

Your Ref: Inquiry into Aged Care

Quote in reply: Elder Law Section:21000326.33

30 July 2010

Caring for Older Australians  
Productivity Commission  
PO Box 1428  
CANBERRA CITY ACT 2601

By Email: [agedcare@pc.gov.au](mailto:agedcare@pc.gov.au)

Dear Commissioner

## **PRODUCTIVITY COMMISSION INQUIRY INTO AGED CARE**

I write to you on behalf of the Queensland Law Society in relation to the Productivity Commission Issues Paper 'Caring for Older Australians.'

The Queensland Law Society is the peak professional body for the State's legal practitioners. We lead a profession of more than 8,500 members throughout Queensland. The Society is comprised of several specialist committees who provide advice to the Queensland Law Society Council on law reform and areas of concern to the profession.

This response has been compiled with the assistance of the Elder Section, who have a wealth of experience in elder law as well as a keen awareness of the issues affecting this area of law. I would like to acknowledge the comments and suggestions we have received from the Law Council of Australia and the Law Institute of Victoria in preparing this paper.

### ***1. Legal Issues Confronting Older Australians***

The Society is committed to promoting and protecting the rights and interests of older persons, especially in circumstances where elder abuse has been identified.

The Society commends the Government for establishing this inquiry, as there are many legal and social challenges faced by older Australians that have not been adequately addressed in the aged care legislation.

In particular, our members have found that the legal obstacles faced by Older Australians have been:

- difficulties in access to justice in circumstances of Elder Abuse;
- uncertainty, ambiguity and over-complication of Retirement Villages laws (both in conveyancing and understanding Retirement Village rights and obligations).

In order to overcome these issues, as a preliminary the Society recommends:

- defining elder abuse and ensuring an appropriate regulatory regime; and
- harmonisation of state and territory laws.

### **1.1 Legal Issues and Elder Abuse Issues Paper**

The Public Advocate of Queensland and the Queensland Law Society have released a joint paper outlining the legal position in relation to Elder Abuse in Queensland, which is a useful guide to assist the Commission in its inquiry 'Caring for Older Australians.' In addition to those issues highlighted in the joint paper *attached*, the Society wishes to raise further comments in order to facilitate improvement of aged care in Australia.

## **2. Review of the Aged Care Complaints Investigation Scheme – Aged Care Act 1997**

In August 2009 the Society made submissions to the Department of Health and Ageing addressing concerns about the legal and practical operation of the *Aged Care Act 1997* (Cth). The Society's expressed concerns in that letter remain and are summarised in this part below.

### **2.1 Alternative Dispute Resolution**

The Society is still concerned that the Complaints Investigation Scheme ("the Scheme") overlooks the mechanism of alternative dispute resolution when investigating and determining aged care complaints. Instead the Scheme focuses on an inquisitorial approach in investigating the complaint and making a determination that action be undertaken by the care provider, without fully appreciating that the resolution may be better resolved between the parties through an independent and neutral third party.

Furthermore there seems to be little consideration that an Older Australian and their aged care provider will, in most cases, continue their relationship after a complaint has been lodged, therefore any determinations must be sensitive to that issue. To that end, there must also be consideration that most Older Australians have a degree of emotional, physical or psychological dependence on their care provider.

Therefore the Society recommends that a new section 16A.5A be introduced to the *Investigation Principles 2007* (Cth) to allow the Secretary to coordinate alternative dispute resolution, if a person has so requested.

### **2.2 Procedural Fairness**

The Society is also concerned that the Scheme does not provide an approved aged care provider an opportunity to be heard or to make submissions in relation to a complaint. Similarly, the Scheme appears to be lacking transparency by:

- not identifying the onus of proof in relation to an allegation;
- not determining what standard of proof is to apply;
- not being required to consider any evidence proffered by either party;
- not providing reasons for the decision or setting out criteria of which each decision is assessed;

- providing a restricted right of appeal to the Federal Court on a question of law, which is arduous on the appellant if they have not been provided with reasons for the decision.

In order to overcome these issues, it is the recommendation of the Society that there be legislative review of the *Aged Care Act 1997* and the *Investigation Principles 2007* so that these legislative instruments are transparent and comply with procedural fairness.

### **3. Elder Abuse in Aged Care Facilities**

The Society is concerned that the *Aged Care Act 1997* (Cth) does not have appropriate measures in place to deter Elder Abuse.

Section 63-1AA of the *Aged Care Act 1997* (Cth) places obligations on approved providers of residential care to report allegations or suspicions of a “reportable assault.” Subsection 9 limits “reportable assault” to criminal offences such as unlawful sexual contact or unreasonable use of force. However elder abuse is not just confined to criminal acts of sexual and physical assault, as it includes financial abuse, psychological abuse and neglect. Part 3 of the Joint Paper on Elder Abuse (**attached**) sets out definitions and elements of elder abuse of which the Society respectfully submits should be incorporated into the *Aged Care Act 1997* (Cth) in order to further expand the definition of “reportable assault” under section 63-1AA(9).

### **4. Interpreters and funding for Community Aged Care Packages (“CACP”) clients**

Concerns have also been raised with respect to the amount of funding that is received by CACP clients.

CACP clients are those who have been assessed by an Aged Care Assessment Team as requiring low-level care. CACP clients receive individually planned and tailored aged care services which is funded by the Australian Government, with these low-level aged care services being provided to Older Australians in their own home.

CACP clients may also receive language assistance, interpreters or other services from the Disability Services Cultural and Linguistic Diversity Strategy (“DS-CALDS”), which was established in 2004.

The concerns are that CACP clients who also require assistance from DS-CALDS are disadvantaged as their interpreter from DS-CALDS is paid directly from their CACP funds, without adjustment. This has undermined the effectiveness of CACP which results in linguistically and ethnically diverse Older Australians receiving less aged care services than other CACP clients who don’t require language assistance through DS-CALDS. This appears to be contrary to the principles set out in section 9 of the *Racial Discrimination Act 1975* (Cth).

It is therefore proposed that there be a careful review of the *Aged or Disabled Persons Care Act 1954* (Cth), the *Aged Care (Consequential Provisions) Act 1997* (Cth) and other ancillary legislation so that all CACP clients receive the same amount of services, regardless of ethnic origin and English linguistic capabilities.

The Society submits that these proposed amendments to the *Aged Care Act 1997*, *Aged or Disabled Persons Care Act 1954* (Cth), and the *Aged Care (Consequential Provisions) Act 1997* (Cth) would signify an important step in the Commonwealth protecting the rights of Older Australians by deterring Elder Abuse as well as affording equality and ensuring that an adequate standard of care is exercised by aged care providers. It will also provide Older Australians access to justice and an opportunity to resolve

disputes through neutral and independent alternative dispute resolution mechanisms. The amendments also will ensure Scheme transparency.

Thank you for the opportunity to provide comments and submissions to the Productivity Commission in this very important and evolving area of law.

Please do not hesitate to contact either myself or have a member of your staff contact our Policy Lawyer, Louise Pennisi on 3842 5872 or l.pennisi@qls.com.au if you wish to discuss these concepts further.

Yours faithfully

Peter Eardley  
**President**