

**SUBMISSION TO THE
AUSTRALIAN SENATE
COMMUNITY AFFAIRS
LEGISLATION COMMITTEE**

AGED CARE AMENDMENT BILL 2000



**Australian Nursing Homes
And
Extended Care Association**

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Introduction

The Senate, on the recommendation of the Selection of Bills Committee, has referred the Aged Care Amendment Bill 2000 to the Community Affairs Legislation Committee for inquiry and report by 7 November 2000.

In recommending the reference of the Bill to the committee, the Selection of Bills Committee provided the following reasons for referral:

To examine the provisions of the Bill to the Committee which give additional powers to deal with the non-compliance of provider standards, including the provision for the revocation of places and evacuation of residents, and the impact of the provisions on providers, key personnel, residents and relatives of residents of aged care facilities.

The Committee has invited the Australian Nursing Homes and Extended Care Association (ANHECA) to provide a written submission addressing the above issues.

About ANHECA

ANHECA is a Federal Employer Association representing private sector and church and charitable aged care employers throughout Australia. The aged care industry includes the infrastructure of services encompassing all levels of government, the community and carers involved in the provision of services for the care of the aged. The industry covers the full range of services from financial assistance to full resident care through high care aged care facilities, low care aged care facilities, retirement village and independent living style accommodation and associated health care services.

The members of ANHECA are the various State Associations that represent employers across Australia. These are:

- Australian Nursing Homes and Extended Care Association - QLD.
- Australian Nursing Homes and Extended Care Association Victoria Incorporated
- Australian Nursing Homes and Extended Care Association New South Wales
- Australian Nursing Homes and Extended Care Association (Tasmania)
- Australian Nursing Homes and Extended Care Association South Australia Incorporated
- The Nursing Homes and Extended Care Association of Western Australia Incorporated.

ANHECA strives for and is committed to excellence in aged care in a commercially viable environment. ANHECA will:

- Promote the interests of its members
- Provide effective industry leadership
- Work closely with industry stakeholders.

Mission Statement

ANHECA will continue to promote and maintain an efficient, effective and world class aged care industry in Australia, which anticipates, identifies and meets the needs of ANHECA members through its own initiatives.

The role of ANHECA in pursuing the above is to:

- Promote the commercial interests of aged care service providers
- Provide a forum for members to deal with current and future issues affecting aged care
- Formulate progressive, achievable and cost effective aged care policies for presentation to government and the community
- Represent members to government, stakeholders and others interested in the Australian aged care industry.

In pursuing ANHECA's Mission the Association has set the following objectives:

- Promoting a commercial and regulatory framework to enable members to achieve a reasonable commercial return consistent with market forces and the supply of world quality aged care services in a managed competitive environment
- Developing and promoting an industry national policy on aged care and the roles of industry stakeholders to relevant groups, including politicians, public servants and the community at large
- Enhancing the image of the Association and the aged care industry by forging a progressive approach to industry issues and expanding and improving communications with government and other industry stakeholders
- Liaising with government, non-government parties, other associations and bodies to research issues affecting members' interests and to achieve a relevant information base on which national policy decisions can be made

- Monitoring and critically reviewing Association performance in terms of indicators reflecting policy development and advice, coordination of industry positions and representation of members interests to governments and other stakeholders
- Developing an equitable funding scheme based on sound commercial business practices, standard accounting procedures and a level playing field to enable aged care providers to ensure excellence of care in well maintained facilities yielding a commercially viable return, regardless of ownership structure
- Consulting with industry and government to develop longer-term strategies, which are fiscally responsible and recognise the need for self-sustainability, self-regulation and the maintenance of high standards.

Aged Care Amendment Bill 2000

The Aged Care Amendment Bill 2000 provides 2 schedules of amendments to the Aged Care Act 1997 (the Act) to give more power to the Department of Health and Aged Care over approved providers who do not comply with standards established under the Act. Each schedule will be commented upon separately.

