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29 October 2008

Committee Secretary
Community Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600, Australia
Email: community.affairs.sen@aph.gov.au

Re: Aged Care Amendment (2008 Measures No. 2) Bill 2008

The **A**ged **C**are **C**risis **T**eam (ACCT) welcomes the opportunity to respond to the proposed changes to the *Aged Care Act 1997* (Aged Care Amendment (2008 Measures No. 2) Bill 2008.

The Aged Care Crisis Team supports any adjustments/changes to the Act which provide additional protection to vulnerable frail older people.

The Aged Care Crisis Team is an independent group of Australian citizens. Members of our group are engaged with the aged-care sector in a variety of ways – as health professionals, as consumers of services and as volunteers.

Our website, www.agedcarecrisis.com, provides ready access to information and issues relating to the care of frail, older people. Its purpose is to support/inform older people, their family members and carers as they traverse an exceedingly complex system of care.

We make the following general comments.

- Shortcomings in the current system of aged care are leading to widespread lack of confidence within the broader community.
- Consultation with **independent consumer groups on all aspects of aged care** should be paramount. For too long the voice of the aged care consumer has not been heard.
- We draw attention to the current reliance on the market economy for the provision of care to a significant proportion of frail, older Australians. This increasing dependence is creating serious problems within the sector. In particular, the pressures associated with cost-cutting are driving many of those staff who seek to provide humanitarian and personal empathic care out of the sector.
- Frail older people across Australia are at risk because aged-care proprietors are not required to adhere to mandated staff/resident ratios.
- The increasing complexity of the population residing in aged-care facilities (for example, the escalating number of residents with complex, high-care needs and the stagnant skill-set of provider-staff) makes reform of aged care a matter of great urgency.

We make the following specific comment on the proposed changes as outlined in the Aged Care Amendment (Security and Protection) Bill 2007. Our comments are limited to the issue of the regulation of approved providers.

1 Regulation of approved providers

The Aged Care Crisis Team has long been concerned about various aspects of provider regulation. We therefore believe that the preferred option is **Option B** – to reform the legislation such that it better protects residents and more effectively and efficiently regulates the provision of services.

While we support the basic objectives of the proposed **Option B** Amendment in relation to the regulation of approved providers, we make the following comment.

1. We call for **complete transparency** on the full ownership arrangements of every aged-care facility. Every family who is considering residential care has the right to know exactly who is providing that care.
2. It is the responsibility of the provider organisation to set out, in detail which is understandable to the lay person, the complete ownership arrangements of all parties involved in the provision and administration of resident care.
3. Aged-care facilities should be required to provide regular, timely and accessible reports on the level of staff resources, on a resident-time basis, devoted to resident care.
4. As reported in the Regulation Impact Statement for the **Option B** Amendment, the level of complexity in modern organisational structures is high. This should never be a reason for avoiding complete transparency. It is our view that, the more complex the structure, the greater the need for transparency.
5. The Aged Care Crisis Team is pleased to note that the **Option B** Amendment is expanding the scope of scrutiny from the individual facility to include the corporations and their networks. There is considerable evidence that the corporate entity is not detached from the process of care. Personnel, policies and procedures of the owner organisation greatly affect the care provided at the facility level.
6. Greater scrutiny of the corporate entities involved in the provision of aged care – at both the facility end and also of all relevant networks - is a potent way to ensure that the quality of care of these facilities is maintained and enhanced throughout the sector. Scrutiny of the management structure of entities that control multiple aged-care facilities is a cost effective way of improving care right across an organisation.
7. The Aged Care Crisis Team supports the linking of bed allocations and provider approvals and draws attention to situations where bed allocations to providers, who are already approved, operating facilities with good records, have been refused while individuals with no record of caring for frail, older people have been given.

For ease of reference, excerpts of the proposed amendments are highlighted at the beginning of each heading and paragraph below.

a) Linking approved provider status to an allocation of places

Currently an entity can be an 'Approved Provider' despite not yet having been allocated any Australian Government funded aged care places. This can give rise to uncertainty regarding the protections provided to care recipients and the rights and responsibilities of the approved provider. It also allows an entity to hold itself out as being 'approved' despite not having been allocated places and not being subject to the same level of scrutiny under the Act as those providers with allocated places.

