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The Secretary
Senate Committee on Community Affairs
Email:community.affairs.sen@aph.gov.au

Dear Sir/Madam

SUBMISSION TO THE COMMITTEE ON THE AGED CARE AMENDMENT (SECURITY AND PROTECTION) BILL 2007

I understand that this submission is late but I understand that you may accept late ones such as this one which is from an individual.

I do not make any comment on the policy behind the legislation but, as a lawyer, I am always concerned to ensure that a law is a good law in the sense of being clear, certain and leaving the reader in no doubt as to their obligations. In this regard, I think the legislation falls down significantly.

Here are some of my concerns:

1. *The legislation is retrospective*

Quite apart from the fact that, as a matter of principle, retrospective legislation is generally bad (for reasons I need not go into here), the ambit of the obligation to report appears to extend back in time as far as Captain Phillip's arrival on our shores.

This means that providers will now need to pour over their records (or memory) to determine what past or existing allegations were received or suspicions arose.

2. *Staff Obligations*

Curiously, the legislation does not impose an obligation directly on staff to report. Rather, it transforms and transfers the obligation to the provider to ensure that staff report.

Does this mean, if staff don't report when they should have, the provider has breached their obligations? Undoubtedly yes, because the legislation does not contain any excuse for this failure.

This effectively creates what the law calls, a strict liability - there is no excuse. The fact that a staff member does not report, even if the provider has done everything reasonable to ensure they do, the provider is still guilty.

A collateral consequence of this issue is that providers will now have to look closely at their existing and future staff employment contracts and contracts with employment agencies. Such contracts will need to include a provision creating an obligation on staff to report.

3. Uncertain terms and obligations

The legislation is replete with crucial obligations or terms which are not defined such as:

- What is unreasonable force and where does this leave the use of physical restraints in aged care?

- What is unlawful sexual contact? It presumably means whatever the relevant State criminal law says is an unlawful sexual act. Does it mean, for example, that if the sexual contact is consensual, it is not unlawful? Does it mean as well that, if the contact is non consensual because the person concerned had no capacity to consent, or that the perpetrator had no capacity to understand what they were doing, that the contact is unlawful?

- What does minor assault mean in the context of the reporting exception relating to abuse by a resident with dementia?

- What does one of the essential triggers for reporting, namely, when you begin to suspect on reasonable grounds, mean?

4. Being Knowledge manager, internal police, judge and jury

The legislation imposes some crucial obligations on providers to know the criminal law together with clothing that obligation with necessary value and fact judgements which could lead to the typical "damned if we do and damned if we don't" syndrome.

Because the Bill defines assault by reference to the law of your State then they will need to know what that law says.

It requires the provider to also assess all allegations against the less than precise criteria in the Bill (e.g., begins to suspect on reasonable grounds). Ultimately this may lead to a policy of reporting everything as opposed to using discretion because the dangers of reporting are far exceeded by not reporting.

This is particularly so when it appears that it does not matter if the alleged victim (if they have capacity) or an incapable resident's Attorney requests that the allegation not be reported. Perhaps, this is not significant when the allegation

involves an alleged act by a staff member on a resident but what if it is an alleged act by one resident on another resident? Will a provider be able to expel the offending resident or what controls could they place on them to prevent reoffending without the ironic result of such controls then constituting an assault and reactivating these provisions?

Thank you in anticipation of considering these thoughts.

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