

15 April 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 consultations on the Exposure Drafts of subordinate legislation on aged care by the Department of Social Services.

The Law Council has consulted with its National Elder Law and Succession Law Committee about the Exposure Draft 'Approval of Care Recipients Principles 2014' (Exposure Draft) and provides the following comments.

The term 'aged person' is not defined in the Exposure Draft or under the *Aged Care Act 1997* (Cth). The Law Council notes that the term 'aged person' has been used in this context since the current principles were made at the time of the enactment of the Aged Care Act in 1997. It is noted that no attempt has previously been made to define this term.

The Law Council notes that the term 'aged person' now appears in Clause 6(1)(b) of Exposure Draft, as well as in other clauses, but is similarly not defined. There are a number of reasons why the term 'aged person' may not have been defined in the Exposure Draft, including to ensure flexibility in determining who is eligible for residential care.

The Law Council considers that the use of the term 'aged person' creates confusion about the proper criteria for eligibility for residential care. The use of the term "aged" suggests that age is a relevant consideration in determining eligibility, when clearly the intention of the legislature is that the correct criteria is capacity. The Law Council suggests that an alternative title should be adopted, such as an 'eligible person', or other title which does not suggest that age is relevant to eligibility, in order to provide greater legal certainty and clarity.

If this suggestion is adopted, the Law Council further suggests that clause 6(1)(b) of the Exposure Draft 'Approval of Care Recipients Principles 2014' be amended to state:

(b) for a person who is not an aged person there are no other care facilities or care services more appropriate to meet the person's needs

I trust these comments will be of some assistance. Please contact Valerie Perumalla on (02) 6246 3750 or valerie.perumalla@lawcouncil.asn.au if we can provide any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Martyn Hagan', written in a cursive style.

MARTYN HAGAN
SECRETARY-GENERAL