Aaged Care Amendment Bill 2011

Rebecca de Boer
Social Policy Section

Sharon Scully
Law and Bills Digest Section

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Aged Care Amendment Bill 2011

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House: House of Representatives

Portfolio: Health and Ageing

Commencement: Sections 1 to 3 and unless otherwise stated, on the day the Act receives Royal Assent.

Schedule 1 1 October 2011
Schedule 2 1 September 2011
Schedule 3 The day after the Act receives Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Aged Care Amendment Bill 2011 (the Bill) amends the Aged Care Act 1997 (the Act) to strengthen consumer protection for accommodation bonds and to improve the arrangements for handling complaints about Commonwealth funded aged care services.¹

Background

Basis of policy commitment

The provisions of this Bill were first announced as part of the Government’s health reform agenda and were foreshadowed in the 2010-11 Federal Budget. The proposed amendments seek to provide greater protection for aged care residents through strengthening the arrangements for bonds and improving complaint management in aged care.

Significant reform to aged care was not addressed as part of the Government’s health reform agenda. Rather, the Government commissioned the Productivity Commission (PC) to conduct an Inquiry into Caring for Older Australians and to provide options for structural reform of the aged care system. The PC is due to report to Government by the end of June 2011 but it is not clear when

¹ See Explanatory Memorandum, Aged Care Amendment Bill 2011, p. 1.

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the Government will release the report. A draft report was released for public consultation early 2011.2

The aged care sector is considered to be long overdue for reform and the Government has signalled that reform to aged care will be a second-term priority for the Gillard government.3 Although the provisions of this Bill do not make significant changes to the aged care sector, they may offer some improvements in the short term to both consumers and aged care providers.

Aged care bonds – historical overview

Aged care bonds have traditionally caused division among consumers, the aged care industry and other stakeholders. When the Howard Government first proposed the introduction of aged care bonds for all residential aged care residents in the mid-1990s, there was considerable community outrage and opposition from some parts of the aged care sector (for example, Catholic Health Australia). This has since changed and there is now widespread support for the introduction of bonds from the majority of aged care providers.4 Community expectations have also changed, although there is still some resistance to the extension of bonds to all aged care residents.5

The original intention of aged care bonds was to create an income stream for aged care providers that could be used for capital infrastructure. The accommodation bond effectively acts as an interest free loan from the aged care resident to the provider. Aged care bonds only apply to residents who are assessed by the Aged Care Assessment Team (ACAT) as requiring a ‘low’ residential aged care place. Since 1997, the average amount for the aged care bond has increased, but the total number of bonds has decreased. Despite this, the total value of accommodation bonds has doubled since 2004–05.6 The decrease in the number of bonds has largely been attributed to more people living in the community for longer and being assessed by ACAT as ‘high’ care prior to entering residential

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2. See footnote 7.
4. The Campaign for the Care of Older Australians (known as the ‘Grand Plan’) represents over 95% of all residential and community aged care providers in Australia. Their policy, inter alia, advocates for the removal of the distinction between ‘high’ and ‘low’ aged care places and the introduction of aged care bonds for all aged care residents.

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care. The increase in the value of bonds is considered to be the result of rising property values.\(^7\) It should be noted that the Government does not limit the amount of a bond.

Aged care providers have long argued that the current subsidy arrangements do not meet the costs associated with the provision of care or investment in capital infrastructure.\(^8\) It is not uncommon after each Federal Budget for the aged care industry to express disappointment that there was not additional funding for capital infrastructure.\(^9\) There have been predictions that there will be insufficient residential care ‘stock’ to meet future population projections.\(^10\) The introduction of bonds for all aged care residents was canvassed by the PC in its draft report, to address concerns about cross-subsidisation between ‘high’ and ‘low’ care residents as well create an income stream that could be used to generate income for capital infrastructure.

Although the proposed amendments to the Act do not address the structural issues associated with reform to the aged care sector or increase the amount of aged care bonds, they may offer greater flexibility to aged care providers to invest in aged care infrastructure. They also ensure that the income generated from bonds will be used for the purpose for which it was envisaged. Penalties apply if the income from bonds is misused.

### Complaints Investigation Scheme

A review of the Aged Care Complaints Investigation Scheme (CIS) was completed in October 2009 (known as the Walton Review). The Government accepted the recommendations of the Review.\(^11\) The Review made several recommendations, namely to restructure the organisation into three distinct Divisions\(^12\) and the establishment of the separate Aged Care Complaints Commission.\(^13\) The Review highlighted a number of structural issues about the resolution of complaints. It found that 63

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12. These Divisions are Assessment and Early Resolution, Investigations and Community and Stakeholder Relations.

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per cent of complaints were investigated and only a small percentage was resolved.14 Under the CIS, all complaints that might be a breach of the provider’s responsibilities require investigation. This resulted in a high caseload for CIS, compared with other complaint resolution bodies. It was suggested that this should be reversed with a greater number of complaints resolved.15 Further the review found that the CIS process was burdensome for both aged care providers and consumers alike and lacked flexibility when resolving complaints.

