

Submission to Department of Health and Ageing and Senate Committee

The Aged-care Rights Service Inc (TARS)

(1) Commonwealth Aged Care (Living Longer Living Better) Bill 2013

(2) Consultation Draft- Home Care Packages Program Guidelines

May 2013

Preamble

TARS is an independent legal centre that specialises in providing aged care advocacy and legal services to older people throughout NSW. As such, we have specialist knowledge of the issues affecting older people who are the recipients of Commonwealth funded Aged Care services.

Our submission is in two parts. Firstly, we have set out proposed amendments to the Bill and secondly amendments to the Home Care Packages Program Guidelines. Our recommendations for the two overlap, which is why we have them in the one submission.

We request that the Department and the Committee carefully consider our submission. Please do not hesitate to contact us should you require further information or case studies.

(1) Commonwealth Aged Care (Living Longer Living Better) Bill 2013 ('The Bill')

Introduction- Call for standardised agreements across all aged care

Older people frequently sign aged care agreements at a very stressful time in their lives. If they are immobile, sick, losing capacity or have lost capacity then it is left to an informal or formal representative to sign the document. The older person may be asked to sign the document when they don't know or really understand what they are signing. This may be under duress. It is an emotional time. There is no legislation regulating timing for provision of and execution of these documents. Older people should not be put in a room and told to or asked to sign the document 'on the spot.' Further, there is no regulated cooling off- period or settling-in period. There is no requirement that the operator advise the older person to obtain independent financial and legal advice.

Home Care Agreements, Accommodation Agreements and Bond Agreements are currently drafted heavily in favour of the approved provider. Additionally, not all approved providers are a member of an industry association, and therefore do not come under their influence. Such sole providers may add other anomalies to their agreements. There is an urgent need for a stronger, clearer, more transparent standard agreement because the recipient of the care is old, and invariably frail and vulnerable.

This recommendation is consumer driven. One consequence of the proposed reforms to the Aged Care Act is that residential care is coming under one banner. There will be no low care/high care in the future, so it is the time to standardise all agreements.

Many large operators now own aged care facilities and retirement villages that are on the same parcel of land or adjacent or the businesses which work closely together. If this is not the case then many corporate business models are moving in this direction. The providers suggest to people that there will be a 'continuum of care' when they transition from retirement villages to the aged care facility but that is not the case, as each has a separate contract and regulated by different state and federal legislation. Also aged care beds may not be available when the person requires it.

Recommendation

The new Act should provide for a mandatory standard contract to be regulated. TARS proposes that a working party consisting of TARS (as an independent advocacy service funded under NACAP), consumer advocates such as COTA, ACOSS, and peak industry bodies, and the Department should be formed to draft a standard accommodation or community agreement. The contract should be as simple and user friendly as possible.

Existing Aged Care Contracts

TARS recommends that the committee should review existing contracts being used by major providers.

We have set out below in point form issues we have identified in an aged care service contract. Some terms are onerous, others are simply in breach of the Act. The contract is titled, "Resident Agreement for Low Care (hostel) and High Care (nursing home) Residents."

- Alternative Decision Maker clause- "you must have nominated a Power of attorney" should read " may consider appointing a Power of Attorney"
- Guarantor clause- states that that the appointment of a guarantor is 'required', this is not the case under the previous Act or The Bill. It is recommended that the words be struck out or "We require" be replaced by "If"
- Succession clause – states that the agreement is binding to heirs and successors. Suggested that the words "the heirs" be replaced by "your estate". Older people are always worried about what their children will have to pay for when they die.
- Periodic payments clause- states that there must be a security paid where the person is paying the bond by periodic payments. This should be struck out.
 - Funeral Arrangements clause- this should be removed as it is not a contractual term
 - Incontinence products clause- states that incontinence products (and other similar products provided) must be paid for by the resident. This only applies to Low Care and there needs to be some differentiation. This would be a payment in breach of the Act.
- Schedule – medical assessment- needs to be revised as it assumes that there will be agreement by both parties and may intimate that the resident cannot ask for their own medical assessment.
- Schedule – cleaning the room costs -We are unaware of any provision in the Act which allows an aged care home to request the resident pay for the cost of cleaning the room except where the resident wilfully causes destruction or damage.

