



Aged Care Amendment (Security and Protection) Bill 2007

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Aged Care Amendment (Security and Protection) Bill 2007

Date introduced: 8 February 2007

House: House of Representatives

Portfolio: Ageing

Commencement: 1 April 2007

Purpose

To introduce Investigation Principles, an Aged Care Commissioner and compulsory reporting of certain assaults in aged care facilities to the *Aged Care Act 1997*. There are also provisions made for protections to be extended to those who do such reporting.

Background

Overview of Residential Aged Care Sector

The Commonwealth Government is essentially responsible for funding and regulating the formal residential aged care sector in Australia. The framework under which this formal residential aged care sector operates comes via the *Aged Care Act 1997* and the associated *Aged Care Principles 1997*.

The three main strands of residential aged care are:

- high care places (formerly nursing home beds)
- low care places (formerly hostel beds), and
- Community Aged Care Packages (CACPs) and Extended Aged Care at Home (EACH) packages – these packages provide an alternative to residential aged care and allow the elderly to stay in their home or like environment.

According to the latest data in the *2007 Report on Government Services – Aged Care Attachment* (Productivity Commission) there were, as at June 2006, a total of 163,468 residential aged care places across Australia. At that time there were 2929 residential services providing these places. The Commonwealth's contribution to the funding of these residential aged care places (including funding for aged care packages) in 2005-06 was about \$5 billion.

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Growth of the Aged Population

It is predicted that the growth of the aged population will accelerate rapidly over the next several decades. Australian Bureau of Statistics data on the projected growth of the aged population show that the proportion of people aged over 65 is likely to increase from 13% in 2004 to between 26% and 28% in 2051.¹ This increase in the aged population will have profound implications for the residential aged care sector and over time an increasing proportion of resources and funding will be needed to keep pace with this ageing demographic.

Elder Abuse

The essential aim of this legislation is to help prevent abuse of the elderly in residential aged care. Over the years there have been a number of cases of elder abuse reported and confirmed in aged care homes and one of the purposes of this legislation is to strengthen current arrangements in this area.

What is Elder Abuse?

In Australia, the Elder Abuse Prevention Association provides these definitions of elder abuse:

Elder abuse is the infliction of physical, emotional, and/or psychological harm on an older, vulnerable adult at the hands of a family member or a paid carer in an institution. Elder abuse can take the form of financial exploitation, intentional neglect of an older adult by the carer, or unintentional abuse due to ignorance of care issues.

Physical abuse can range from slapping or shoving to severe beatings and inappropriate restraint. Physical abuse can include hitting, beating, pushing, kicking, pinching, burning, or biting.

Emotional or psychological abuse can range from name-calling or giving the “silent treatment” to intimidating and threatening the individual. When a family member or a carer behaves in a way that causes fear, mental anguish, and emotional pain or distress, the behaviour can be regarded as abusive.

Financial exploitation can range from misuse of an older family member's funds to embezzlement. Financial exploitation includes fraud, taking money under false pretences, forgery, forced property transfers, purchasing expensive items with the older person's money without their knowledge or permission, or denying the older person access to his or her own funds or home. It also includes the improper use of legal guardianship arrangements, powers of attorney, or conservatorships.

Carer neglect can range from withholding appropriate attention to intentionally failing to meet the physical, social, or emotional needs of the older person. Neglect can include failure to provide food, water, clothing, medications, and assistance with the activities of daily living or help with personal hygiene.

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Sexual abuse can range from sexual exhibition to rape. It can include inappropriate touching, photographing the older person in suggestive poses, forcing the person to look at pornography, forcing sexual contact with a third party, or any unwanted sexualised behaviour. It also includes rape, sodomy, or coerced nudity.²

Extent of Elder Abuse

There is very little hard data available on the extent of elder abuse in residential aged care. One report estimates that one in 20 older Australians are abused.³ In a speech to an Abuse of Older People Symposium in June last year, Paul Sadler (CEO of the Aged and Community Services Association of NSW and the ACT), stated that international research indicates that between 2% and 6% of older people living in the community are abused and that Australian research indicates that between 1 % and 5% of clients of Aged Care Assessment Teams (ACAT's) are victims of elder abuse. All potential residents of residential aged care must be assessed by an ACAT and it is during this assessment that ACAT workers may find evidence of abuse occurring.

