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ELDER RIGHTS ADVOCACY

5 February 2007

Mr Elton Humphery
Committee Secretary
Community Affairs Committee
Email:community.affairs.sen@aph.gov.au

Dear Mr Humphrey

Please find attached our comments on the Aged Care Amendment (Security and Protection) Bill 2007 for the attention of the Committee. While we have appreciated the opportunity to comment on the draft Bill, this has been a somewhat constrained process due to the tight timelines.

We believe we bring a unique perspective to this area of legislation in our role as a service funded under the National Aged Care Advocacy Program, an initiative of the Australian Government. In this role we have assisted complainants to use the existing Complaints Resolution Scheme, administered by the Department of Health and Ageing, and have been aware of some of the shortcomings of a resolution based scheme for complainants.

We are therefore pleased to see the proposed changes outlined in an investigative model such as the (Security and Protection) Bill. Our comments as attached are based on our day to day experience of working with residents, family members and carers (over the seventeen years the service has been funded), particularly since the changes to the aged Care Act in 1997.

We would be pleased to provide any further information the Committee may request, or to speak in more detail to the submission if appropriate.

Yours Sincerely

Mary Lyttle
Chief Executive Officer

Aged Care Amendment (Security and Protection) Bill 2007

Elder Rights Advocacy Submission
Contact Person Mary Lyttle

Background:
Elder Rights Advocacy is funded under the National Aged Care Advocacy Program, to provide advocacy to funded aged care recipients across Victoria. The National Advocacy Program around the country assists over 10,000 enquirers each year with information, advice and support to have their rights upheld. During the last five years in Victoria, we have assisted approximately 11,000 people with queries and concerns about rights, with around half of these enquiries involving specific case advocacy on complaints.

In these casework situations we assist complainants in using the internal complaints process of the aged care provider, and ensure their rights are upheld. We have also provided intensive support to complainants involved in mediations through the Complaints Resolution Scheme, and assisted with submissions and hearings before Complaints Resolution Committees. In our role and practice as advocates we bring a unique, consumer focused expertise to the matters addressed in the Bill. In the absence of more detail, we have drawn on our practice knowledge to comment on some matters which will be the subject of the Principles.

Part 6.4A- Investigations

94A-1 Investigation Principles
(1)
In the area of which matters are to be investigated, we have a view that psychological abuse is also of importance in this environment, due to the impact this can have on the resident. At some point this needs to be addressed as a matter requiring action for consumers. Further, we would want to know on behalf of residents and their representatives who are complainants:

- How complainants lodge complaints?
- Are anonymous complaints still accepted?
- What capacity will the investigators have to respond swiftly in the event of a serious complaint/allegation affecting the heath and safety of residents?
- On what grounds can the Secretary decide not to accept a complaint for investigation?
- What is the level of evidence required by investigation officers to accept a complaint from resident, families or advocates?
- Will verbal information, diary notes, or eye witness accounts be accepted or will only written and sworn evidence (Sworn affidavit), be accepted by the scheme as evidence to a complaint?
- What reasons will be given to complainants if the complaint is not accepted for investigation?
- What is the appeal process if matters are not accepted for investigation?

- In relation to security of tenure complaints. Will these be accepted for investigation and possible compliance action, or will these matters be the subject of negotiation to resolve the issue? (Note: we currently deal with 2-3 such issues per week, with many matters referred from CRS for speedier assistance by the advocate).

(2)

If the Approved Provider is found not to have complied with its responsibilities:

- What information is provided to the complainant on this outcome and the actions taken by the Secretary against the Approved Provider? In our experience, the current restrictions on providing such information about compliance action to the complainant can result in extreme frustration. The complainant may then perceive that lack of information as inaction by the department.
- What actions are to be taken to ensure the Approved Provider complies with their responsibilities prior to sanctions being imposed? Has consideration been given to a system of graded monetary penalties (i.e. fines) as a compliance measure. This is not as financially severe as the cost of sanctions (i.e. administrator appointments, restrictions on admitting new residents etc.), but may ensure compliance.