The Aged Care Crisis Team supports the linking of approved provider status to an allocation of places – as proposed in the **Option B** Amendment.

> "... only those entities that have been approved as approved providers and have an allocation of places would be regulated under the Act ..."

It is untenable that a provider with approver status, but without an allocation of funded beds (and therefore not monitored regularly) can use that status as an enhancement for his/her business. The aged-care consumer needs assurance that approver status is synonymous with on-going scrutiny.

As stated in the Regulation Impact Statement, the Department of Health and Ageing relies on its powers to reduce, or withhold subsides, as a component of maintaining standards of quality care. An aged-care provider who has no allocation and is not receiving subsidies is therefore immune from that process.

b) Ongoing suitability of approved provider

The problem is that the Act has been written assuming that, in most cases, the entity approved as an approved provider would have all the necessary skills to directly deliver the care services. However, there have been at least two examples of large financial institutions with no aged care experience purchasing large numbers of services and engaging management companies to manage those services.

If an applicant for approved provider status is reliant on a management company to demonstrate that it has skills and experience in aged care, then there can be risks to residents if the management company withdraws its services and the approved provider no longer has the expertise to manage care. This could have a significant impact on an organisation's capacity to provide aged care and could pose risks for care recipients.

As already stated, the level of complexity within the organisational structures behind many Australian aged-care facilities is increasing. The Aged Care Crisis Team has long held grave concerns that the impact of unapproved owner entities on the management of facilities is considerable.

> "It is not only the fact that the management company of the facility might withdraw its services at any time, it is undoubtedly true that the ethos, the policies and practices of the ownership entity have significant impact on the actual running of the facility by the management company."
>
> *Aged Care Crisis*

For example, it is our experience that policies and practices of the owner entity impacts greatly on staff morale and retention.

The Aged Care Crisis Team receives much correspondence from qualified and empathetic staff members of facilities who indicate that they are extremely dissatisfied that they are unable to provide quality care to their residents due to low staffing levels and cost-cutting from the owner entity. Thus, in many instances, the very people we depend upon to provide high quality care leave the sector for other employment. The whole system suffers because of this.

The importance of the owners to the system is well illustrated by the revelations, in 2007, in the USA, that the acquisition of nursing homes by private equity has been associated with a decrease in staffing and deterioration in care[1].

c) Considering the record of related entities

The allocation or transfer of places or approval of extra service status requires the Secretary to consider the record of the approved provider including the record in relation to each of the services operated by the approved provider.

The *Act* was written to reflect the expectation that related aged care services will be owned and managed by a single approved provider. However, in recent times, the nature of the industry has changed and some organisations have created new approved provider entities for each service.

This limits the capacity of the Department to take into account the performance record of other services that have key personnel in common with the service under consideration.

The Aged Care Crisis Team supports this proposed amendment and believes that such reform is long overdue. We think it is essential that the Department should consider the performance record of all entities involved in the care of vulnerable frail Australians at all stages – including the initial allocation of beds, if and/or when transfers occur and if or when an upgrade to 'extra services' occurs.

In particular, the selling and transferring of beds from one owner to another without complete scrutiny has long been a matter of much concern to many Australians.

As already stated, the performance of homes is closely linked to the owner. Currently, the aged-care regulations are focussed entirely on the management of the home – without due regard to the owner entity.

The Aged Care Crisis Team draws attention to the vulnerability of the frail aged-care residents and believes that providers and owners who have failed them once should not receive second chances.

We were dismayed to learn that the previous Minister for Ageing was reported to state, in August 2007:

> "... owning a sub-standard home did not automatically disqualify players from the industry ..."

We are aware of several instances where aged-care facilities, with connected ownership arrangements, failed inspections and yet were able to continue to operate at least one of their facilities.

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[1] More Profit and Less Nursing at Many Homes: *Article: New York Times - 23 Sep 2007*
http://www.agedcarecrisis.com/news/2264-more-profit-and-less-nursing-at-many-homes

d) Clarifying key personnel

Currently approved providers are required to identify key personnel as part of establishing their suitability, and notify the Department about changes in key personnel. Key personnel are defined in the legislation according to the organisational role performed. As business structures have changed it has become more likely that control may be exercised over an approved provider by a variety of individuals and organisations that may be outside the immediate entity that constitutes the approved provider.

