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Submission No. 071

(Dementia)

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2 May 2012

Committee Secretary
Standing Committee on Health and Ageing
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Sir / Madam

Dementia: Early diagnosis and intervention

The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees.

The Council has over 130 members who are responsible for investing more than \$1.8 trillion on behalf of 11 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world.

The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The Council's trustee corporation members (comprising private trustee companies and Public Trustees) possess specialist skills in a wide range of financial and personal services, including estate planning, wills, powers of attorney, deceased estate administration, and management of various types of personal trusts.

For many of those members' clients the service offering provides key life and estate planning solutions to ensure they have pre-positioned financial management and estate planning around the possible loss of capacity. As can be seen from the following data, our trustee corporation members are highly involved in both the planning and delivery of these solutions.

Each year those members:

- write about 55,000 wills and 9,000 powers of attorney,
- administer about 15,000 deceased estates,
- manage about 2,100 charitable trusts and foundations with assets of about \$3.2 billion,

- act as trustee for over 20,000 other personal trusts,
- manage assets under Court / Tribunal orders for over 50,000 vulnerable people,
- manage assets under powers of attorney for about 7,000 clients, and
- prepare over 40,000 tax returns.

Financial management services offered by trustee corporations provide very a valuable amenity for people who wish to make effective provision for their financial future if onset occurs and, importantly, provide protection from the incidence of elder financial abuse.

Trustee corporations are also active in public education on loss of capacity issues through public seminars, addresses by invitation, websites and newspaper articles.

We are pleased to provide comments to the Committee's *Inquiry into Dementia: Early diagnosis and intervention*.

Our submission addresses the issue of helping people with dementia, and their carers, plan for their futures in respect of organising their financial and legal affairs.

Comments

For many elderly people, managing their financial affairs can become a challenging and potentially stressful task.

This is especially so for people ageing with a disability such as dementia, and for their carers, if solutions for appropriate management have not been implemented to ensure an effective transition to supported or substituted decision making .

Coping with these challenges is made more difficult by the complexity of the legal, taxation and superannuation systems. Additionally, family relationships can add tension where there are key decisions to be made about financial and lifestyle decisions.

Also, people's assets are increasingly likely to comprise a greater range of financial products than in the past, for example: shares, managed funds, property (possibly including an interstate holiday house or investment property) and interests in family businesses and companies.

Further, people today are living longer, which means that they may need assistance with managing their assets for many more years than in the past. Age itself may provide vulnerability, yet when compounded with diminishing capacity, requires careful and instructive planning, or in its absence, prompt reaction to ensure smooth transition to prudent financial management.

In order to prepare for an uncertain future, it is generally wise for people to give early attention to ways in which their financial assets can be managed and protected.

Various tools are available to assist in planning for the future.

Wills

One very important way of minimising some of the potential trauma associated with personal finances is for people to ensure that they prepare a valid will that clearly sets out how they want their assets to be distributed after their death.

If a person dies without a will (ie "intestate"), their estate will be distributed according to the relevant State/Territory legislation, which may not be consistent with their intentions and may result in delays and additional costs in settling the estate.

To make a valid will, a person must:

- o have the requisite mental capacity to make a will,
- o understand that they are making a will,
- o exercise genuine free choice,
- o understand the property being disposed of and the manner of its disposition, and
- o have the document appropriately witnessed.

It is therefore essential that a person attend to their will before a lack of mental capacity, caused by conditions such as dementia, prevents them from doing so.

A key recommendation would be to make sure that diagnosis provides a catalyst for people to seek appropriate advice and solutions to get “their house in order” before capacity deteriorates to the extent that they cannot make their own choices. More often than not, a will made at this time by a person diagnosed with early dementia will be the “last” will, effectively ensuring that their last known intentions for succession are able to be implemented.

The catalyst could be to ensure that medical practitioners are appropriately equipped with materials to give to their patients diagnosed with early dementia to provide an action plan in respect of their financial affairs.

Further, appropriate advice will often be required for the spouse / partner of the diagnosed person in order to best meet the short-term and long-term financial needs of both. For example, when their wills are being prepared, consideration might be given to establishing a testamentary trust or making provision for a special disability trust, depending on the couple’s particular circumstances.

As illustrated above, trustee corporations are actively involved not only in ensuring that advance planning occurs but also by providing last minute solutions when required.

Fortunately, if a person no longer has testamentary capacity, an application to the Supreme Court can be made for the Court to make a will based on a variety of evidence to support the Court’s conclusion as to the nature of the will the person would have likely made in respect of the distribution of their estate. However, applications for Court-made wills can be costly and require a lot of evidence. In some cases, the “testator” has died before the application has been finalised.