Schedule 1

Item 1

The first amendment in this schedule makes a necessary definitional change to include resident leave days as occupied places for the purpose of a progressive revocation or suspension.

ANHECA agrees with this amendment.

Item 2

This amendment indicates the way in which the secretary provides notice of the sanction. Although the words “in writing” have been excluded, the reference to Section 67-5 makes it mandatory that the notice must be in writing.

ANHECA agrees with this amendment.

Item 3

This amendment is a housekeeping amendment to delete redundant words.

ANHECA agrees with this amendment.

Item 4

This amendment makes it clear that the imposition of the sanction commences when the Section 67-5 notice is given to the provider. See also the amendment under Schedule 1 Item 9.

ANHECA agrees with this amendment.

Item 5

See Item 4

Item 6

This amendment sets out extra matters that the Secretary must include in the Section 67-5 notice. This amendment makes it clear the number of places subject to the sanction and the effective date of the sanction.

ANHECA agrees with this amendment.

Item 7

This amendment introduces a new division of the Act, Division 67A. This division outlines when sanctions take effect. This allows that where the date of effect of the sanction is a date after the Section 67-5 notice, there is sufficient time to inform the affected residents, the next of kin, or persons who are considered to be concerned with the well being of the affected residents.

The amendment also sets out the methodology for progressive revocation or suspension of allocated places and defines what are considered to be vacant places for that purpose and what are considered to be occupied places for that purpose.

Residents on pre-admission leave have been specifically excluded from the calculation of occupied places because they are excluded from Subsection 42-2(1) as not being provided with residential care by the approved provider operating the service. Pre-admission leave is leave taken by the resident prior to entering the facility because, for example, the resident wishes to spend his/her last weekend prior to entering the aged care facility, with the extended family. Pre-admission leave is deducted from social leave under the Act.

To be counted as an “occupied place” the approved provider must be providing aged care to a care recipient in respect of an allocated place immediately before the section 67-5 notice time. The exclusion of Section 42-3 in Section 42-2 means that residents on pre-admission leave are not provided with aged care and therefore the place will not be included among the “occupied places” and therefore will be revoked or suspended. Therefore there could be an instance where the resident pays for a place in good faith and the Commonwealth rescinds that approval.

Residents who are reserving a place under Section 58-6 have also been excluded from the calculation of occupied places because they are not considered to be receiving care. These residents have exceeded their entitlement to social leave throughout the year but still wish to spend time away from the facility on a social basis. To do so, after the 52-day social leave limit has been exceeded, the resident pays a higher amount to reserve that place for their return, ie the resident contribution and the subsidy not paid by the Commonwealth.

Again, as these residents are not considered to be receiving care, they will return to find that there is no place available after they have paid to reserve the place in good faith.

Other than the matters relating to residents on pre-admission leave and residents reserving a place in the facility, ANHECA agrees with the amendment. ANHECA considers that residents on pre-admission leave and those residents who have exceeded their social leave limit and are paying to reserve the place under section 58-6 should be deemed as receiving care for the purposes of section 67-5A.

Item 8

This amendment adds a new subsection to express that the Secretary must make it clear that the sanction period begins on a certain date and, in some cases, may be effective for a certain length of time.

ANHECA agrees with this amendment.

Item 9

This amendment was made necessary because of Item 4 above. The amendment inserts a definition of "section 67-5 notice time".

ANHECA agrees with this amendment.

Item 10

This amendment makes it clear that the amendments under Part 4.4, because of this Bill, are effective if the section 67-5 notice is given after this Bill is enacted.

ANHECA agrees with this amendment.

General

The revocation or suspension of the provider's approval will have great financial consequences and will immediately affect staff and this may have a flow-on effect to other residents. Whilst the sanctions are punitive, they can only be enforced due to non-compliance with standards or in situations where the residents are considered to be in serious risk. There are, however, limited principles that the Secretary must follow in the imposition of sanctions.