For example, an approved provider entity may form part of a collection of companies managed by another company. When this occurs such people may not be notified to the Department as key personnel despite them having a significant impact on the operations of the approved provider, including the quality of care and the financial viability of the provider (directly impacting on the security of accommodation bonds and security of tenure).

The problem with this is that it presents potential risks to care recipients and the Commonwealth Government as well as meaning that certain business structures potentially escape the scrutiny that is applied to key personnel in other business structures.

The Aged Care Crisis Team supports the proposed amendment to expand the class of personnel to include anyone who has authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the approved provider.

The aged-care consumer has the right to have knowledge of all personnel who exert significant influence over the management, tenure and viability of the facility. This knowledge should be updated and maintained at all times. As already stated, there have been recent incidents where facilities have failed standards of care and/or have not been able to maintain financial viability – leaving residents and staff in dire circumstances.

For example, when a recent closure of a Victorian facility occurred in October 2008, the administrator stated that a sale required the agreement of 45 separate parties under a strata title arrangement. Presumably not all of these were parties were significant in regard to how the home functioned or its total economic viability. However, this situation gives some indication of the number of key personnel and the complexity of the arrangements behind much of our nursing home care.

> “The trauma and disruption to residents and staff as a result of this closure was considerable with 81 frail and elderly residents being removed from their familiar home surroundings, staff losing employment and entitlements as well as Australian taxpayers covering the cost for the $8.5 million dollars in guaranteed accommodation bonds[2].”
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> *Aged Care Crisis*

[2] Fears home eviction is a death sentence: *Source: The Australian - Rachel Hewitt (21 Oct 2008)* http://www.agedcarecrisis.com/news/3203-fears-home-eviction-is-a-death-sentence
“…a sale required the agreement of 45 separate parties under a strata title arrangement…”

2 In conclusion

The Aged Care Crisis Team is of the view that caring for frail, older people is a collective responsibility which guards and protects the welfare of one of the most vulnerable groups in our society. This view of collective responsibility is at odds with current policies whereby aged-care services are open to the market economy, and frail old people become customers who, in theory, but not in reality, are able to pick and choose from a range of commercial providers. We therefore deplore the current move towards placing the well-being of our family members at the mercy of market forces.

However, if Australians facing the end-of-life are, in fact, to be placed in the hands of corporations and private equity firms, the very least they can expect is to have rigorous systems in place to ensure their physical and financial protection.

We therefore support the **Option B** Amendments relating to the regulation of approved providers as delineated in this Regulation Impact Statement. We see this as just one step in achieving further accountability and transparency within the aged-care sector and urge that further measures are taken to ensure real security and protection for those experiencing frail old age.

3 Appendix: References

Below are a series of articles which demonstrate the significance of the issues raised in this submission.

denotes web link

denotes PDF file

Appendix Item: Home profit claim denied

Source: Roxburgh Park, Craigieburn Star - By Cimara Pearce (4 Nov 2008)

http://www.agedcarecrisis.com/news/3257-home-profit-claim-denied

Appendix Item: Nursing home companies

This web page summarises several nursing home entities, looks at patterns of dysfunction, and links to pages describing a selection of these companies:

http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/health/nh_comp.html

Appendix Item: Nursing Home Transparency and Improvement Hearing

Source: United States Senate - Special Committee on Aging (15 Nov 2007)
David Zimmerman, Professor and Academic Director of the College of Engineering, University of Wisconsin, Madison, WI

http://aging.senate.gov/events/hr183dz.pdf

Appendix Item: More Profit and Less Nursing at Many Homes

Article: New York Times - 23 Sep 2007
http://www.agedcarecrisis.com/news/2264-more-profit-and-less-nursing-at-many-homes

Appendix Item: Aged care residents may recover accommodation bonds – but not yet

Source: Slater & Gordon (26 May 2008)

http://www.agedcarecrisis.com/nursinghomes/accommodation-bonds

Appendix Item: Victim impact statement - nursing home collapse

Title: Take heed - 2 years in the life of… (9 Mar 2008)

http://www.agedcarecrisis.com/yoursay/2566-take-heed-2-years-in-the-life-of

Appendix Item: Open letter to Government

The following letter was sent out to federal politicians, by Dr J Michael Wynne in June 2008, in an effort to have the concerns regarding probity in aged care addressed:

http://www.agedcarecrisis.com/nursinghomes/open-letter-to-govt

Dear member of parliament,

Most members will be concerned for the welfare of the aged in their electorates. I do not know if you have a specific interest in aged care but if not interested please discard this and accept my apology for the intrusion. Alternately forward it to those with an interest or responsibility.