In recent times there have been a number of highly publicised examples of elder abuse occurring in residential aged care. For example, in 2000 it was found that a Melbourne nursing home had subjected over 50 residents to kerosene baths and in early 2006 there was wide media coverage of elder abuse in an aged care home in Victoria. On February 13 this year, the Commonwealth Department of Health and Ageing stated that twenty nine cases of elder abuse in residential care had been reported to the federal government in the previous seven months. The Department further indicated that six residential care staff had been charged as a result of their investigations.⁴

There are a range of current procedures and mechanisms operating in the residential aged care sector that are designed to help prevent elder abuse. These include accreditation and monitoring arrangements as carried out by the Aged Standards and Accreditation Agency, a Complaints Resolution Scheme including a Commissioner for Complaints, various advocacy services and a Charter of Residents Rights and Responsibilities under the Aged Care Act 1997 which state that residents in homes have the right to be treated with dignity and respect and to be able to live without abuse or neglect.

It should be noted that the Government is also introducing or has introduced other measures to help prevent abuse occurring in aged care homes including compulsory police checks for all aged care workers and an increase in the number of spot checks on homes as carried out by the Accreditation Agency.

The provisions in this Bill strengthen the existing arrangements and include provision for the creation of a new Aged Care Commissioner, the compulsory reporting of elder abuse and protection measures for staff who report abuse. The Government consulted widely with the sector and consumer groups before introducing the legislation and there appears to be broad support for the various measures, although as the Submissions to the Senate enquiry into this Bill demonstrate, there are still serious concerns with respect to various

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of its provisions and the procedural issues surrounding them.⁵ The Report gives an in-depth analysis of many of the issues, and this Digest touches on a few of them.

Concerns Raised before the Senate Committee

The lack of detail available regarding the 'Investigation Principles' was identified by several contributors as a problem, certainly a procedural issue and possibly a substantive issue as well, although without sufficient further information it was not possible to give any useful analysis. The Committee noted that the Department had undertaken to provide interested parties with adequate opportunities to respond, and simply commented in passing that similar details had been available and useful during the recent discussions of the Private Health Insurance legislation.⁶

There were concerns regarding the scope of the reporting obligations. In particular the Australian Medical Association (AMA) suggested that the obligation to report should be confined to abuse perpetrated by carers on residents of a residential care facility rather than including, as the Bill does, assaults by one resident on another.⁷ Australian Unity also considered that too many complaints would be required by the legislation and came up with the interesting solution of requiring reporting for incidents of a more significant nature to the police and the Department, and reserving some situations for reporting to the Department alone. They also suggested family members could over-ride this decision by requiring more reporting.⁸

Another issue which excited concern in a cross-section of submissions was the question of whether the individual who had been assaulted should be allowed to veto the automatic reporting of the incident. The Australian and New Zealand Society for Geriatric Medicine drew an analogy between rape victims who have the right to treatment without police intervention and were asking the question as to why geriatric but cognitively intact residents of care facilities should not be given the same choice.⁹ The Committee concluded that the residents could choose to refuse to co-operate with the police investigation, thereby making it difficult to pursue the matter, and alternatively that the need for reporting to ensure a positive environment for 'inmates' was too important to compromise.

Concerns regarding the position and the independence (or lack thereof) of the Aged Care Commissioner were documented in the Report:

There was some criticism that the Aged Care Commissioner was not sufficiently separate from the Department of Health and Ageing to independently investigate complaints.¹⁰

Another concern was the length of the term for the Commissioner (three years).¹¹ Certainly there are many 'Commissioners' appointed whose terms is longer – five or more years being common, and there is also the question of who and how they are appointed. In the case of the Aged Care Commissioner it is proposed that the Minister appoint him or

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her, whereas it is also common for such an appointment to be given greater gravitas by requiring the appointment to go through the Governor General. Both of these issues may be seen to contribute to a less independent role for the Commissioner.¹²

In the event the Committee, in its Majority Report, flagged three issues that it felt needed addressing before the Bill should be passed. Firstly there was the question of the commencement date, with respect to which they recommended a minimum of a month's extension on the current date so that approved providers and their staff can be ready to implement the new provisions. They also recommended close monitoring of the effect of the new provisions and finally that the whistle-blower provisions be extended to cover family members of residents and aged care advocates.