Section 66-1 details the list of sanctions that the Secretary has at his/her disposal. There are, however, no guidelines or principles as to what the Secretary takes into account to impose the various sanctions. How, for example, does the Secretary determine between the revocation of the approved provider's approval and prohibiting the charging of accommodation bonds/charges?

Schedule 2

Item 1

This amendment imposes a further responsibility on providers to ensure that “key personnel employed by the provider are basically suitable to provide aged care in an aged care facility. Failure to do so could lead to the imposition of sanctions. There is no definition as to what constitutes “suitability”. For providers to ensure that employees are suitable there may need to be some type of police check at the interview stage, however, given that there is no definition of “basic suitability”, this could mean that the provider may be required to further check into the background of applicants for key personnel positions. This may be contrary to Industrial Law and may be regarded as discrimination in employment.

ANHECA does not agree with the amendment as it stands. ANHECA agrees that providers have a responsibility to take all available steps to ensure the safety of residents in care and to account for the care provided to those residents, however, it should not be the providers’ responsibility to ensure the suitability of key personnel as defined in the amendment.

ANHECA recommends that providers be required to simply advise the Secretary of all key personnel and all changes to key personnel within 28-days of the change. ANHECA considers that the Department should have the responsibility for checking the criteria relating to disqualified individuals and of advising the industry of the identity of disqualified individuals.

Alternatively, ANHECA recommends that the amendment be either deleted or amended to read:

“3-4(c) accountability for the care that is provided, and, as far as legally possible, the *basic suitability of their *key personnel.”

ANHECA also recommends that the term “basic suitability” needs definition.

Item 2

This amendment adds as a requirement for approved provider status that the Secretary must be satisfied that none of the applicant’s key personnel are disqualified individuals. This amendment is necessary after the insertion of the new Division 10A (see Item 10).

ANHECA agrees with this amendment subject to the comments in Item 10 below.

Item 3

This amendment is a housekeeping amendment to denote that “key personnel” is defined in schedule 1.

ANHECA agrees with this amendment.

Item 4

This amendment is a housekeeping amendment to denote that “key personnel” is defined in schedule 1.

ANHECA agrees with this amendment.

Item 5

This is a housekeeping amendment following the split definition of “key personnel”. This makes it unnecessary to refer to paragraph 8-3(1) (a) and subsection 8-3(2).

ANHECA agrees with this amendment.

Item 6

This adds an additional subsection to section 8-3 to make it clear that the additional provisions do not limit the operation of section 8-3.

ANHECA agrees with this amendment.

Item 7

This amendment is a housekeeping amendment to denote that “key personnel” is defined in schedule 1.

ANHECA agrees with this amendment.

Item 8

This is a housekeeping amendment following the split definition of “key personnel”. This makes it unnecessary to refer to paragraph 8-3(1) (a) and subsection 8-3(2).

ANHECA agrees with this amendment.

Item 9

This amendment states that where a provider makes a change to his/her key personnel because the person is, or is about to become a disqualified person, the approved provider is taken not to have notified the Secretary of the change unless the notification includes the reason why the person is, or is about to become a disqualified person.

Whilst on face value it would be difficult to terminate an employee because they are about to be convicted of an indictable offence, they are about to become insolvent or they are about to be of unsound mind, this would relate to the criteria of disqualified persons prior to the enactment of the Bill.

ANHECA considers that apart from the transitional time after Royal Assent and the commencement of the amended Act there would be no way that the provider could know whether a key personnel was about to become a disqualified individual and therefore there should be a transitional issue covering the time between Royal Assent and the commencement of the amended Act.

After the period between Royal Assent and commencement of the Act there would be no way that the provider could know that a key personnel was about to become a disqualified individual until such time as the individual was convicted, was insolvent or was declared to be of unsound mind. Accordingly the requirement concerning “about to be a disqualified individual” should be deleted for instances occurring after the commencement date.

