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The Productivity Commission

**BY EMAIL: [agedcare@pc.gov.au](mailto:agedcare@pc.gov.au)**

Partners:

Brian Herd, B.A., LL.B. (Hons)

Trent Waller, LL.B. Accredited Family Law Specialist

Joanne O'Brien, LL.B. (Hons), Dip Fin Advising.

David Quinn, LL.B. (Hons), G. Dip. IR, Accredited Specialist – Workplace Relations

Senior Associate:

Genevieve Dee, B.A., LL.B. Accredited Family Law Specialist

Tania Carvalho, LL.B., Grad. Dip. LP.

Margaret Arthur, LL.B. (QUT) Accredited Family Law Specialist

Associate:

Kirinya Khamson, B.A., LL.B (ANU)

## **SUBMISSION ON DRAFT REPORT INTO CARING FOR OLDER AUSTRALIANS**

This letter is a response to your general invitation to make submissions in relation to your draft report.

Our firm provides a range of specific legal services and, in particular, in the area of Elder Law or law relating to older people. We have had extensive experience over many years in advising and assisting the providers of services to older people and older people themselves.

This submission addresses two particular issues arising out of your report.

### **1. Informal Caring**

While the report does examine this aspect of aged care I believe it does not give it the depth of treatment that it warrants.

This is of particular concern when, as your report and other research indicates:-

- (a) The number of older people over 85 will significantly increase over the next 40 years.
- (b) Increased longevity results in increased rates of disability leading to higher demand for care.
- (c) Formal, government funded aged care services will be limited in their ability to meet the increased demand for care.
- (d) Informal carers currently provide most of care services to older Australians yet the availability of informal carers to perform this role is expected to decline over the forthcoming years.
- (e) There will be a shortfall of some 250,000.00 aged care places by 2050.
- (f) Older people prefer to age at home, if not in a familial environment, then certainly in a familiar one.
- (g) In coming years, the number of taxpayers will decline in proportion to the number of retirees who will need care. This will decrease further the pool of public funds available for funded aged care and exacerbate the reluctance of government to find the funds to care.

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If this concatenation of events occurs (which is likely), and if, in particular, Government does not commit sufficient funds to the increasing demand for aged care (which historically, they never have and which, on any reasonable hypothesis, they never will), it is a fair and pressing question to ask – where and how will the forthcoming bulge of baby boomers, particularly, be care for?

As a poignant example of this conundrum, I recall reading a newspaper article some time ago which reported on the manager of an aged care facility opening the front door of the facility one morning to discover an 87 year old frail and distressed woman curled up in a foetal position with just a blanket and toothbrush with her. It transpired that her daughter, who had been caring for her, had simply found the stress and strain too much and attempted to alleviate her predicament in this way.

In my view, the answer to this forthcoming imbroglio is not to look to the Government for solutions but, rather, to the family. There must be a robust, honest and probing examination and a shift in the policy debate towards increasing the extent and rate of informal caring because, based on the points above, that is the only pragmatic solution.

In this context, I have given a presentation on this subject entitled “*Aging, Caring and the Law*”. The presentation examines:

- the impact of our forthcoming demographics on caring;
- the need for legal change in relation to informal caring especially in the context of filial responsibility laws and family agreements; and
- the vital nature of incentives to encourage families to care.

I **enclose** a copy of the power point used as the basis for my presentation which will give you some insights into the issues I have addressed.

## **2. Integrated Aged Living**

There is a pressing need in Australia at both federal and state level to closely examine the future legal framework and models for the accommodation of the elderly.

Putting aside informal caring arrangements, the development of alternative and creative forms of accommodation for the elderly and the ability of the law to keep up with it, has been a bit like the proverbial tortoise and the hare.

Both the for profit and not for profit sectors have been involved in a constant exploration of, and experimentation in, various types of accommodation that would meet the needs of the aged (and the dependent). Lawmakers have been trying to play catch up in addressing the legal cleavages that these developments often throw up.

These trends have emanated essentially from the prevailing demographic force of ‘*ageing in place*’ and an effort to create a seamless transition for older people through the various stages of ageing.

In response to this, the lawmakers have attempted to legislate and regulate these developments but in a piecemeal, reactive fashion. This evolving legal landscape is of course further muddied by the old shibboleth of the state/federal cleavage in legislative powers in our federal system.

As an example of this imbroglio, in Queensland, it would be possible at the moment for a provider of accommodation to the elderly to have, on the one block of land, the following structures and applicable laws in relation to accommodation and services:-

- (a) an aged care facility under the *Commonwealth Aged Care Act*;
- (b) a retirement village under the Queensland *Retirement Villages Act*;
- (c) a manufactured home park under the Queensland *Manufactured Homes (Residential Parks) Act*; and.
- (d) rental accommodation under the Queensland *Residential Tenancies and Rooming Accommodation Act*.
- (e) freehold title or strata title under state body corporate legislation.

Our recent experience suggests that current economic conditions and imperatives as well as consumer demand are motivating operators to move into congregate or integrated models as a way of ensuring and insuring their future viability.

I was very surprised then to read in your report (page 336) that this type of multi faceted development does not appear to cause difficulties for developers. That is certainly not my experience as a legal advisor.

Having advised providers in this context, I can say that the legal and practical issues arising from this lifestyle collage are indeed complex including:

- access to facilities and services as between different types of residents
- the charging of residents for overlapping services and facilities
- duplication or contradictions in legal compliance between parts of an integrated model
- multi layered financial management and reporting obligations
- perceptions of differing 'classes' of residents e.g., between full paying retirement village residents and rental residents
- demarcating and reconciling the legal layers that can arise e.g., the concept of 'strata care' or 'care in the air' - development of high rise aged accommodation where one part of a high rise building is used as a Commonwealth regulated aged care facility and the other part as a State regulated retirement village.

These are just some of the issues that need to be confronted. Needless to say, they lead to complex contractual relationships for both providers and consumers not to mention increased compliance costs in developing and maintaining such disparate legal structures. It also has the inevitable consequence that such added costs will inevitably flow on to the consumer exacerbating their costs of accommodation.

There is a need in my view for:

- Good research on viable, alternative and innovative legal structures and models for congregate or integrated living for the aged;

- Harmonisation (dare I say, uniformity) of legal frameworks for such accommodation across Australia
- An examination of the cost/benefit of differentiating applicable laws between 'big' and 'small' aged care and retirement accommodation i.e., one law may not fit all sizes.

Regards

Brian Herd  
**ELDER LIFE SERVICES**  
Email: [bherd@crhlaw.com.au](mailto:bherd@crhlaw.com.au)

Encl.