

**Submission: *Aged Care Legislation Amendment (Financial Transparency) Bill 2020***

**To the Committee Secretariat: Senate Standing Committees on Community Affairs, uploaded via the committee website.**

Date: 31/07/2020

Proponent: John Mullen,

**BACKGROUND:**

1) My mother, Eileen Mullen, spent her final years (Nov 2009 to Jan 2013) in a dementia specific aged care facility in Western Australia. From the outset it was made known that her full care needs would not be met by the facility and it was left to family members to fill the deficit.

2) In 2011 management of the facility was taken over by the son, of the owner (a former builder). This change saw the commencement of austerity measures that steadily lowered the level of care delivery to the point that family visits could not compensate for. These changes were implemented in view of and in consultation with people who worked as consultants, but also as assessors for the Aged Care Standards and Accreditation Agency Ltd.

3) In August 2012 a memo was posted expanding the practice of understaffing the dementia specific section of the facility, for financial gain. At this point, with clear documentary evidence of the facility operating contrary to the Aged Care Standards, I made my one and only complaint to the aged care authorities.

4) By **August 2015**, my complaint remained unresolved and was abandoned by the Commonwealth Ombudsman. At this point I made an **FOI application** to the department in charge of aged care to find out what had gone wrong in the mishandling of my complaint.

5) My FOI request was about my understaffing complaint and it is not disputed that the material requested falls under the categories listed under section 86-9 of the *Aged Care Act 1997* (AC Act), information that " *The Secretary may make publicly available....*".

6) The aged care authorities, presently known as the Aged Care Quality and Safety Commissioner (ACQSC), continues to deny me access to the information requested, arguing that it is "*protected information*".

**PRESENT SITUATION:**

7) It is almost 5 years since I made my FOI request, I have appealed against the denial of access to the Office of the Australian Information Commissioner (OAIC), the Administrative Appeals Tribunal (AAT), the Federal Court of Australia (FCA) and the Full Federal Court of Australia (FFCA). Whilst there was partial improvements through the OAIC and AAT appeals, the court appeals have been dismissed.

8) The ACQSC appears to be steadfastly opposed to the level of transparency I believe all Australians have a legal right to.

9) I am awaiting a decision from the High Court of Australia (HCA) as to whether I am to be permitted to appeal the decision of the FFCA which continues deny me access to the information about the deliberate understaffing of my mother's aged care facility.

**CONCERNS WITH THE FINANCIAL TRANSPARENCY BILL:**

7) Scrutiny of my case demonstrates the ACQSC propensity to use time delays, contrived confusion, deception and complex technical/legal tactics to avoid transparency. I believe the present state of the *Aged Care Legislation Amendment (Financial Transparency) Bill 2020* leaves the way open for more of the same avoidance of transparency.

8) The Bill does not address the fact that the information it seeks to publish is currently regarded as 'protected information' under Part 6.2, Division 86 of the AC Act. This omission alone is probably enough to ensure that the information sought is never published.

9) Some of the language used in the Explanatory Memorandum leaves the way open to make an interpretation that is different to that intended.

10) The AC Act being amended was originally written by aged care providers who sought to take profit from the industry. It has often been said to me that there are "loop-holes" that allow aged care providers to behave inappropriately. I do not see any such loop-holes, yet

the ACQSC through their legal representatives, the Australian Government Solicitor (AGS) have managed to convince the courts that there are meanings to the "Protection of Information" section that are not apparent to the informal reader.

11) There is an area of expenditure that is not well defined in the amendments that I believe would be beneficial, that is details of consultation payments made to consultants who have working/financial relationship to the ACQSC. In my own experience, I observed consultants from the Accreditation Agency Ltd. 'helping' to prepare facility records for assessment. The consultants would leave and different people would perform an assessment of the records.

12) A person who worked for the Agency Ltd. told me that they "... got 85% of their income from providers and only 15% from government...". I believe this is an unacceptable arrangement, ostensibly cooking one set of books from Monday to Thursday, then swapping with a colleague of Friday and approving their cooking of another set of books.

#### **SUGGESTIONS:**

12) Whilst it would be possible to say that the changes this Bill introduces are made legal by sub-section 86-2(2)(e), this has not worked at the court level for s86-9. It may be safer for this Bill to include a further sub-section "86-2(2)(f)" specifically referring to the publication of material listed under the new section 9-2A.

13) Whilst I have long argued that the types of material listed under s86-9 of the AC Act, sets that information apart from what is said to be protected information, I have yet to convince the courts of this. In any case I suggest that this Bill introduce a further sub-section "86-9(1)(n)" there-by specifying that material listed under the new section 9-2A may be made publicly available.

14) The committee should make themselves familiar with the original Explanatory Memorandum of the AC Act, particularly where it explains the meaning of protected information (page 158 of Senate version). The ACQSC have made submissions to the court that the phrase "such as", when talking about "such as commercial-in-confidence information...." makes that an example of what information might be considered protected, there-by giving artistic license to expand the definition to all other things that might come under the heading "affairs of an approved provider".

15) The Explanatory Memorandum for this bill also employs the phrase "such as" (on page 3 of 6) in relation to the same subject matter. I suggest that the words "... (such as client records) ..." are unnecessary and can be removed, whereas the phrase "... 'commercial in confidence' material (such as tender submissions) ..." re-introduces the same ambiguity as previously. I can see how a conflict arises between protecting 'commercial in confidence' information and releasing the information listed in the proposed s9-2A. Giving that particular example does not limit the conflict if it's just an example.

16) I suggest that the Explanatory memorandum be modified to stipulate exactly what commercial information is protected and what commercial information is not protected (which I assume will be all that under s9.2A and s86-9 of the AC Act), so there is no ambiguity or loop-hole that stops progress of this bill or the publishing of information.

17) The bill presently captures the spend on 'external consultants', but I suggest more scrutiny would be beneficial. The report should include what consultants were used, to what degree (hours spent, dollars spent) and what the consultants relationship is with aged care authorities.

#### **LEARN FROM MY ORDEAL:**

18) I ask that in considering what parts of submissions are to be published, the committee be mindful of the fact that I am still awaiting a HCA decision on whether I can make an appeal with respect to transparency in aged care. Please learn from my ordeal, without jeopardising that process.

19) I describe my experience as an ordeal because my single unresolved complaint from 2012 has been mishandled under 7 separate investigation numbers over 3 years, with no outcome. My single FOI application to aged care authorities has been dealt with under 15 different case/file/reference numbers over 5 years, my application for leave to appeal to the High Court being the 15th. Please make sure the legislation you pass does not leave a way open for a repeat of this ordeal.

Sincerely,

John Mullen