The proposed amendments attempt to give effect to some of the recommendations of the Walton Review. The Bill proposes to replace the existing ‘Investigation Principles’ with ‘Complaint Principles’. Section 96-1 enables the Minister to make the Complaints Principles to reflect this new focus. The Principles would be made by legislative instrument and, consequently, may be subject to parliamentary scrutiny. This amendment is further discussed under Key provisions.

The Walton Review also put forward alternatives to dispute resolution such as local resolution, assisted resolution and mediation. It remains to be seen whether they will be included in the Complaint Principles.

**Parliamentary and Committee consideration**

During the debate in the House of Representatives on the Bill, the Opposition moved an amendment to the Bill but this focused on extending the scope of the debate rather than the substance of the Bill.16 This Bill, with amendments, was negatived by the House of Representatives on 2 June 2011. However, it was passed later that day.

The Senate Committee on the Selection of Bills declined to refer this Bill to Committee. The Senate Committee on the Scrutiny of Bills noted that two provisions of the Bill, proposed Schedule 1, item 1 and proposed Schedule 1, item 5, could be considered a trespass on personal rights and liberties. This is further considered elsewhere in the Digest, under Key provisions.

The Committee has sought the Minister’s clarification on these matters.

**Policy position of non-government parties/independents**

Although the Opposition voted against the Bill, the debate in the House of Representatives would suggest that there is some support in the Opposition for the proposed amendments. Mr Crook did

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14. Ibid.
15. Ibid., p. 28.

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Position of major interest groups

There has been little stakeholder commentary in relation to the proposed Bill. Many of the stakeholders in the aged care sector participated in the PC’s inquiry and the Walton Review. There is widespread support among stakeholders for many of the proposals put forward by the PC’s draft report and the Walton Review.

Financial implications

This Bill has nil financial impact for the Commonwealth. The changes will provide greater flexibility for aged care providers with the income from accommodation bonds.

Key provisions

Due to time constraints, this Digest will only focus on certain provisions in Schedules 1 and 2 of the Bill, which set out proposed amendments to the Act.

Schedule 1—permitted use of accommodation bonds

Schedule 1 relates to the provision of specified information to the Secretary of the Department of Health and Ageing (the Secretary) and permitted use of accommodation bonds.

Provision—item 1

Item 1 proposes to insert new section 9-3B into the Act, which relates to the obligation of approved providers to provide information about their ability to refund accommodation bond balances.\(^\text{18}\)

Currently, the Secretary is restricted in requesting information from approved providers if he or she has concerns that the approved provider is experiencing financial difficulties or may be unable to refund accommodation bonds. For example, periodic reporting is not expressly provided for in the Act, making it difficult for the Secretary to monitor approved providers where accommodation bonds may be at risk.\(^\text{19}\)

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17. Ibid., p. 29.
18. For the meaning of ‘approved provider’ see clause 1 of Schedule 1 of the Act.

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Proposed section 9–3B gives the Secretary discretionary power to request the approved provider to give specified information relating to matters including:

- the provider’s suitability to provide aged care
- the provider’s financial situation
- the amount of one or more accommodation bond balances at any point in time, and
- how the provider has used accommodation bonds.\(^\text{20}\)

The Secretary may make such request if the Secretary believes on reasonable grounds that the approved provider:

- has not refunded, is unable to refund or is unlikely to be able to refund an accommodation bond balance as requested
- is experiencing financial difficulties, or
- has used an accommodation bond for a use that is not permitted under proposed section 57-17A (see item 5).

Importantly, the Secretary would be able to request the approved provider to give the specified information on a periodic basis.

The approved provider must comply with the Secretary’s request:

- within 28 days after the request is made or such shorter period as specified in the request, or
- for periodic reporting—before the time(s) worked out in accordance with the request.

The approved provider that is a corporation, would commit an offence with a penalty of 30 penalty units or $3300 for failure to comply with such request in the proper time.

Comment—item 1

It is noted that the Scrutiny of Bills Committee expressed concern about the requirement that the approved provider give the information ‘within 28 days after the request is made or such shorter period as specified in the request’. According to the Committee:

> The explanatory memorandum does not indicate why a shorter period may be required. The Committee therefore seeks the Minister’s advice as to why a shorter period could be required and whether the minimum period for the production of information should be 14 days as recommended in the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

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\(^{20}\) For the meaning of ‘aged care’, see clause 1 of Schedule 1 of the Act.

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Pending the Minister’s reply, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.²¹

Provisions—items 2–4

Items 2 and 3 propose to amend subsection 57-2(1) of the Act.

Existing subsection 57-2(1) provides for the basic rules of accommodation bonds.

Items 2 and 3 introduce two new rules—that the approved provider:

- must not use an accommodation bond for a use that is not permitted under proposed section 57-17A (see below), and
- must comply with prudential requirements under section 57-3.

In addition, item 4 proposes to repeal paragraphs 57-2(1)(n) and (na), effectively freeing up income derived from the accommodation bond.

