

24 February 2007

Committee Secretary
Community Affairs Committee
Parliament House
Canberra ACT 2600
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Aged Care Amendment (Security and Protection) Bill 2007

The Aged Care Crisis Team welcomes the opportunity to respond to the proposed changes to the *Aged Care Act 1997* (Aged Care Amendment (Security and Protection) Bill 2007).

The Aged Care Crisis Team is an independent group of Australian citizens. Members of our group are engaged with the aged-care sector in a variety of ways – as health professionals, as consumers of services and as volunteers.

Our website, www.agedcarecrisis.com, provides ready access to information and issues relating to the care of frail, older people. Its purpose is to support/inform older people, their family members and carers as they traverse an exceedingly complex system of care.

The Aged Care Crisis Team believes that review and reform of the *Aged Care Act 1997* is long overdue. We support changes to the Act which provide additional protection to vulnerable frail older people.

We make the following general comment.

- The standards of care enunciated in this Act are below acceptable community standards
- Failure to comply with the set standards carries no penalty other than accumulation of penalty points and, on rare occasions, sanctions.
- Frail older people across Australia are being put at risk because aged-care proprietors are not required to adhere to mandated staff/resident ratios.

We make the following specific comment on the proposed changes as outlined in the Aged Care Amendment (Security and Protection) Bill 2007:

1 Function of Aged Care Commissioner

- (i) **Amendment Section 95A-1:** The Aged Care Commissioner may only check that the *Office for Aged Care Quality and Compliance* and the *Aged Care Standards and Accreditation Agency* have followed the correct procedures; he/she is not permitted to deal with a complaint **about the merits of a decision**. For example, the Commissioner cannot indicate whether the investigation of a complaint resulted in a correct conclusion. A complainant, therefore, will have to go to the Administrative Appeals Tribunal (AAT), or even the Federal Court, for a full review of the complaint.
- (ii) **Amendment Subsection 96-3(2):** The power of the Minister to establish Committees to review complaints and make determinations has been cancelled.

2 Reporting/Whistleblower Protection

Amendment 63-1AA Schedule 2 Reporting assaults:

A 'reportable assault means unlawful sexual assault, unreasonable use of force, or assault specified in the Accountability Principles and constituting an offence against a law...'

- (i) No definition of the word 'unreasonable' is given in the above definition. Likewise, in the Financial Impact Statement in the Explanatory Memorandum, there is no definition of 'serious assault'.
- (ii) Only a small minority of cases of elder abuse involve breaking the law; so the vast majority of cases do not come under compulsory reporting. Thus, most cases of physical abuse, all emotional abuse, financial abuse and incidents of neglect are not covered.

Amendment 63-1AA (6) Note 1:

- (iii) Whistleblowers are only protected if they report *reportable* offences. So, again, the whistleblower will have no protection if he/she reports the vast majority of cases of elder abuse as outlined above.
- (iv) Whistleblowers are only protected if they report to the people specified – providers, departmental complaints officers, police. If the system fails, as it has repeatedly done in the past, and the staff member goes to the media *in the public interest*, they will not be protected from adverse consequences such as defamation, job loss etc.

Section 96-8 (6) Note 1:

- (v) Re retribution to the whistleblower:

'the provider has a responsibility under the section to ensure as far as reasonably practical compliance ... Sanctions may be imposed on the provider ... if the provider does not comply with the responsibility'

This clause provides weak protection for the whistleblower. eg what does 'reasonably' mean? 'Sanctions may be imposed' - given the past history of only few sanctions ever being imposed. This does not appear to provide adequate protection.

- (vi) Similarly, in the explanatory notes, it says:

'Failure to have the necessary systems and protocols in place and failure to report such incidents [reportable offences] may lead to compliance action and the possible imposition of sanctions.'

Note the words: **may** and **possible**.

- (vii) The only action to be taken against providers who are guilty of non-compliance to the Act is sanctions.

Why is there not provision based on Human Rights under the Act for severe fines and/or court action against offenders?

People still have the right under general legislation to sue but we know that in practice this is very hard to achieve (lack of evidence because of dementia, limited life span, and lack of transparency – in other words evidence obtained by complaints investigations is collected and then not made available).