The Aged Care Bill – specific recommendations

That the Bill authorise Regulations to define the scope of a standard contract. These regulations should include:

1. S.52F-3 Accommodation agreements should be amended to state that 14 days before a person receives an accommodation agreement they should be given a Disclosure Statement which provides detail about the provider's company name and contact details, development plans (where a facility is still under construction), care and services, financial management, payments and refunds following termination of contract, security and safety, compliance with legislation, and dispute resolution.

Then, fourteen (14) days after the Disclosure Statement is received, a standard national accommodation agreement should be provided to the person and they should have 14 days as a minimum to review it. (refer 52F-1 (1)(a)).

2. We recommend that the standard agreement should provide tick boxes on the execution page confirming the person has either obtained independent legal advice and financial advice or decided not to obtain independent legal advice on this contract.

3. There should be a cooling off period.

4. There should be a 3 month settling in period

5. There should be a procedure for alteration of contract so that if a variation is proposed by the provider, the resident must seek independent legal advice from the solicitor of their choice and the provider must pay for the reasonable costs of that advice. The provider must be given a certificate stating that the resident has obtained said legal advice. Otherwise the variation or new contract is of no effect.

6. Services, care and facilities (for an aged care home contract) should be set out in the contract so they cannot be later withdrawn or reduced

7. Annexures to the contract must include premises condition report, list of services and facilities, home rules if any, home site plan, premises floor plan. Note floor plan is relevant to security of tenure so that people are not moved around by operators without their consent. For example, we are aware that some providers have turned single rooms into shared rooms giving residents little choice, or offering long term them another room in the facility.. This obviously allows them to have twice the capacity of residents but it is hardly fair on the resident.

8. Financial terms should continue to be set out clearly at the front of the agreement.

9. There should be timeframes within the contract or disclosure documents in relation to facilities being built so that new residents and their family know when specific services and facilities will be provided.

10. Residents should be notified if a provider is in financial difficulty or in liquidation.

11. Clause 52C-2(a) Note we support this change as residents have in the past been charged \$200 administration fee for being admitted into a facility. This is in breach of the Act.

12. Clause 52C-2(d) We support this change as in the past providers were charging fees in lieu of service, therefore the resident was paying the service they left and paying fees for the new service. For example, some of our clients have agreed to pay a particular fee, then 7 years later they were presented with an account for a substantial amount of money clearly not agreed to in the original agreement. The fee was upheld by the Department of Health and Ageing.

13. Clause 56-2 (e) To promise such care and service- this allows the resident to seek legal advice if the care was negligent.

14. Clause 56-2 (j) some providers refuse to allow Advocates on the premises, or to provide information sessions to residents and staff on residents' rights and aged care advocacy. We have advocated for many residents who have told us that they were informed by management not to contact advocates or to make a complaint to the Aged Care Complaints Scheme.

15. The *User Rights Principles 1997* should form part of the contract, as they are very important to older people. We refer you to Rodney Lewis' 'Elder Law in Australia' 2012 (Second Edition) at page 312:

“...it is essential, in order for those rights to be enforceable, to include them by express reference in an appropriate way in the residential care agreement. In this way they become part of the regime of promises contained in the contract between the provider and the resident.”

If the URP are included in the contract, the resident has the right to contract enforcement and contractual damages as an individual for serious breaches. This is their home and the UPR form their basic human rights.

Residents' Rights- The User Rights Principles

As the Committee would be aware, the User Rights Principles 1997 (URP) were made under the Aged Care Act 1997 (the Act) which included a Charter of Residents' Rights and Responsibilities. At present, if an aged care provider breaches the URP, then ultimately they may lose their accreditation. We agree that penalties should apply for any breach of the URP. We commend the decision to include of a copy of the Charter of Rights for residential and community care recipients in their agreements.

If a complaint is made about the aged care provider and/or the care they provide or their staff, the complaint will go to the Aged Care Complaints Scheme. In our experience, action may not be taken to penalise the provider and more importantly to remedy the existing problem. We emphasise that the Committee should consider the safety and best interests of the older person in the facility as paramount over and above the commercial interests of the aged care provider. The aged care provider will still profit by providing safe and abuse-free services.

The Committee should consider the legal consequence of breaching the URP if an aged care provider is in breach of the URP there should be a range of penalties for specific legal offences for serious breaches. Penalties should be enforced. The Bill should include the categories of offences and impose mandatory penalties commensurate with the severity of the breaches.

