AGAC Submission to the Senate Enquiry into Aged Care Legislatively Reform

The Australian Guardianship and Administration Council (AGAC) welcome the opportunity to comment on this singularly important set of Bills to amend existing aged care legislation. AGAC is the peak body for the Australian State and Territory Tribunals, Public Guardians and Advocates, and State or Public Trustees of Queensland, Victoria, Tasmania, South Australia, Western Australia, Northern Territory, Australian Capital Territory and New South Wales. Guardianship Tribunals make various orders in relation to adults who lack decision making capacity. Public/State Trustees and Public Advocates/Guardians are statutory officers who can be appointed under a financial management or guardianship order respectively. Guardianship legislation is State based and while some differences exist there is greater similarity than difference across all jurisdictions.

Background

AGAC welcomes the introduction of the five (5) Bills before the House which arise out of the Productivity Commission's report *Caring for Older Australians*. AGAC made two submissions to the Productivity Commission during its enquiry phase and commented on the final report. In brief the concerns of AGAC put to the Commission during the enquiry included the following:

- Size of accommodation bonds – including the rapid acceleration in the amounts being requested for bonds frequently in excess of $750,000 and up to and including $2.6million.

- The paucity of available services giving rise to a general misconception that the amount of a bond would be readily negotiable given the often emotionally charged nature of a consumers move from home to aged care, as well as the high level of competition for available beds.

- The ability for service providers to "cherry pick" consumers who are able to pay more.

- The inequity of retention amounts.

- The trend by service providers to market bonds agreements that would facilitate older Australians becoming eligible for a pension.

- The prudential requirements for management of accommodation bonds.

When the Productivity Commission tabled its report AGAC was pleased to see recommendations to simplify access to the aged care system and particularly to

broaden the range of options for payment of services. We recognised that the dismantling of the current bonds schema as it stands was not viable and that the distinction between high and low care needed to be removed. We expressed concern about the potential to introduce a reverse mortgage scheme because of our experience in management of the affairs of people who have entered into reverse mortgages and the financial disadvantage which can quickly accrue.

Members of AGAC have extensive experience dealing with the angst and anger emanating from individuals and families where an older person has lost capacity to manage their affairs and has had to enter an aged care facility. As you know this event frequently triggers the sale of the family property in order to meet bond requirements under current legislation. This has been without a doubt one of the most controversial and divisive elements of existing legislation.

Tribunals around Australia are approached for the appointment of both guardians and financial managers where a person has lost capacity and in particular where there are high levels of family conflict or where the person themselves objects to receiving care or moving into an ACF.

Public Advocates/Guardians and Trustees are “down river” from this process and are often the recipients of the Tribunal orders. Guardians and advocates are frequently required to make decisions about care, accommodation and services. Trustees, where appointed as financial managers, are the custodian of the finances in order to fund such services. The policy intention of the Living Longer, Living Better aged care legislation is clear and supported.

Our submission will make particular comment about the schema for calculation of fees and the various appeal provisions. These Five (5) Bills seek to bring together several existing pieces of legislation and comprehensively revise the *Aged Care Act 1997.* While we believe this should go a long way in reducing confusion we are still concerned about the size and complexity of the legislation and the introduction of two Commissioners; the Commissioner for Aged Care and the Commissioner for Aged Care Pricing and the potential for public confusion about the two roles.

General Comments

While AGAC members are supportive of the policy thrust of the legislative reform, we are concerned that it remains based upon a framework which is still linked to medium to large institutional care. There is ample research to demonstrate the inherent risk of abuse and neglect of older people in institutional care. It is one of the reasons why many older people fear going into an aged care facility.

The Green House Project which has been operating in the United States since 2003 is a successful, popular, example of an alternative to institutional care for frail elderly people. Each home is designed for seven to twelve residents who have their own private room with ensuite as well as shared recreational areas and kitchen space where they may cook their own meals if they wish. Homes are run on a social model rather than a biomedical model. Families are very much involved. Each house has a care worker on site twenty four hours per day and a small team of specialists

attending as needed. AGAC acknowledges the costs associated with smaller group service delivery however note that some Australian Service providers have adopted or adapted elements of this model in the design and delivery of aged care services. The model is applicable across all groups and can be particularly powerful for people with dementia.

We applaud the introduction of caps across the board and in particular lifetime caps that will be indexed. The principles that protect full rate pensioners; ensure that people do not contribute more than the cost of their care; that a persons home or other assets are excluded from the fee for home care have full support. However, it is noted that there are still no caps for continuing care patients. If they choose to swap to the new scheme but payments already made would go unrecognised.

