the Law Council recommends adequate resources be provided to ensure the Gateway Agency's ongoing success. Failure to provide sufficient resources may result in sub-standard services, diminishing the capacity of the Gateway Agency to maintain the national aged care information base and deliver assessment and care coordination services as envisaged in the Draft Report.

Yours sincerely

Bill Grant
Secretary-General