Please note that in hospitals doctors control referrals and admissions and so are in a position to exert strong economic leverage and use this to maintain standards. This does not happen in nursing homes where health professionals exert much less influence because they have little economic leverage. You might feel it appropriate to encourage your members to lobby their local member about this issue.

Problems in Aged Care Regulations

I am writing to politicians again about a serious anomaly in federal aged care regulations and ask that we should once again press for changes through the political system and party channels.

Some may remember my correspondence in April 2007. As a result of your efforts the previous federal coalition government promised in June 2007 to address the issues but lost government before doing so. After 6 months of inquiry and correspondence it has become clear that the present labor government is reluctant to do so. I am therefore writing to ask members to once again press the issues through political channels.

Background

Since 1997 any criminal or otherwise unsuitable organization has been able to gain control of nursing homes and for practical purposes buy "approved provider status" without being required to undergo any sort of assessment. This was exposed when an objection was lodged to the purchase of DCA nursing homes[3] by a private equity arm of Citigroup.

The objection was based on Citigroup's poor track record in exploiting those to whom it owed a duty of care. It transpired that Citigroup's subsidiary had not been required to seek approved provider status. Approval status came with the purchase. It was an add on value, traded in the marketplace - particularly valuable to a company like this.

An 18 month thorough probity review of Citigroup's private equity group had previously been performed in NSW. Licenses for operating in the much less vulnerable hospital sector were eventually granted to this same Citigroup subsidiary but with conditions giving greater protection - and only when the company was already selling the hospitals.

It became clear that the majority of the wealthy financiers, banks and private equity groups that now own large numbers of nursing homes would have purchased their approved provider status when they bought into the sector. Few would have had their own suitability assessed.

[3] http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/health/dca.html

I drew this matter to the attention of politicians and aged care associated groups in Australia in April 2007. Some took this matter up. In June 2007 both the federal ministers responsible agreed in writing to address the problem in proposed legislation, although it was not clear what form this would take. This was not done before the election.

The issues are explored and copies of correspondence have been placed on this page[4].

The labor government's response

I was unable to get a response from the labor shadow minister for ageing prior to the election but have corresponded with the newly appointed labor minister for Ageing, the Hon Justine Elliot, and her department since the election. There has been a reluctance to release information or give any undertakings.

When forced by questions on notice and by FOI requests they have responded by simply restating the current regulatory position. It is clear that the labor party has either put aged care on the back burner, or the minister and her advisers do not understand the significance, or lack the courage to deal with the response of the corporate marketplace. Any useful changes are likely to be ideologically unpalatable to the market.

These developments are explored in greater depth and the correspondence is available on this page[5].

The Issue

Extracts in letter from Ms Allison Rosevear, Assistant Secretary, Residential Program Management Branch, Dept. Health and Ageing (April 17, 2008) on behalf of the Minister for Ageing:

> As I have advised previously, the *Aged Care Act 1997* (the *Act*) **does not regulate the ownership of approved providers**; it focuses on assessing the Approved Provider entity and the individuals that may exercise executive or managerial control of the Approved Provider. If there is a change of ownership of an Approved Provider which results in a change of the directors or senior management then the Approved Provider is required to notify the Department of the changes and the Department may review the Approved Provider's suitability in light of the notified changes
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> The Australian Government is committed to quality care for frail older people and monitors this in the aged care sector through the accreditation system. The Department of Health and Ageing is responsible for monitoring and recording approved service providers' compliance with their obligations under the Act and the Aged Care Principles.
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> All residential aged care services - - - - - must go through the accreditation process at least every three years.

The issue as explained by the present minister (above) arises from a contrived, artificial and invalid separation of owner from provider in the regulations. This invalid construct sees the two as quite separate, whereas some are owners as well as providers.

