HOLMANWEBB
LAWYERS

Level 17 Angel Place
123 Pitt Street Sydney NSW 2000
GPO Box 119 Sydney NSW 2001
T 61 2 9390 8000
F 61 2 9390 8390
holmanwebb.com.au
ABN 71 304 498 001

Our Ref ACF:

27 February 2017

The Executive Director
The Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

BY EMAIL: elder_abuse@alrc.gov.au

ELDER ABUSE DISCUSSION PAPER

---

1. Background and introduction

We refer to the Discussion Paper on Elder Abuse dated December 2016.

Holman Webb has a specialist health, aged care and life science practice and represents many health and aged care providers across Australia.

Holman Webb supports measures which will reduce the abuse of our elderly population.

However, proposals to reform the law should be also practical to implement within the health and aged care industry.

Please find below our response on some of the proposals:

2. Proposal 3–5 Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:

(a) liable, civilly, criminally or under an administrative process;

(b) found to have departed from standards of professional conduct;

(c) dismissed or threatened in the course of their employment; or

(d) discriminated against with respect to employment or membership in a profession or trade union.

We support the proposition that reporting elder abuse should not be subject to a breach of laws, including privacy laws.

3. Proposal 5–1 A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

Who should be permitted to search the national online register without restriction?

We support an online register, however, access to such a register should be appropriately restricted for privacy issues, particularly if registration becomes compulsory and the relevant individual does not wish to disclose certain matters to certain people, including family members who have 'fallen out' with that individual.

4. **Proposal 5–2 The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.**

We are concerned that mandatory registration of enduring documents may not be practical for many elderly people with mobility and complex health issues and of limited financial means. Therefore, we suggest voluntary registration.

5. **Proposal 5–4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:**

(a) legal practitioner;

(b) medical practitioner;

(c) justice of the peace;

(d) registrar of the Local/Magistrates C(ourt; or

(e) police officer holding the rank of sergeant or above.

Each witness should certify that:

(f) the principal appeared to freely and voluntarily sign in their presence;

(g) the principal appeared to understand the nature of the document; and

(h) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

We are concerned that the proposed witnessing requirements may not be practical for many elderly people with mobility and complex health issues and suggest that the list of authorised witnesses be expanded, for example, to include registered nurses and pharmacists. Further discussion is required regarding potential liability in relation to the certification process as to capacity to understand the nature of the document.

6. **Proposal 5–5 State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person's failure to comply with their obligations under the relevant Act.**

It is our experience that most enduring guardians act in good faith without any reward over a number of years by volunteering their time, however, family disputes often arise.

Any penalty or payment of compensation should only be made in exceptional circumstances where there is a lack of good faith, gross negligence or criminal activity. It would be adverse to the elderly if there is a significant disincentive for a person to take on the role and responsibilities of their enduring guardian.

7. **Proposal 5–8 Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:**

   (a) making or revoking the principal's will;

   (b) making or revoking an enduring document on behalf of the principal;

   (c) voting in elections on behalf of the principal;

   (d) consenting to adoption of a child by the principal;

   (e) consenting to marriage or divorce of the principal; or

   (f) consenting to the principal entering into a sexual relationship.

   If the care recipient clearly indicates a desire to enter into a relationship, including a sexual relationship, why should the enduring guardian not be able to consent? Requiring a court order to consent to a sexual relationship is against the rights of residential care recipients under the User Rights Principles 2014 (Cth) to select and maintain social and personal relationships with anyone else without fear, criticism or restriction.

8. **Proposal 5–10 State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.**

   We agree with this approach. Inconsistency with the laws in relation to enduring powers of attorney, enduring guardianship and other substitute decision makers has created great confusion within the health and aged care industry.

9. **Question 6–1 Should information for newly-appointed guardians and financial administrators be provided in the form of:**

   (a) compulsory training;

   (b) training ordered at the discretion of the tribunal;

   (c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or

   (d) other ways?

   Once again, many enduring guardians act in good faith and without any reward and many have limited means. Compulsory training should only be implemented if

government were to provide the training at no cost to the enduring guardian and flexible training options are available, such as on-line training in multiple languages.

10. **Proposal 11–2 The term 'reportable assault' in the Aged Care Act 1997 (Cth) should be replaced with 'reportable incident'.**

With respect to residential care, 'reportable incident' should mean:

(a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient;

(b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or

(c) an incident resulting in an unexplained serious injury to a care recipient.

With respect to home care or flexible care, 'reportable incident' should mean a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient.

Further discussion on the definition of "neglect" is required. Does neglect include being late for an appointment for an hour or neglect over a period of time?

11. **Proposal 11–3 The exemption to reporting provided by s 53 of the Accountability Principles 2014 (Cth), regarding alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, should be removed.**

We propose that the aged care industry be consulted further regarding the removal of this exemption.

12. **Proposal 11–4 There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of:**

(a) a person's national criminal history;

(b) relevant reportable incidents under the proposed reportable incidents scheme; and

(c) relevant disciplinary proceedings or complaints

Whilst we support a national employment screening process at manageable cost to the Approved Providers, however, many reports or "reportable incidents" may be unsubstantiated. Health and aged care staff should only be precluded if those reports are proved rather than just alleged.

13. **Proposal 11–6 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.**

    We welcome this proposal, subject to industry consultation on the National Code of Conduct for Health Care Workers.

14. **Proposal 11–7 The Aged Care Act 1997 (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:**

    (a) when necessary to prevent physical harm;

    (b) to the extent necessary to prevent the harm;

    (c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and

    (d) as prescribed in a person's behaviour management plan.

    Who is a 'senior clinician'? Many aged care providers do not have access to independent medical practitioners on site. Restraint may be required in emergency situations.

15. **Proposal 11–8 Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.**

    Where the care recipient does not have the legal capacity to enter into an agreement, the approved provider can only deal with the care recipient's legal representative.

Should you have any questions in relation to the above, please do not hesitate to contact me.

Yours faithfully
HOLMAN WEBB

Alison Choy Flannigan
Partner
T: 61 2 9390 8338
E: alison.choyflannigan@holmanwebb.com.au