We recognise the need for some flexibility and the opportunity for service providers to make specific application to the Aged Care Pricing Commissioner for above cap charges. In our original submission to the Productivity Commission we cited very real examples of bonds up to $2.6million being commanded, simply because “they could” within the existing legislation. Clearly that scenario has been addressed in the proposed legislation. We have taken the same case details and applied the proposed fee schedule as a comparison to test the fairness of the new schema. The outcome is that the means tested fee would be capped at $25,000 pa if the person entered either a Tier 1 or a Tier two accommodation facility. However if entry was to a Tier 3 facility the means tested fee/accommodation deposit would be dependent on the aged care facility providing evidence to the Pricing Commissioner of both the quality of accommodation and services provided. The accommodation deposit could not however be set based on the means of the individual to pay.

The change in methodology for funding aged care is fully supported including the new term of Accommodation Care payment consisting of:

- Periodic payment;
- Lump sum; or
- a combination of both

This will provide families and also appointed financial managers, private or public, with far greater flexibility in arranging the finances of an individual in order to meet their care needs. However the actual calculation of the models is very complex and we believe well beyond the scope of the average Australian. We are concerned that such complexity will result in the establishment of a new “industry” of advisors with the potential to add further cost to individuals and families as they negotiate the process of funding aged care. If the legislation is to be accessible to the majority of Australians without specialist advice there would need to be guidance available to understand the Act and apply the formulae.

It is noted however that the accommodation deposit (paid to the ACF to generate the calculated means tested fee) is not refundable when the lifetime cap is exceeded, so payment of the accommodation deposit effectively removes the cap.

The introduction of the principle of “consumer directed care” reflects best practice and will also provide for a continuum of consumer directed service delivery across the life

span. In particular we refer to the provisions in the recently passed National Disability Insurance Legislation which are firmly grounded in principle of consumer directed care to the greatest extent possible.

We are pleased to see the continuation of the respite, oxygen and enteral feeding supplements and support the addition of four other supplements namely:

- Dementia supplement;
- Veterans supplement;
- Workforce supplement; and
- Any other primary supplement set out in these subsidy principles.

We note the policy intent of the workforce supplement is to enable service providers to attract and retain sufficient numbers of skilled and trained workers. Notwithstanding these important initiatives our members remain concerned about the major challenge identified by the Productivity Commission – that is meeting the demand for both the quantity and quality of staff available to provide aged care services now and into the future.

AGAC also supports the increased attention to carers via enhanced support for carer respite and counselling. This is an essential component of this scheme. Providing appropriate support to both the formal and informal networks will maintain individuals safely in the community, thereby supporting the policy of ageing in place.

We note that the definition of 'vulnerable' persons continuing to reside in the home of a person who has entered residential care has not changed from the existing Act. Over the years we have experienced significant problems with this definition, for example:

Mrs A first entered care into a multipurpose facility in a country area of NSW. Her carer before that admission was her son who continued to reside in the family home. The multipurpose facility could not provide the level of care required by this lady and she moved to a government funded facility in a larger town. The exemption for the family home from assessment was apparently negated by the fact that the care did not continue until immediately before the move to the government funded facility.

In many cases the two year exemption of the property as an asset from consideration in calculation of an accommodation charge results in a significant reduction of the pension at the end of that period due to the value of the home. There is then a need to sell to meet the ongoing costs of the family member in care leaving the vulnerable person without a residence.

Home Care

AGAC recognises the importance of the changes that support people remaining in the community rather than needing to enter residential care. However the change of name from Community to Home Care could be read as a deliberate narrowing of focus to the

provision of care ***only*** in the home. We are concerned that this change of name, and possibly criteria, could undermine the policy intention to enable people to continue to have access to their community. Continued engagement in the local community to the greatest extent possible is a key strategy in maintaining people within their own home and the community.

We are very pleased to see the more equitable application of funding criteria and fees across the whole range of aged care services. Historically, many families have kept their family member at home for far too long because they have either been unable to afford or fear they have been unable to afford appropriate aged care support.

The provision of care in the family home has great strength and some weaknesses. Thorough screening of care providers will be paramount to ensuring that quality services are provided in a safe and transparent manner. The expansion of the community visitor program should assist with this screening.

As we age the need for home modifications increase; and this is particularly so to enable the safe, affordable and consistent delivery of home care e.g. the provision of lifting equipment may obviate the need for two staff.