ANHECA also considers that the amendment should include a reasonable timeframe for advising the secretary that a key personnel may be a disqualified individual. Given that there is a financial penalty for not notifying changes in key personnel and strict liability applies, ANHECA suggests that in cases where the provider has omitted to notify the reason for the person being or about to become a disqualified person in the notification and that notification was made within the required 28-day period, then a further 28-days should be given to furnish the reason.

As the Secretary will be advised of all disqualified individuals and will obviously be keeping a “black book” on these individuals, ANHECA would like to know what the Department intends to do with such information. To assist providers in the employment of key personnel and as a duty of care for residents receiving aged care, ANHECA suggests that the names of disqualified individuals be displayed on the Department’s web site and a hard copy sent to all providers. ANHECA also suggests that advice of those who have come off the disqualified individuals list be also circulated.

Item 10

This amendment introduces a new Division 10A dealing with “disqualified individuals”. Disqualified individuals cannot be one of the key personnel of an approved provider (new section 10A-2). Section 10A-1 sets out the meaning of “disqualified individuals” and provides three criteria that would make a person a disqualified individual, these are if:

- The individual has been convicted of an indictable offence; or
- The individual is an insolvent under administration; or
- The individual is of unsound mind.

Section 10A-1 then goes on to define:

- An indictable offence
- Insolvent under administration
- Of unsound mind

Section 10A-1 includes exclusions as follows:

A person who is one of the key personnel of a corporation applying to become an approved provider and a person who is one of the key personnel of an approved provider is taken to be of unsound mind only if the person is mentally incapable of performing the duties as a key personnel.

There is also a link to the Crimes Act to provide circumstances where the person does not have to disclose an indictable offence and others who are aware of those offences are required to disregard them. They are:

- The person was not sentenced to imprisonment for the offence, or was not sentenced for no more than 30 months; and
- A prescribed period of time has elapsed since the conviction (5 years where the offence was committed by a minor; 10 years in all other cases); and
- No further offences have been committed during the prescribed period referred to above.

ANHECA is concerned that the criteria is linked by the word “and”. This means that a person who has committed an indictable offence as an adolescent and was sentenced to imprisonment for a period exceeding 30 months will be a disqualified individual forever. It also means that a person who has committed an indictable offence must satisfy each of the criteria to have the conviction treated as a spent conviction. ANHECA considers that the word “and” (wherever appearing) in the above criteria should read “or”.

ANHECA can agree with the intent of this section but is concerned with the responsibilities imposed on the providers and the cost of those responsibilities. It is noted that that the amendment is silent on the extent of the providers’ responsibilities in relation to determining whether any key personnel would be disqualified individuals. ANHECA is also unsure whether any of these responsibilities would contravene Discrimination and Industrial laws.

ANHECA recommends that providers be required to simply advise the Secretary of all key personnel and all changes to key personnel within 28-days of the change. ANHECA considers that the Department should have the responsibility

for checking the criteria relating to disqualified individuals and of advising the industry of the identity of disqualified individuals.

Section 10A-2 sets out offences against the Act together with penalties. Subsection 10A-2(1) says that the corporation is guilty of an offence if it is reckless to the fact that one of its key personnel is a disqualified individual. There is no definition of “reckless” and therefore we must rely on the legal definition that the provider has taken all reasonable steps to ensure that no key personnel are disqualified individuals. Again there are no details as to what are “all reasonable steps”.

ANHECA has recommended that providers should advise the Secretary and it should be the Secretary’s responsibility to undertake the checks of key personnel to ensure that they are not disqualified persons. Where the Secretary advises that a key personnel is a disqualified individual there should be a reasonable time frame for terminating that person from the key personnel position.