The ALP supported the Majority's recommendations but also argued that the whistleblower protections should cover 'any form of abuse or neglect' in residential care, rather than the current more narrow definition covering physical or sexual assaults. The Democrats made a similar recommendation to the ALP with respect to broadening the coverage for whistleblowers and also recommended an education campaign and that competent older people be given the right to request confidentiality and privacy in relation to the reporting of abuse, including a right to veto the reporting of abuse. They recommended that the monitoring of the implementation of the legislation take place in the form of an independent review and that it take place two years after the changes commence.

Financial implications

The government reports that the new initiatives in the Bill 'are part of a \$90.2 million (over four years) package of reforms aimed at further safeguarding older people in Australian Government-subsidised aged care from sexual and serious physical assault.'¹³ The explanatory memorandum doesn't comment on what precise levels of funding will be needed to establish the office of the Aged Care Commissioner.¹⁴

Main provisions

There are two Schedules to the Bill, the first dealing with 'Investigations,' which introduces both new 'Investigation Principles' and the Aged Care Commissioner, while the other Schedule deals with 'Reporting assaults' and also covers what are known as the 'whistle blower' provisions. Both Schedules amend the *Aged Care Act 1997* (the Principal Act).

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Schedule 1—Investigations

The first part of Schedule 1 introduces ‘Investigation Principles’ which govern the investigation of complaints and other matters under the principal Act. The new Investigation Principles are designed to allow the Minister to specify the matters to be investigated under the Act and the form in which this takes place (**proposed ss.94A-1(1)(b) and (d)**).

Item 4 inserts **proposed Part 6.4A** which deals with ‘Investigations’ and sets out the parameters of the Investigation Principles, which the Minister will make by Regulation (these Principles will be a disallowable instrument, ss.96-1(2)). **Items 1-3** contain consequential amendments, including removing a section of the principal Act which defines the Minister’s capacity to constitute Committees to govern issues that will now be dealt with under the Investigation Principles and by the Aged Care Commissioner. The Minister retains a general power to constitute committees ‘for the purposes of [the Principal] Act’.

Item 5 inserts **proposed Part 6.6** which deals with the Aged Care Commissioner. The Aged Care Commissioner is established to examine decisions made by the Secretary under the Investigation Principles and identified by those Principles as being something the Aged Care Commissioner should examine. Recommendations arising from these examinations are to go to the Secretary. The ACC can also examine complaints about (or initiate their own enquiries into) the Secretary’s processes for handling matters under the Investigation Principles. There is also a power to examine complaints about (or initiate their own enquiries into) the conduct of accreditation bodies with respect to its responsibilities under the Accreditation Grant Principles, and the conduct of a person carrying out an audit or making a support contact under those Principles. The Commissioner is able, at the request of the Minister, to advise the Minister about all these various powers of investigation.

The Accreditation Grant Principles are established under Part 5.4 of the Principal Act and are central to the recognition of accredited facilities, their funding and reviews of these matters by the accreditation body.

Proposed section 95A-2 deals with the appointment of the ACC which will be done by the Minister for a period of not longer than three years.

Proposed sections 95A-3—95A-9 deal with fairly standard provisions in the terms and conditions of employment, including a duty to disclose any relevant interests the ACC has or acquires and the ACC’s duty to not undertake paid employment outside of their duties as ACC without the Minister’s approval.

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Schedule 2—Reporting assaults

Schedule 2 inserts a **new section 63-1AA** into the Aged Care Act's *Division 63*, dealing with 'Accountability etc.' This section requires an approved provider to report allegations or their own suspicions that a 'reportable assault' has occurred as soon as possible or within 24 hours of this coming to their attention. They are required to report it to both a police officer¹⁵ and the Secretary of the Department. A reportable assault is defined as one committed against a resident of a Commonwealth approved facility where the occupant is approved for Commonwealth funding and involves:

unlawful sexual contact, unreasonable use of force, or assault specified in the Accountability Principles and constituting an offence against a law of the Commonwealth or a State or Territory¹⁶

Proposed subsection 63-1AA(2) creates an opportunity for the 'Accountability Principles' to create exceptions or modifications to this requirement, although proposed subsection (4) clarifies that the effect of these earlier subsections would never change the approved provider's obligation to comply with State and Territory laws regarding possible assaults and nor would those provisions function to prevent a provider from reporting suspicions or allegations to a police officer or the Secretary.