However, the funding of home modifications needs to be more clearly defined and could easily lead to a two class system; those who can afford and those who can not. In addition, making permanent modifications to homes is comparatively easy in owned properties and in most Department of Housing properties. However modifications to private rental properties are extremely problematic. We acknowledge that this legislation will not be able to remedy the latter; however it remains a real issue for many older individuals and couples.

Persons on a pension alone can access the Home Modification Scheme but our experience is that of an extremely slow and cumbersome process. We would hope that the new legislation brings enhanced processes and greater access.

We applaud the introduction of more consistent, fairer payments for home care and the annual cap on the contributions to $5,000 - $10,000 depending on the income of the person.

We also recognise the challenges of staffing home care provision (see comments above). We note that the number of approved providers is strictly controlled, however historically approved providers sub-contract to non-approved, unregulated, providers. We cannot yet see details of how this inherent weakness in the service delivery system will be overcome.

The delivery of home care is based on the supposition of a strong pre-existing informal care network. That is not present for a significant number of Australians. We accept that clients of the guardianship and administration system in Australia are very often amongst the most vulnerable in the community and may be a skewed sample, however it is our experience that the majority of clients coming before tribunals, public advocates, guardians and trustees either lack an informal care network or have dysfunctional relationships.

The expansion of the Community Visitors scheme to visit home care sites is supported and will ensure that those providers are also independently monitored and reviewed, which in turn is beneficial for the care recipient. Community visitors will need to be sensitive to the privacy issues pertaining to visiting a home and more particularly so for people who lack capacity to express a view or concern.

Residential Care

As noted earlier we are particularly pleased to see a broadening of payment options. Entry into an accommodation agreement, where a payment method can be nominated later, is beneficial to our client base. Under the current scheme the sale of the family home is almost automatic and gives rise to great distress for clients and families. The proposed payment options mean that our clients may not be forced to sell their assets, at least immediately.

There is considerable commentary that this legislation will mean that it is no longer necessary for the family home to be sold in order to fund Aged Care. While it is true that there is no longer the pressure from day 1 to sell this typically principal asset, the legislation does not change the Centrelink or Department of Veterans' Affairs provisions relating to treatment of the family home as an asset after 2 years.

We are pleased to see an intended increase in the number of concessional beds and flexibility in the manner in which they are distributed, however reading of available material does not indicate a target number of how that will be achieved.

We note the reference to the accommodation payment and the accommodation deposit but we can not find an adequate definition of what constitutes a deposit. We accept that this may well be provided for in the material on-line, however note that it is voluminous and has been difficult to find underpinning our concerns about the complexity of the legislation.

We note that under the current schema there has been a strong trend to put in place high bonds with extra services for people who should in fact be in high care. This is another form of "cherry picking" and an example of the problems with the current comparatively poorly regulated environment. It is for this reason amongst others that we are fully supportive of the introduction of the Ministerial power to establish caps across the range of fees and the establishment of a Pricing Commissioner. However, we could not identify the principles upon which the Commissioner will base decisions in relation to above cap applications, which is of concern. We note the appeal provisions in relation to the Commissioners decisions.

Members of AGAC are also keen to know whether the Pricing Commissioner will have any role in determining applications for hardship. We also have concerns about the timeframe available to consider a hardship application.

We are concerned to see what we perceive to be continuation of a rigid approach in relation to changes in clients' circumstances and asset base.

To illustrate we provide case examples below. Public/State Trustees have extensive experience in the submission of documentation to both Centrelink and the Department of Ageing for the purposes of asset assessment. We find that Centrelink is far more responsive particularly to matters of hardship and especially changed circumstances. Once an application is lodged with the Department of Ageing it is very hard to register any change. It is extremely difficult to mount a hardship case even when the facts are very clear.

Mrs B, a married woman entered aged care (after a period in hospital) leaving her spouse still residing in the family home. While she was in hospital her husband (the sole owner on title) sold the home and advised Centrelink that the proceeds had been gifted to his daughter. When Mrs B entered care she was then assessed as having to pay an accommodation bond based on a half share of the gifted assets and her pension was slightly affected also. The husband of Mrs B then advised Centrelink that he and his wife were separated. The burden of the asset gifting which she did not sanction or participate in continued to impact on her pension and the assessed accommodation bond. Her financial manager successfully negotiated the removal of the half share of the funds from calculation of her Centrelink pension, however numerous applications for consideration under hardship relief for the aged care accommodation bond have been unsuccessful and the bond remains outstanding with interest accruing.

