

Aged Care Amendment (2008 Measures No. 2) Bill 2008

Submission from

Aged and Community Services Australia

Aged and Community Services Australia (ACSA) is pleased to offer the following comments on this Bill. ACSA represents over 1,100 church, charitable and community-based organisations providing housing, supported accommodation and community care services to around 700,000 older Australians, people with a disability and their carers.

Introduction

ACSA supports the thrust of the comments made by the Minister in her second reading speech that caring for Australia's ageing population is one of the major challenges facing us, requiring careful planning, adequate funding and appropriate attention to safeguarding the interests of the clients of these services.

ACSA acknowledges that, as outlined by the Minister, these changes have been the subject of consultation with aged care provider and consumer representative groups however there was no unanimity between the Government and other stakeholders on some key points and these comments will highlight areas where our views, and those of other stakeholders, did not support the final version of the measures proposed in the Bill.

Changes in the Aged Care Sector

ACSA observes to correct the record that, notwithstanding the comments in the Second Reading Speech and the Explanatory Memorandum about the changing composition of the aged care industry, the majority of aged care services - nearly two-thirds - are, and have always been, provided by not-for-profit organizations.

These range from large church or community-based charities, who have operated multi-site and multi-service aged care services for several decades, to small, often rural services - supported by the input of social capital by local communities. The changes in ownership patterns described by the Minister are characteristic of the minority for-profit component of the industry but not of the industry as a whole. Nonetheless the Bill's intention of keeping up-to-date with changes in private ownership and management structures is acknowledged and supported.

The potential for complex corporate structures to dilute responsibility for flaws in operational or financial performance is a risk shared by all service providers - by association in terms of risks to the reputation of the industry; and more concretely in terms of the measures

introduced by the previous Government (the Accommodation Bond Guarantee Scheme) that would seek to recover bad debts incurred by one provider from the rest of the industry, notwithstanding their complete separation from any actions that may have resulted in such bad debts. Care will be needed however to prevent ‘considering the record of related entities’ becoming ‘guilt by association’ and being used inappropriately in support of compliance action. Transparency of decision-making is essential to prevent this.

Defining the Scope of the Aged Care Act

Aged care providers have been concerned for some time about the potential for the *Aged Care Act* to be taken to apply to aged care services not funded by the Australian Government. As outlined above, the church and charitable aged care sector has traditionally provided a broad range of care services in order to be able to respond to a wide range of clients’ needs and to avoid a ‘one size fits all’ response. ACSA’s members for example pioneered the use of packaged community care – of the type now funded under the CACP and EACH programs and have been involved in the provision of seniors’ housing since the 1950s. Forcing these housing services into the straightjacket of the *Aged Care Act* would be a retrograde step and this Bill will assist in ensuring that this does not occur.

Linking Approved Provider status to the allocation of funded places is supported.

Protection of Accommodation Bonds

Restricting the operation of the *Aged Care (Bond Security) Act 2006* to services operating under the *Aged Care Act* is supported in principle. Aged care providers will need to manage the transition from unfunded to funded places carefully in this regard to protect against residents, or their families, defaulting on their financial obligations as soon as they are covered by the security of tenure provisions of the *Aged Care Act*. We would envisage the simultaneous refunding of ‘unregulated lump sums’ and the payment of corresponding Accommodation Bonds. The Explanatory Memorandum refers to the ‘subsequent’ payment of bonds, this is unlikely to be the way this works in practice.

It should be noted that this measure increases the risk to all aged care providers by expanding the scope of Accommodation Bonds enjoying statutory protection. The Bill proposes no compensation for this additional risk.

Freedom of Movement

One measure foreshadowed in the second reading speech that did not enjoy strong support from provider or consumer stakeholders is the requirement to report ‘missing’ residents of aged care homes to the Department of Health and Ageing. Many, including ACSA, were concerned about the implied restriction to the freedom of movement of residents and the

likelihood of progressive tightening of security measures each time an event is reported, as departmental officers seek to prevent the recurrence of the circumstances of particular events by drafting new regulations, procedures and rules to apply to all from that point on.

There is a risk that in seeking to protect potentially vulnerable older people we deny them the freedom to take risks available to other members of the community. We should be very wary of restricting people's liberty in order to avoid bureaucratic or political embarrassment. We should take pains not to inadvertently compound the institutional character of residential aged care by denying residents the same rights that would be afforded to other members of the community. While this measure specifically is not part of the Bill it should nonetheless be opposed and the changes proposed at Item 112 deleted.