The approved provider is also responsible for trying to ensure that their staff members follow similar reporting guidelines, although in this case the staff member can choose one of the following to report to:

- the approved provider
- one of the approved provider's 'key personnel',¹⁷
- a police officer, or
- the Secretary of the Department

There is a preliminary provision to protect someone reporting these issues, and it requires an approved provider to ensure that one of their staff members who makes a disclosure which qualifies for protection under **proposed s 96-8** is given the protections offered by that section (see further below). This could involve the approved provider not only ensuring that they themselves do not violate the provisions of **proposed s 96-8** but also that none of their staff do.

The identity of the person who makes such a report is protected under **proposed subsection (7)**, although the need to disclose their identity to a

- relevant police officer
- the Secretary of the Department
- someone or some body to which the approved provider is required by a law of the Commonwealth or a State or Territory to disclose it to

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- one of the approved provider's key personnel.

The approved provider is, however, required to take reasonable measures to ensure that any of their staff do not disclose the identity of someone who has made a report to any other members of the staff or to anyone else inappropriate (**proposed subsection (8)**).

Proposed s. 96-8 sets out which reports are protected and also what protections are offered. **Proposed subsection (1)** stipulates that for a disclosure to qualify for protection it must be made by an approved provider or their staff member to

- a police officer
- the Secretary
- the approved provider or one of their key personnel or
- someone authorised by the approved provider to receive such reports.

The person making the report is required to inform the person they are telling of their name before they make their disclosure and they must have reasonable grounds for thinking a reportable assault has occurred. Furthermore the discloser must make the disclosure in 'good faith'.

If these criteria are satisfied the person who has made the disclosure is not civilly or criminally liable for making that disclosure and no contractual or 'other' remedy may be enforced on the basis of the disclosure, and nor may a contract be terminated on that basis (in particular **proposed subsection (5)** prohibits the termination of a contract of employment and the employee may be reinstated, or the court may order compensation as an alternative if this is appropriate). Furthermore they are not liable for an action of defamation with respect to the disclosure and have 'qualified privilege' in proceedings for defamation in respect to the disclosure. Finally there's a general prohibition on victimisation or threats to cause a detriment to someone because of a protected disclosure or a possible protected disclosure (**proposed subsection (6) and (7)**).

Item 4 in effect makes the commencement date of the amendments partially retrospective. Allegations or suspicions made after the Act comes into effect will require reporting even when they cover events which may have occurred before the amendments came into effect, that is, reportable assaults that occurred in the past but only became suspected, or only had allegations made about them once the amendments become operative will need to be reported.

Concluding comments

The provisions of the Bill appear to have widespread support, although concerns regarding the proximate commencement date are widespread (the Bill nominates 1 April 2007). As discussed above, concerns regarding the unseen 'Investigation Principles' were also notable amongst contributors to the Senate's Community Affairs Committee Inquiry and

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there was some concern with respect to the lack of choice which is given to older people in the decisions regarding reporting. A final theme that was commonly mentioned was the issue of funding and the advisability of circumventing many of these elder abuse problems before they occur. In particular a repeated concern dealt with the question of minimum staffing levels for residential aged care facilities.¹⁸ Similarly there were frequent concerns raised regarding the costs of training staff to comply with the new legislation, in particular the question of whether the Commonwealth should be providing this funding. The need to ensure police officers are given appropriate training was discussed by the Australian and New Zealand Society for Geriatric Medicine, who also commented that while they support the initiatives being taken by the Government:

The main emphasis should be on prevention...Ensuring the quality of nursing and personal care in residential care requires adequate staffing, appropriate numbers of trained nursing staff and expert support for those residents who pose a challenge to the skills of staff and the safety of other residents.¹⁹

Endnotes

1. ABS- 3222.0 - *Population Projections in Australia 2004 to 2101*, 2006.
2. See generally <http://ww.eapa.asn.au/definitions.htm> , accessed 1 March 2007.
3. *Medical Observer*, 'The Minefield of Elder Abuse,' 8 September 2006.
4. *AAP News* 'Six nursing home staff face elder abuse charges,' 13 February 2007.
5. The Report of the Standing Committee on Community Affairs *Aged Care Amendment (Security and Protection) Bill 2007 [Provisions]*, March 2007.
6. Ibid, pp. 5-6. The Committee noted the relevant commentators as follows: *Committee Hansard* 1.3.07, p.14 (Australian Unity); p.17 (LHMU); p.21 (Aged and Community Services Australia and Aged Care Association Australia). Also *Submission* 10, p.3 (Aged Care Association Australia).
7. *Submission* No. 14, p. 1.
8. *Submission* No. 7, p. 3.
9. *Submission* No. 1, p. 2.
10. The Senate Report, p. 14, quoting *Submission* 5, p.4 (Liquor Hospitality and Miscellaneous Union).
11. *Submission* No. 8, p. 3.
12. To assist the reader, the results of an ad hoc survey of comparable provisions is included at Attachment A. The comparisons looked at the legislative provisions governing the appointment of Commissioners – both the length for which they are appointed and the method

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of their appointment. It should be noted this is not a comprehensive survey but provides a useful background and some comparators.