The penalty, 300 penalty units or \$33,000 is considered excessive especially when read in conjunction with subsection 10A-2(2) that indicates that each day the contravention continues is a separate offence and therefore liable to a penalty of \$33,000 for each day!

Section 10A-2 also sets out the offences and penalties for individuals who are the key personnel of an approved provider where the approved provider is a corporation. There is no offence where the approved provider is not a corporation eg, sole trader, partnership, trust, church or charity set up under state law etc. There is also nothing in the Act or the Consequential Provisions Act 1997 that deems the above to be corporations for any provision of the Act.

It is interesting to note that the indexation for a penalty unit has far outstripped the indexation for the subsidies provided to care for the frail aged in Australia!!

Section 10A-3 sets out remedial orders by the Federal Court where an unacceptable key personnel situation, as defined, exists. The Section states that the Federal Court may make orders as it considers appropriate, to ensure that an unacceptable key personnel situation ceases to exist. This would obviously include excluding the disqualified individual from the key personnel position.

Item 11

This amendment includes the requirement to ensure the basic suitability of the providers’ key personnel as a Responsibility of Approved Providers under the Act. This therefore links this requirement to the Sanctions Principles and on-going sanctions. It is therefore imperative that the words “reckless as to that fact” in subsection 10A-2(1) are defined.

Item 12

This item simply substitutes a new heading

ANHECA agrees with this amendment.

Item 13

This item simply substitutes a new heading to account for the increased provider responsibility.

ANHECA agrees with this amendment.

Item 14

The new Section 63-1A sets out that it is the providers' responsibility to ensure the suitability of key personnel. Again ANHECA considers that the term "all reasonable steps" should be defined.

ANHECA recommends that providers be required to simply advise the Secretary of all key personnel and all changes to key personnel within 28-days of the change. ANHECA considers that the Department should have the responsibility for checking the criteria relating to disqualified individuals and of advising the industry of the identity of disqualified individuals.

Item 15

This is a definition of "disqualified individual" which simply refers to the definition in Section 10A-1.

ANHECA agrees with this amendment.

Item 16

This is a new definition of "Key Personnel" and is included in the dictionary. The definition has been split to cover an approved provider and a person making application to become an approved provider.

ANHECA agrees with this amendment.

General

ANHECA is concerned that this Schedule includes a number of requirements on providers that are not fully spelt out. The major responsibility to providers arising out of the changes in schedule 2 of this Bill requires the provider to take all reasonable steps to ensure that none of the provider's key personnel are disqualified individuals. This means that all providers need to take steps to ensure that their current key personnel would not be disqualified individuals and that all future staff and contractors who would be considered to be key personnel within the meaning of the Act are not disqualified individuals.

It also means that all persons making application to become an approved provider would need to ensure that their key personnel are not disqualified individuals.

To do so, they would need to ensure that:

- Their key personnel have not been convicted of an indictable offence, as defined; or
- Their key personnel are not insolvent under administration, as defined; or
- Their key personnel are not of unsound mind, as defined.

As the provider is required to take all reasonable steps to ensure the above and there is no definition as to what the reasonable steps are, providers may be required to have police checks, checks of a person's financial history in relation to bankruptcy etc and psychiatric evaluations carried out on their key personnel. The question arises will a Statutory Declaration by the key personnel suffice and that this Statutory Declaration form part of the contract of employment?

If the provider is required to have the checks and evaluations carried out this will be an expensive exercise for which there is no funding. It will be a new requirement the cost of which was not taken into account when subsidies were set.

ANHECA has recommended that providers be required to simply advise the Secretary of all key personnel and all changes to key personnel within 28-days of the change. ANHECA considers that the Department should have the responsibility for checking the criteria relating to disqualified individuals and of advising the industry of the identity of disqualified individuals.

There may also be problems for the provider in relation to Discrimination, Privacy and Industrial laws. ANHECA is not qualified to comment on the effects of the Bill on these laws and considers that the Senate needs to be thoroughly briefed by experts in this regard.

