

Aged Care Amendment (Security and Protection) Bill 2007

Below are various comments sourced from our legal National Partner regarding the above legislation:

- The phrase “unreasonable use of force” encompasses criminal and non-criminal conduct. Given the reference to unlawful sexual contact and an assault, it is unclear what this is referring to. To the extent that it covers non-criminal conduct, it seems inappropriate to require such a report to the police.
- The protection provisions (s96-8) do not extend to non-staff members who may make a complaint, such as residents, family members or visitors.
- Given that a reportable assault may take place before or after the commencement of the legislation, there is a potential for pre-1 April 2007 reportable assaults which have already been dealt with by an approved provider, to be the subject of an allegation or suspicion post-1 April automatically invoking the requirements under section 63-1AA(2).
- It is inconsistent that an allegation must be reported, whether it is based on reasonable grounds or not, but suspicions must be based on reasonable grounds. The better approach should be to require the reporting of allegations based on reasonable grounds. It also seems inconsistent that an approved provider is responsible for taking reasonable measures to require staff members to report suspicions but not for taking reasonable measures to require staff to report allegations (see 63-1AA(5)).
- The definition of a reportable assault is also not limited to the assault taking place at the residential aged care facility. It is quite possible that a resident may have been assaulted outside the facility. This would fall into the definition of a reportable assault all other preconditions being met. Perhaps an extreme example is one given to me by an approved provider with a psychogeriatric facility. Female residents were known to leave the facility and engage in prostitution. Given the questions about their mental capacity to engage in sexual relations, there is potential that unlawful sexual contact has taken place. Under this legislation, the approved provider would be required to report on each and every occasion the resident left the facility where there was a suspicion of such activity.
- At the Tri-State, the First Assistant to the Secretary stated that while it is not envisaged many complaints would proceed to a conciliation (not mediation), if they did and there was a successful resolution, the investigation of the complaint and any non-compliance action would not follow. If this is the case, this needs to be made explicit in the Investigation Principles.
- The First Assistant to the Secretary did not answer the question whether natural justice to the approved providers extended to engaging legal representation in the investigation phase. In our opinion, this needs to be made clear.
- It is not clear whether a conciliation can take place independent of the Department, with the result that a successful resolution avoids further investigation, or whether the conciliation must be one conducted by the Department.

- In our opinion, the Department does not have the power to impose punitive sanctions or require compensatory payments. It seems to be contemplated that the Notice of Required Action may encompass a wide range of actions. Given that the AAT has in the past admonished the Department for imposing punitive sanctions, and we have seen in matters before the CRS settlements involving compensatory payments, this is a real concern.
- Given the distinction between an approved provider and a staff member, for the purposes of section 63-1AA, it is not entirely clear when a staff member becomes the approved provider or vice versa. Greater clarity will assist in defining with some certainty the responsibility of the approved provider and its employees.
- It is clear that not every complaint will relate to an approved provider's responsibilities under the Act or the Principles. Genuine complaints will therefore fall outside of the Investigation Principles. What strategies will be put in place by the Department to refer such complaints back to the approved provider for resolution?