The author acknowledges with gratitude the work of Patrick O'Neill, from the Parliamentary Library, in providing this table.

13. Explanatory Memorandum p. 1.
14. The Report of the Standing Committee on Community Affairs *Aged Care Amendment (Security and Protection) Bill 2007 [Provisions]*, March 2007, noted that the financial information in the *Explanatory Memorandum* had been insufficiently 'broken down' and further information was subsequently made available by the Department, p. 22.
15. All references to a police officer refer to officers with responsibility for the area where the assault is alleged or suspected to have taken place.
16. ss. 63-1AA(9).
17. Key personnel are defined in ss 9-1(2) of the Aged Care Act 1977 as:
 - (a) a member of the group of people who are responsible for the executive decisions of the approved provider;
 - (b) any other person who is concerned in, or takes part in, the management of the approved provider;
 - (c) any person who is responsible for the overall nursing care provided, or to be provided, by the *aged care service conducted, or to be conducted, by the approved provider;
 - (d) any person who is responsible for the day to day operations of an *aged care service conducted by the approved provider, whether or not the person is employed by the approved provider.

The section goes on to point out that paragraphs (a) and (b) of the subsection do not apply if the approved provider is a State or Territory and that a person referred to in paragraph (2)(c) must hold a recognised qualification in nursing.
18. *Submission* No. 5, pp. 3–4.
19. *Submission* No. 1, p. 2.

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Attachment A

Appointments of Commissioners: summary of preliminary survey

Refer to footnote 12 for further information regarding the Table.

Act, section	Commissioner appointed by	Duration
National Water Commission Act 2004, s. 11	GG	3 years
Law Enforcement Integrity Commissioner Act 2006, s. 175	GG	5 years
Murray-Darling Basin Act 1993, s.6	GG	5 years
Aboriginal Land Rights (Northern Territory) Act 1976, s. 52	GG	3 years
Public Service Act 1999, s. 45	GG	5 years
Parliamentary Service Act 1999, s. 43	Presiding Officers	5 years
Building and Construction Industry Improvement Act 2005, s. 15	Minister	5 years
Building and Construction Industry Improvement Act 2005, s. 29 [Federal Safety Commissioner, at SES level]	Secretary	
Privacy Act 1988, s. 19A	GG	7 years
Australian Law Reform Commission Act 1973, ss. 7, 9	GG	7 years
Taxation Administration Act 1953, s. 4 [Commissioner of Taxation]	GG	7 years
Australian Federal Police Act 1979, s. 17	GG	7 years
National Health Act 1953, s. 82B [Private Health Insurance Administration Council]	Minister	not specified
Commonwealth Electoral Act 1918, s. 21	GG	7 years
Aboriginal Land Rights (Northern Territory) Act 1976, s. 52 [Aboriginal Land Commissioners]	GG	3 years
Cultural bodies		
Australian War Memorial Act 1980, s. 10 [council]	GG	3 years
Australian War Memorial Act 1980, ss. 20–21 [director]	GG	7 years
War Graves Act 1980, s. 5 [director]	GG	3 years

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Act, section	Commissioner appointed by	Duration
Australian National Maritime Museum Act 1990, s. 30 [Director]	GG	7 years
National Gallery Act 1975, ss. 24, 26	GG	7 years
Environment Protection and Biodiversity Conservation Act 1999, s. 107 [inquiry commissioners]	Minister	not specified
National Museum of Australia Act 1980, s. 13 [Council]	GG	3 years
National Museum of Australia Act 1980, s. 13 [Director]	GG	7 years
National Library Act 1960, s. 10 [Council]	GG	3 years
National Library Act 1960, s. 17 [Director-General]	GG	7 years
Archives Act 1983, s. 7 [D-G]	Minister	under PS Act.
Archives Act 1983, s. 7 [Advisory Council]	Minister	3 years

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