In an industry sector already experiencing considerable difficulty recruiting sufficient adequately trained staff, many will find a requirement to undertake psychiatric evaluations, have police checks done on them and to produce formal evidence of solvency an unnecessary intrusion.

Recommendations and Comments

Schedule 1

In the proposed Division 67A, places for residents who are on pre-admission leave and places for residents who have exceeded their entitlement to social leave and are reserving the place for their return to the facility are excluded from the calculation of occupied places for the purpose of the progressive revocation or suspension calculation. ANHECA considers that places “occupied” by residents on both pre-admission leave and for residents who are reserving a place for their return to the facility should be treated as occupied places for the calculation.

Section 66-1 details the list of sanctions that the Secretary has at his/her disposal. There are, however, no guidelines or principles as to what the Secretary takes into account to impose the various sanctions.

Schedule 2

ANHECA recommends that it should be the Secretary’s responsibility to carry out the checks of key personnel for disqualified individuals and therefore paragraph 3-4(c) should be amended accordingly. Alternatively, “basic suitability” requires definition.

ANHECA is extremely concerned that Government will require providers to carry out State and Federal police checks on current and future key personnel as well as solvency checks and psychiatric assessments. ANHECA considers that this may contravene privacy laws, Industrial law and Discrimination law.

The proposed subsection 9-1(3A) should be amended to reflect actions by key personnel occurring prior to the commencement of this Act that would lead to them being disqualified individuals and those occurring after the commencement of this Act. Providers may be aware of situations that occur up to the commencement of the Act that would mean that the key personnel was about to become a disqualified individual but they would not know that the person was about to become a disqualified individual if the action occurred after the commencement of the Act.

If the liability lays with the provider to determine whether the key personnel would be disqualified individuals under the Act (something that ANHECA disagrees with), there should be a further timeframe to advise the reasons why the person was a disqualified individual. If the provider advises a change to the key personnel within the required 28-days, and that change was due to the person being a disqualified individual, and the provider omitted to provide reasons why the person was a disqualifies individual, then the provider should have a further 28-days to provide that information.

The information on disqualified individuals kept by the Secretary should be made available to providers, residents and the families and prospective residents and their families to ensure the care of aged persons. ANHECA recommends that the Secretary keep an up to date list of disqualified individuals on the Department's web site and that all providers are updated by circular copy. Given that ANHECA has recommended that it should be the Secretary's responsibility to carry out the disqualified individual checks, ANHECA recommends that the responsibility of the provider be to advise all key personnel and all changes to that list within the 28-day period.

In relation to spent offences for the purpose of Division 10A, ANHECA recommends that this should read:

“The person was not sentenced to imprisonment for the offence, or was not sentenced for no more than 30 months; or A prescribed period of time has elapsed since the conviction (5 years where the offence was committed by a minor; 10 years in all other cases); or No further offences have been committed during the prescribed period referred to above.”

ANHECA recommends that definitions be included for the terms:

- Reckless to the fact; and
- All reasonable steps.

ANHECA considers that the penalty imposed in subsection 10A-2(1) is excessive and also considers that the indexation applied to penalties under the Act far outstrips the indexation applied to the subsidies paid to care for residents.

The penalties only apply to the provider, and the individual concerned, if the provider is a corporation. This is discriminatory against corporations in that there is no penalty for sole traders, partnerships, trusts, churches, charities and community organisations that are not incorporated as a corporation.

ANHECA considers that a provider should be required to simply obtain a Statutory Declaration from key personnel and from persons appointed as key personnel attesting that the person:

- Has not been convicted of an indictable offence, subject to the provision of spent convictions; and
- Is not insolvent under administration; and
- Is not of unsound mind.

ANHECA recommends that the Australian Senate Community Affairs Legislation Committee should be thoroughly briefed by experts in Discrimination law, Industrial law and Privacy law in relation to these amendments.