Reporting missing persons to the police (and notifying their relatives, with prior consent) should be sufficient.

Additional Police Checks

The second reading speech refers to the Government's intention to widen the net in terms of the requirement for staff in aged care services to have undergone a criminal record or 'police' check. Under the current arrangements this is a requirement for all staff (and certain contractors) who might be expected to have unsupervised access to residents or clients. This is a common formulation of the scope of police checks in many settings other than aged care.

The Minister has announced her intention to extend this requirement to staff who do *not* have unsupervised access to residents, that is to persons other than those who 'care for' older Australians. The need for and cost-effectiveness of this requirement, to be enacted by regulation, is unclear.

ACSA believes that action on this proposal should be deferred until a positive cost-benefit is proven or abandoned if it is not.

Improving Access to Care

Aged Care Assessment Teams (or Services) perform a vital role in the care of older people. Skilled multi-disciplinary assessment of the usually complex and layered care needs of older people is an important central function. Establishing the eligibility of an older person for care funded by specific Commonwealth programs can be a good fit with this role but carries the risk that assessments can be required for administrative reasons rather than to provide better care.

Eliminating unnecessary assessments, as is proposed at Items 69 and 70, has the potential both to allow ACATS to focus on higher value tasks and to reduce frustrating, repetitive and often intrusive assessments for older people and their families. ACSA believes that this streamlining could go further and eliminate assessments currently required for people already

living in residential aged care. This may require the current policy anomalies surrounding user payments for accommodation in residential care to be resolved – but they should be anyway.

ACSA is also of the view that approvals for low level care in either a community or residential setting need not lapse after 12 months as proposed.

Sanctions for Non-Compliance

The Bill sets out to clarify the purpose of sanctions under the Act and to place the health, welfare and interests of current and future care recipients at the apex of considerations that might come into play. Discussions on this point have suggested that this change makes it clearer that the Department need not take the business interests of the provider, the continuing employment of current staff, or other factors, into account when considering sanctions.

It is not clear exactly what the word ‘paramount’ (Item 118) means in this context. Does this factor outweigh any combination of the other relevant considerations – in which case why have them – or is it simply to emphasise that the interests of current and future residents are the most important factor to take into account? ACSA believes that greater clarity is required on this point.

Prioritising or weighting relevant factors may be reasonable, however a requirement to take all factors into account before reaching a decision is an appropriate check on the arbitrary exercise of administrative power. The application of sanctions could include a decision to effectively close down a service – it would seem to be more consistent with the extent of the power placed in the Department’s hands if a requirement to take all factors into account remains in place.

Item 118 should be amended or clarified to ensure that the Secretary must continue to take a balanced view of all factors into account.

There is a real potential danger that the Department will ‘speak for’ residents and interpret their health, welfare and interests and use this provision simply to remove a source of appropriate balance, challenge and scrutiny. If the Secretary is to act in the name of residents it should be a requirement that they be properly consulted before this occurs. It is also quite possible that the interests of current residents may be different to the (hypothetical?) interests of future residents and it is not clear how their interests will be actually assessed rather than simply used to justify decisions already taken by the Department.

Deterrence

The proposed addition of deterrence as a factor to be considered by the Secretary (Item 117) is not supported by ACSA. This proposal highlights the fact that the Aged Care Act relies

heavily and increasingly on sanctions to regulate the behavior of aged care providers and very little on a more constructive approach including seeking to understand the reasons for non-compliance; identifying the risk factors that could provide early warning of problems; or developing targeted improvement programs where a researched need is identified, and so on.

The addition of this factor will encourage a heavy-handed, policing approach to regulation. It will inhibit the development of a more mature and trusting relationship between providers and the Department and the development of more modern and sophisticated approaches to safety and quality. In this regard it is inconsistent with the Government's stated plans to improve relations with the non-government sector through the development of a 'compact'.

Qualitative improvements in the safety and quality of aged care services require a more sophisticated approach, however it is acknowledged that this is beyond the scope of the current Bill.

For the time being, Item 118 should not proceed.

Net Impact on Budget

The Explanatory Memorandum states that this Bill will have 'no net impact on budget'. This is only true because the costs of compliance will be born by aged care providers. Some limited streamlining of the aged care approval round process is proposed at Item 28 but all of the savings from this accrue to the Department of Health and Ageing.

Additional police checks, additional reporting and many of the other changes will incur a cost. In the absence of additional funding from government to cover such costs, funds will need to be diverted from care services to pay for them. This is what being 'absorbed within existing budgets' means in practice.