Powers of Attorney

In terms of facilitating proper ongoing management of a person’s financial affairs, an Enduring Power of Attorney (EPA) is also very important.

An EPA permits a person (the donor) to confer legal authority on another person (the attorney) to make various financial decisions (and sometimes other decisions depending on the relevant State/Territory provisions) on behalf of the donor.

Importantly, an EPA (compared with a general power of attorney) remains operative after the donor loses mental capacity, for example as a result of dementia. However, it can be revoked or altered whilst ever the donor still has legal capacity.

An EPA is a flexible and relatively cheap planning tool in terms of ensuring that people’s wishes in relation to their financial affairs are carried out once they suffer decision-making impairment.

The donor should ensure that they appoint a trusted person, with appropriate skills, in that role.

Unfortunately, there have been many cases before Courts and Tribunals where attorneys have been found wanting in their financial management and abuse has occurred. Courts and Tribunals have had to intervene by requiring removal of the appointed person and, where possible, recovering assets.

It is recommended that the Committee familiarise itself with the recent research completed by Monash University under the auspices of State Trustees Ltd in Victoria - *Protecting Elders Assets Study: Ethical Management of Older Persons' Financial Assets*.

It is also recommended that the Committee refer to the numerous recommendations arising from the 2006 House of Representatives Legal & Constitutional Affairs Committee *Inquiry into Older People and the Law* in respect of protecting the elderly and people who have lost capacity against financial abuse.

Donors of EPAs are afforded various protections:

- o they can specify conditions and limitations that attach to the attorney's powers.
- o the attorney has a responsibility to always act in the best interest of the donor, to keep the attorney's own money and property separate from that of the donor, and to keep appropriate accounts and records.
- o the donor can specify whether or not the attorney can take a benefit (or confer a benefit on a third party) and if so, what is to be the extent of that benefit; this avoids unlimited access of an attorney to the donor's assets without express prior approval.
- o witness requirements aim to ensure that an appropriate person attests that the nature and importance of the document was explained to, and appeared to be understood by, the donor.
- o the attorney must formally accept the appointment - having the attorney's signature on the document also assists financial institutions etc in verifying the attorney's identity when the power is being used.

There are still ongoing legal issues surrounding an attorney's power to make or vary binding nominations in respect of superannuation benefits. As more Australians have their retirement funding connected with superannuation, we recommend that the law be clarified to remove the uncertainty. This would be an issue with clients with early onset of dementia, who may need to renew their nominations but do not have the continuing capacity.

Enduring Guardianship

People diagnosed with early dementia should also consider appointing an enduring guardian to make decisions on their behalf on matters such as accommodation, health and other lifestyle issues once they lose the capacity to make their own decisions.

Advance Care Directive

An advance care directive (ACD), often called a living will, is another useful planning tool.

An ACD allows a person to provide specific directives about future medical treatment should that person become incapable of participating in those treatment decisions.

For example, an ACD might express the person's wish not to be subjected to various kinds of intrusive treatment, such as tube feeding, blood transfusion or cardio pulmonary resuscitation.

ACDs are legally binding in some jurisdictions, whereas in others they may still be valid under common law.

The fall-back position

We are conscious that not all people will plan ahead, and that their existing instruments may not have been updated to reflect their current needs or reflect the best solution for their financial or personal management.

Australians are well served by a State/Territory network of Courts and Tribunals to provide solutions to many of the issues arising from the lack of advanced planning.

The Committee should be aware that particularly the tribunals (eg VCAT, NSW Guardianship Tribunal) will need to be adequately resourced to ensure they have the required capacity to deal with an increasing workload. There is great benefit to the client in being able to have application for the appointment of a financial manager or a guardian being heard and decided quickly by a specialist Tribunal.

You may like to refer to a recent study by Deloitte: Access Economics, “Dementia Across Australia: 2011-2050” commissioned by Alzheimer’s Australia, which projects an increase of people with dementia from currently 91,000 to over 128,000 by 2020 and about 304,000 by 2050. Although funding of these tribunals is a State/Territory matter, this is clearly a national issue.

Further information

A useful source of further information on these matters is the website developed by the NSW Planning for Later Life Forum, made up of representatives of a number of government agencies and non-government organisations with an interest in encouraging and facilitating individuals to plan for later life - see www.planningaheadtools.com.au.

Yours sincerely

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