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4 http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/health/dca_sale.html

5 http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/health/bupa_approval.html

Owners are clearly intimately concerned with the profitability of the businesses they own and clearly consider that they have every right to participate in the management of these businesses, particularly when they are not generating profits. In contrast the owner is not seen by the present minister to influence the provider, or to participate in any way in decisions that might impact on care. This is unrealistic. This is about care and ultimately almost all financial decisions impact on care.

Furthermore it is inconsistent. BUPA[6] operates nursing homes in the UK and multiple other countries so is a provider, yet when it purchased DCA from Citigroup it was an owner and so did not have to seek approved provider status. DCA's subsidiary Amity presumably holds the approved provider status. Is it reasonable to expect BUPA not to apply its international experience to its new purchases?

Approved provider regulations are directed only to the criminal records of subsidiary providers, their directors and key managers. Owners are free to replace those who will not do what they require with those who will, provided they have not yet been convicted of any crime. An unsuitable individual or company simply needs to restructure the paper trail to run the business.

It is fanciful to suggest that an owner whose interest in its purchase is commercial would not take an interest in this purchase or participate in business decisions that might impact on its profitability and so on care. Equally ridiculous is the suggestion that it would not insist on appointing like minded senior staff. The stake held by each owner reflects its degree of control. As impossible is the ability to detect and police interference by an unsuitable owner in the running of nursing homes. The track record for this in Australia is already poor.

All this is well illustrated by Citigroup's private equity buyout of DCA. Private equity owners typically purchase less profitable companies and restructure them to make them more profitable and so more valuable. Citigroup's subsidiary did this when it purchased DCA. It sold within 2 years at a huge profit. It could not have done so without actively participating in management and in cost cutting. It clearly had every intention of doing so. By far the largest nursing home cost (probably in the region of 50%) is nursing (numbers and skills). Failures in care and staffing ratios are intimately related.

The nature of the owner therefore becomes critical, probably more critical than the provider. It is the controlling entity, and as such is in a powerful position to influence outcomes for residents. Under the probity requirements abandoned in 1997 it would have been a prime regulatory concern.

While nursing staff are barred if they have criminal records, the suitability and criminality of owners is regarded as irrelevant. Nurse aids receive more scrutiny so we must assume that they are seen as a greater threat.

By any standards the approval process is a political farce - a waste of providers time and tax payers money. It reflects the coalition party's bondage to the industry before the 1996 election and may be one of the parts that nursing home mogul Doug Moran claims he wrote for the new government of the time. If it is not to be made effective then government should stop deceiving the public and trash it.

The importance of the owners is well illustrated and the issue is made more acute by the revelations, in 2007, in the USA, that the acquisition of nursing homes by private equity has been associated with a decrease in staffing and a deterioration in care. Regulators in the USA are now paying far more attention to ownership.

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6 http://www.uow.edu.au/arts/sts/bmartin/dissent/documents/health/bupa_approval.html

There are hearsay accounts suggesting that similar problems in staffing and care following private equity acquisition are happening in Australia. There is insufficient publicly available information available for a similar objective assessment.

Control of the quality of care provided has come to depend on the three yearly accreditation visit by an agency based in far off Sydney. This is supplemented by the occasional unannounced (but not always unexpected) visit. There is also a complaints mechanism dependent on nurse whistle blowers and on formal complaints lodged by inexperienced relatives.

Nurses fear victimisation and distrust the legislative protection offered. Relatives fear that their loved ones will be targeted if they complain. Their complaints are all too often rejected because the lone voice of the family member is contradicted by staff. This leaves them frustrated and disillusioned. Most failures in care are likely to remain undetected.

The oversight and accreditation required to make even these measures work, and the paperwork on which it depends, increase the costs of care. They become so onerous that resources are diverted to them and these are at the expense of care in even the best homes. They become counterproductive.

Nurses and providers complain bitterly about the burden and the impact this distraction has on care.

A system that is:

- so inviting for aggressive profiteers,
- one where cost cutting is so closely linked to poor care and
- one that depends on such onerous, delayed and inadequate after the event controls,
- is one that has been set up to function poorly.

It creates a "what we can get away with" approach, across the board mediocrity and penalises excellence. We can hardly expect it to work well.

A first step in addressing these problems would be to closely scrutinise the owners, those actually holding the purse strings. They ultimately control the money and so the supply of human and other resources on which care depends.

Dr J M Wynne MB.ChB.,FRCS.,FRACS.,Grad Cert Ed
