

5 May 2014

Aged Care Legislation Section
Ageing and Aged Care Division
Department of Social Services

By email: agedcarelegislation@dss.gov.au

Dear Sir/Madam

AGED CARE REFORM: EXPOSURE DRAFT SUBORDINATE LEGISLATION

I refer to the second release of the Exposure Drafts on Aged Care Principles. The Law Council has consulted with its National Elder Law and Succession Law Committee (the Committee) on these Exposure Drafts.

The Committee considers that the Exposure Draft 'User Rights Principles 2014' should make clear the extent of the authority that a person representing a care recipient must hold in order to lawfully commit a care recipient to an agreement under the *Aged Care Act 1997* (Cth).

Section 96-5 of the *Aged Care Act 1997* (Cth) enables a person 'representing' the care recipient to enter into an agreement on behalf of the care recipient with an aged care service if the care recipient lacks capacity. The following types of agreements are provided for in the Act:

- Accommodation bond agreements;
- Accommodation charge agreements;
- Home care agreements;
- Extra service agreements; and
- Resident agreements.

Accommodation bond agreements and accommodation charge agreements will be replaced by 'accommodation agreements' as a result of the amendments to the *Aged Care Act 1997* (Cth) commencing on 1 July 2014 by the *Aged Care (Living Longer Living Better) Act 2013* (Cth)

Section 52F-2 of the *Aged Care (Living Longer Living Better) Act 2013* (Cth) prescribes the process for an aged care provider to enter into an agreement with a care recipient or their 'representative' but it does not provide any guidance on the extent of the authority

that a person 'representing' a care recipient must hold in order to lawfully commit a care recipient to an agreement under the *Aged Care Act 1997* (Cth).

The *Aged Care Act 1997* (Cth) does not provide for any criteria that needs to be met before a person can be considered a 'representative' of a care recipient who lacks capacity.

In regards to accommodation bond agreements, s 23.30(5) of the current User Rights Principles provides that a person 'authorised' to sign documents can enter into an agreement on behalf of a care recipient if the care recipient has a cognitive impairment.

The term 'authorised' in the current User Rights Principles provided some, albeit insufficient, guidance on the criteria that needs to be met in order for a representative to enter into an agreement on behalf of a care recipient.

The Exposure Draft 'User Rights Principles 2014', however, does not contain an equivalent to s23.30 of the current User Rights Principles.

It is therefore unclear whether the legislature intends the use of the term 'representative' in section 96-5 *Aged Care Act 1997* (Cth) to be a new form of representative authority for the purposes of agreements or whether it is simply a recognition that formal appointments otherwise held will be valid for the purposes of agreements under the *Aged Care Act 1997* (Cth) .

The Law Council considers that the Exposure Draft 'User Rights Principles 2014' should make clear the extent of the authority that a person representing a care recipient must hold in order to lawfully commit a care recipient to an agreement under the *Aged Care Act 1997* (Cth), in particular to clarify the meaning and effect of the term 'representative' as used in the *Aged Care Act 1997* (Cth).

The Law Council considers that this would ensure that agreements are enforceable and it would provide clarity on the criteria that needs to be fulfilled for a person to enter into an agreement on behalf of a care recipient who lacks capacity.

Please contact Valerie Perumalla on (02) 6246 3750 or valerie.perumalla@lawcouncil.asn.au if we can provide any further information.

Yours sincerely



MARGERIE NICOLL
DEPUTY SECRETARY-GENERAL