.Additional box- Inform prospective aged care recipients that information about fees, charges and bonds is available from The Department of Health and Ageing, Centrelink Financial Information Service Officer, National Information Centre on Retirement Investment or they choose to seek the advice of financial advisor.

(2) Consultation Draft- Home Care Packages Program Guidelines ('the Guidelines')

If the Guidelines come into effect simply as 'Guidelines' and without a standard contract, they will have no effect on the industry, in terms of fixing systemic and serious problems. In that regard, we refer you to our comments at (1). Overall, it is unclear how this document will interact with the contract that the older person will sign.

Recommendations

1. The Checklist:

Box 3- this should also state that the resident has the right to independent legal advice about security of tenure and their contract. Currently, we are aware that aged care providers often suggest to the older person and their family that they make use of the provider's solicitor. This is a conflict of interest for the solicitor and it is also not in the interests of the older person for the provider to suggest this. This suggestion should not be made by the provider. This Box needs to refer to the need for independent legal advice from the solicitor of their choice. If they don't have one, they should be referred to the state Law Society Solicitor Referral Line.

Box 4- again legal advice is required.

2. Page 29 'Purpose Statement'. This should also be a term of the contract.

3. Refer 3.1.5 point 5 "adjustment of the Home Care Agreement" should be amended to read 'variation of the Home Care Agreement'.

4. Refer 3.22- Planned Expenditure:

a) Administration costs

A number of the items on this list should be struck out as they are unreasonable. The amended Aged Care Act should include a "prohibited items list" of budget items that cannot be charged to the resident. The comments we have set out below also refer to the comments in 3.3 about 'Monitoring Review and Reassessment'.

The prohibited items should include:

- corporate overheads- this is covered by a number of other items including capital costs, government reporting, insurance, staff and IT.
- ongoing research and service improvements- what is this? An explanation is required. If it is marketing and PR, that should not be paid out of this budget.
- advocacy. This should be struck out. Any advocacy provided by the aged care provider is a conflict of interest. We refer you to our comments at point 6 below.
- consumer communication- what is this? If it is marketing it should not be paid for by the recipient.

- setting up and cancelling appointments- this is covered by case coordination below.

(b) Core advisory and care coordination services

- Case coordination, ongoing monitoring and informal reviews, and formal assessments all overlap. Ongoing monitoring cannot be budgeted for if it is not clear how often this happens. For instance there should be a budget line item for monthly or fortnightly monitoring, and one for 6 monthly or yearly reassessments.
- Provision of support to consumers who elect to manage their packages themselves. This appears to be support for people who are supporting themselves. The line item should specify what kind of support, how much it will cost and how often. For example, a six monthly or three monthly meeting with them could be budgeted. Again, this appears to overlap with Service and Support Provision.

Importantly, if the budget is made more transparent and if there are prohibited line items, government funding could be saved as well as put towards a free initial legal advice and advocacy service for care recipients, before they sign their contract. At present, there is no free legal advice service for people in Australia who enter into accommodation agreements and/or home care agreements.

5. Refer 3. Security of Tenure at page 48. We note the Guidelines state ‘Security of Tenure provisions for the Home Care Packages Program are currently being considered.’

We suggest that a security of tenure clause should be written into the Aged Care Bill and further that the Bill should set out the limited means by which an accommodation and/or home care agreement can be terminated by the aged care provider.

6. Refer Part F- Rights and responsibilities at 2.2 Advocacy. We are aware that some providers are identifying particular staff members as an “advocate” and then funding that role out of residents’ care packages. As previously noted, this is a conflict of interest and is against the interests of the resident. When the provider acts as advocate for the resident, they are in effect acting for themselves and we can provide case studies in that regard. The residents already have access to independent advocates at TARS in NSW and equivalent organisations in other states as well as the National Aged Care Advocacy Line.

This issue is best resolved by means of our budget recommendation.

7. Refer 3.1.2 User Rights. We refer you to our recommendations in Part 1 in relation to offences in breach of the URP. We believe this needs to be strengthened.

8. Refer 4.1 Key Personnel.

We are experiencing an increasing number of cases of client who are financially abused by staff. If this is exposed by the provider, often the staff member moves on to a different provider and can continue to commit offences on older people. As we are aware that this problem is increasing, we request that the Committee consider how the legislation can be tightened.

The Aged Care Rights Service Inc

May 2013

Contacts: Ms Patricia Joyce, Manager of Advocacy

Mr Thomas Cowen, Principal Solicitor.