Members of AGAC are pleased to see the introduction of changes relating to the payment of accommodation bonds. It is currently the practice that if the accommodation bond is paid by a source other than sale of the family home and the family home is then rented the income is included for the purposes of calculating the asset base. We note the proposal that under such circumstances rent is excluded and we see this as a strength that overcomes the current problem of double dipping.

However we draw your attention to an apparent contradiction between item 15 in the explanatory notes at page 116 and item 19 on page 117. Item 15 states “neither an accommodation bond nor an accommodation bond balance is a financial investment for the purposes of the Social Security Act”, the section goes on to note the two new types of lump sum payments and the new names of accommodation deposits and refundable accommodation contributions, and that both are excluded from consideration as financial investments for the purposes of the SSAT. In item 19 the explanatory notes states “that it provides for a refundable deposit balance in respect of a refundable deposit paid by a person to be taken as an asset for the purposes of the SSAT”. At worst these clauses appear to be contradictory and if in fact they are not then the drafting is at best confusing.

We also note with interest the comments in relation to the accommodation supplement; see page 65 of the explanatory notes, section 42-28. The reading of this section suggests that once an accommodation supplement decision has been made there is no account taken of a change in circumstances. It is our experience that client asset bases fluctuate in both directions. While it is true that these more frequently go down than up, it is nevertheless the case that clients’ asset bases can increase quite significantly particularly with injections of a beneficial entitlement under a deceased estate and less frequently, but nevertheless true, lottery and other associated

charitable wins. We believe that the legislation could do with further review to provide greater flexibility. We would welcome the introduction of broader appeal mechanisms than already exist.

Some examples of the different fees now payable for clients entering care under the old and new legislation

Mr C Homeowner (value of home $600,000) with pension income only.
Today:
low care may be required to pay an accommodation bond of up to $557,000. No income tested fee
high care would be liable to pay the maximum accommodation charge of $33.29 per day ($12,150 pa)
1st July 2014: Entering care- home an asset with capped value of $144,500 – assessed means tested fee $50 per day however no fee payable as care subsidy equal to this amount.

Mrs D Homeowner (value of home $1,900,000) with pension income only.
Today :
low care may be required to pay an accommodation bond of up to $1,857,000. No income tested fee
high care would be liable to pay the maximum accommodation charge of $33.29 per day ($12,150 pa)
1st July 2014 Entering care- home an asset with capped value of $144,500 –assessed means tested fee $50 per day however no fee payable as care subsidy equal to this amount.

Mr E Non Homeowner financial assets $1,209,500 deemed income $47,701 pa.
Today:
low care may be required to pay an accommodation bond of up to $1,166,500. Income tested fee calculated on any excess deemed income once bond is paid.
high care would be liable to pay the maximum accommodation charge of $33.29 per day ($12,150 pa) and income tested fee $28.62 pd (10,446.30 pa)
1st July 2014 Entering care –assessed as having to pay a means tested fee per day however fees capped at $25,000 pa

Finally, it is increasingly the case that members of AGAC see the circumstances of couples where one person requires significant support, either in home or residential care and the other person does not require or is not eligible for care. The manner in which couples income and assets are treated is such that they are caught between a rock and a hard place frequently leaving them unable to afford residential care, or unable to find sufficient places in home care to provide adequately for their partner. In circumstances where one person remains in the workforce their income will affect the status of the resident; and the full burden of payment for residential care falls on the employed person. In circumstances where the pension is reduced due to income or assets or there is no pension entitlement due to the income or asset test then the full cost of basic care plus all additional accommodation charges are met by the partner.

Where the partner remains in the community and is in receipt of a pension or Centrelink benefit, both persons are eligible for the separated due to ill health supplement, however if the refundable deposit is considered as an asset the pension may be reduced, leaving insufficient funds for day to day living. All modelling provided in the explanatory notes relates to single persons and does not readily cover the circumstances of couples. In some circumstances where both partners of a couple require care it is not clear how their combined assets and income will affect the calculation of means tested payments.

Conclusion

The comprehensive reform of aged care legislation in Australia is welcomed. Members are very supportive of the overall direction of the change. We believe there is still an opportunity for further flexibility to be built into the scheme without losing the policy intent nor regulation required to underpin the provision of quality services.

We support the proposed review of the legislation in three years to see whether it has addressed the concerns identified in the Productivity Commission's report.