(viii) In the Explanatory Memorandum (page 10) there is exemption to mandatory reporting of:

'minor assaults perpetrated by residents with diagnosed mental impairment (such as dementia). The aged care sector has advised that minor assaults by such residents (for example pushing and hitting) are not uncommon and in such cases the focus should be on behaviour management and not Police and Departmental involvement which can be traumatic for all concerned.'

We see here no requirement of the provider to exercise 'duty of care'. A frail elderly person, powerless to defend him/herself is not afforded protection and has no recourse when the provider does not adequately manage the resident with dementia.

For example, 'pushing' an elderly person commonly results in falls, fractures and frequently death. The assault may be considered by the politicians, bureaucrats and the providers to be *minor* but it may well have a *major* impact on the resident attacked and even cause the death of the resident. This is quite apart from the psychological suffering caused to a frail elderly person (and their relatives) who is unable to protect him/herself.

TO SUMMARISE THE ABOVE:

1. The majority of cases won't come under compulsory reporting.
2. Consequences to the provider of not complying with the legislation in terms of both reporting and whistleblower protection are at the best sanctions; and at the worst nothing at all.
3. Whistleblowers will only be protected against the consequences of reporting *reportable offences* and not the vast majority of cases of abuse and neglect. Whistleblowers are only protected against defamation if they report strictly within nominated people.
4. There is no duty of care to protect residents from the actions of other residents with cognitive impairment who may put others at risk. The government talks about '*behavioural management*'. Too often the latter fails and we note the refusal of the Government to commit to safe staff/resident ratios. As well, there has been no commitment to fund dementia units to separate residents who put other frail residents at risk - although there have been several cases where serious injury to frail people due to resident assault (perhaps even resulting in death) have occurred¹.
5. How accountable and transparent to the public will the new complaints system be?
 - a. Transparency of individual complaints investigations. Will the complainant be given a written report which will include findings, measures to be taken to prevent recurrence and future monitoring to ensure compliance? If not, why not?
 - b. Transparency of *Office for Aged Care Quality and Compliance* and the *Aged Care Standards and Accreditation Agency*: Will there be a publicly available record of complaints? If not, why not?
 - c. Will there be a database for research into causes/prevention of elder abuse? (ie, lessons learned, etc.). If not, why not?

On behalf of the **Aged Care Crisis Team**:
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¹  [Broken Trust](#) [The Bulletin: Special Investigation]:

"...According to the home's incident report obtained by *The Bulletin*, Alice was pulled out of her bed by another female resident, then kicked and hit while she lay on the floor. She was taken to Frankston Hospital where doctors diagnosed a broken hip and arm. Over the next fortnight Alice underwent surgery but her condition deteriorated and she died..."

 [A daughter's quest for justice](#) [The Age – 26 June 2004]

"...Val Wilkinson says the rights of the aged are still unprotected three years after a fatal attack on her mother by another nursing home patient ..."

3 References



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1.  [Family anger on death finding](#) [12 November 2006]
"...THE family of an elderly grandmother who died after an "incident" in a Melbourne nursing home has questioned a coroner's findings that her death was an accident..."
2.  [658kb] The Age: [Letter to the Prime Minister of Australia from Mary Wilkinson's daughter](#)
3.  [85kb] **Speech:** "[Laws and Lawyers: Should we be doing more for elders?](#)"
[2006: David Walsh, Legal Practitioner, ACT, Former Chairman ACT Law Society Committee on Elder Law]
4.  [457kb] **Speech:** "[Institutional Abuse in Residential Care Facilities: Criminal and Civil Considerations](#)"
[2006: Simon Harrison, Partner, Nicol Robinson Halletts Lawyers]
5.  [Media Release: 2 Nov 2006--Whistleblower protection laws need national revision: new issues paper](#)
 [Public Interest Disclosure Legislation in Australia: Towards the Next Generation: An Issues Paper](#)
[Nov 2006]
6.  [Pensioner charged over nursing home death](#) [AAP – 1 December 2004]
"...A PERTH pensioner has been charged over the death of an 87-year-old nursing home resident who was allegedly bashed with a walking stick..."
7.  [Woman, 74, battered 88-year-old in nursing home fracas, court told](#) [Sydney Morning Herald - 4 June 2003]
"...A 74-year-old woman bashed an 88-year-old fellow resident at a nursing home with an iron and then tried to choke her by stuffing a scarf down her throat, a court heard yesterday..."