Part 6.6-Aged Care Commissioner
Division 95A

Generally we are pleased with the concept of an Aged Care Commissioner, as a means of oversighting the complaints and investigation process. We have the following comments:

- Is there a role for the Commissioner in promoting the complaints process to care recipients and the community, and reporting publicly on the outcomes? We believe this would be a useful aspect of the role, and could be done more openly (and frequently) than an annual report as required, (e.g. web based information, e newsletters etc, showing quarterly trends in complaints etc.).
- The perceived and actual independence and accountability of the Aged Care Commissioner's role in oversighting the scheme will be an important aspect of ensuring public confidence in the aged care system.
- Why is the Commissioner appointed for a three year period, with it seems, no further re appointment? Surely some more extended period of oversighting a new public policy process would be beneficial in monitoring and reviewing trends?
- The previous Commissioner for Aged Care office holder had been in place for a longer period, and was therefore able to provide (as we understand it), useful recommendations based on experience of the CRS operations, for the changes in the Bill as outlined.
- A comparable position of Public Advocate in Victoria is appointed by the Governor in Council, for a seven year period, with the Governor in Council responsible for any termination of appointment, confirmed by both houses of Parliament, as a means of ensuring the independence of the office.

Schedule 2-Reporting assaults

Overall, we have no disagreement with measures to protect vulnerable residents from abuse and injury, however we recognise that even residents with impaired capacity or frailty, have rights, including the right to information.

63-1AA

- What information will be provided to residents informing them that they have the right to be free from the types of abuse outlined as a reportable offence.
- What steps will be taken, or required of Approved Providers, to inform residents and their representatives that they are also living in an environment of compulsory reporting, and what that means?
- Who will inform residents and their representatives as to what constitutes a 'reportable offence', and the situation in which their views about reporting of the assault will not be recognized, due to the provider's obligations under the Act?
- Who will inform all parties (Approved Providers/residents/representatives) of the rights of (residents/victims) of an assault of their rights in relation to questioning by police when they are called?
- In Victoria, persons with a level of cognitive disability, (arguably a high % of aged care residents), are entitled to support from an Independent Third Person from the Office of the Public Advocate, in any dealings with the police.
- It is a requirement under Victoria Police Operating Procedures that an ITP be contacted prior to interviewing a person with a cognitive disability, however the same does not apply to Approved Providers and their staff who may need information and education on such matters.
- How do we ensure such education and information is provided so that residents are not disadvantaged in such situations, even prior to the police arriving? This has occurred to our knowledge in past situations, as the ITP requirement is not widely known.
- Any of these rights based information strategies could, of course, involve the National Aged Care Advocacy Program, given its existing guidelines on rights based information to be provided. Resource implications would have to be considered in any such decision.
- What training will be provided for staff to ensure evidence of the alleged offence is not comprised, to ensure any investigation is not comprised?
- What steps will be taken to protect the alleged victim from the alleged offender when a report has been made?
- What is the responsibility of the Approved Provider to inform the resident's family/representative as soon as possible of the alleged offence? This obligation to inform should also be linked to the 24 hour time frame for reporting.
- Who represents the best interests of a resident who has been assaulted and who does not have family or a formally appointed alternate decision maker?
- How soon is the facility to be informed if a staff member goes directly to the police and/or the Department with an allegation? When is the family informed in such a situation?

We understand, from information known in the industry, that there are some exempt circumstances in which providers are not obliged to report assaults by residents with cognitive impairment, provided that this impairment has been identified prior to the assault, and a behaviour management plan is in place. We have the following queries in relation to this matter:

- What is the situation if the family/representative of the victim demands that the assault is reported?
- Who is given the responsibility to decide this is not a reportable offence? This discretion if allowed, should be restricted to key personnel or the Approver Provider.
- What definitions are given to unreasonable use of force as a reportable offence? Does this include verbal threats to a resident, or threat of reprisal if the staff member's 'directive' is not followed?
- Family members and representatives should be informed if an assault has taken place, even if the provider does not believe they are required to report the matter to the police and /or the department.
- Residents who do not have family or formally appointed alternate decision makers, should have the right to someone to represent their interests (e.g the Office of the Public Advocate, or an aged care advocate).

Given the anticipated growth in the number of residents with cognitive impairment due to dementia, this is an important area of public policy regulation. This is an opportune moment for the government to enshrine in legislation appropriate protection for those people living with dementia. They should not be treated differently due to their disability, and should be afforded the same protection as the rest of the community living in aged care.

Mary Lyttle
Chief Executive Officer