Application—items 2 and 4

Under subitem 12(1) of Schedule 1, item 2 applies to accommodation bonds charged on or after Schedule 1 of the Bill commences (that is on 1 October 2011).

Before 1 October 2011, an approved provider must only use an accommodation bond:

- for a bond charged for entry into a residential care service—for purposes related to providing aged care to care recipients
- for a bond charged for entry into a flexible care service—for purposes related to providing flexible care to care recipients, and
- in any case—as permitted by proposed section 57-17A (subitem 11(1)).²²

Item 4 applies to income derived from an accommodation bond, or a retention amount, before, on or after Schedule 1 of the Bill commences on 1 October 2011. This is irrespective of whether the bond was charged or the retention amount received (subitem 11(2)).²³

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²² For the meaning of ‘flexible care’, see section 49–3 of the Act.
²³ As to ‘retention amounts’, see section 57-20 of the Act.

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Provision—item 5

Item 5 proposes to insert new sections 57-17A and 57-17B into the Act, which would provide for permitted uses of accommodation bonds and related offences committed by corporations and individuals.

Proposed section 57-17A sets out what constitutes general permitted use, as well as permitted use specifically in relation to both capital structure and investing in financial products.

General permitted use includes an approved provider using the accommodation bond:

- for the purposes of capital expenditure specified in proposed subsection 57-17A(2)
- for the purposes of investing in financial products specified in proposed subsection 57-17A(3)
- to make a loan with specified conditions
- to refund accommodation bond or entry contribution balances, and
- to repay debt accrued for the purposes of capital expenditure or refunding accommodation bond balances; or debt accrued before 1 October 2011—the commencement of this provision, for the purposes of providing aged care.

Proposed section 57-17B provides for offences relating to non-permitted use of accommodation bonds committed by corporations and individuals with penalties of 300 penalty units ($33,000) and imprisonment for two years respectively.

Application—item 5

Item 12 proposes two year transition arrangements, from 1 October 2011 to 30 September 2013, which apply to accommodation bonds charged on or after 1 October 2011.

Under subitem 12(2), as long as an approved provider complies with the User Rights Principles 1997, the provider may, during the two year transition period, use the bond for residential care or flexible care, as the case may be. In this situation, offences in proposed subsections 57-17B(1) and (2) would not apply to that provider, who would also be taken to have satisfied the provider’s responsibilities under Part 4–2 of the Act, which relate to the use of the accommodation bond.

Comment—item 5

It is noted that under proposed paragraph 57-17B(2)(d), an individual who is one of the key personnel of the approved provider commits an offence, if, among other things, the individual knew that, or was reckless or negligent as to whether either the bond would be used or that the use of the bond was not permitted.


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The Scrutiny of Bills Committee also expressed concern about this provision, stating:

Where a bill includes provision for a fault element of negligence, the Committee has taken the view that an explanation of the reasons for the use of negligence requirement should be justified. Unfortunately, the explanatory memorandum at pages 24-26 merely repeats the terms of the provision. The Committee therefore seeks the Minister’s further advice as to examples of the circumstances of possible offences and an explanation as to why negligence is an appropriate standard of fault in this context.

Pending the Minister’s reply, the Committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee’s terms of reference.25

In addition, it is also noted that strict liability would apply to the element of the offence which states that during a two year period after the accommodation bond is used, the aged care provider becomes insolvent and there is at least one outstanding accommodation bond balance.

According to the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (the Guide):

The Criminal Code reflects the same starting presumption as the common law: that fault must be proven for each physical element of an offence for a person to be guilty. ...

The application of either strict or absolute liability negates the requirement to prove fault (see sections 6.1 and 6.2 of the Criminal Code). The application of strict liability allows a defence of honest and reasonable mistake of fact to be raised. The application of absolute liability does not. The defence does not apply to circumstances where a mistake results from a lack of awareness of relevant facts.

Commonwealth Governments and Parliaments have long taken the view that any use of strict or absolute liability should be properly justified.26

In relation to the level of penalties imposed in item 5, the Explanatory Memorandum explains:

The maximum penalty of 300 penalty units for approved providers and 2 years imprisonment for key personnel is consistent with like offences in the Act. For example, section 10A-2 (relating to disqualified individuals) contains a maximum penalty of 300 penalty units for the offence committed by the approved provider and a maximum penalty of 2 years imprisonment where the relevant offence is committed by one of the key personnel of the approved provider.27

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25. Senate Scrutiny of Bills Committee, op. cit., p. 5.

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In relation to the purpose of the penalties, the Explanatory Memorandum states:

The offences are intended to reinforce the significance of approved providers’ obligations to their residents in dealing appropriately with residents’ funds and ensuring that refund obligations are met. They are not intended to be used in circumstances where there have been minor or unintentional breaches. Rather, they are structured to ensure that they only become available in the most extreme of circumstances – where an approved provider has failed to comply with its statutory obligations on the use of accommodation bonds and it has been unable to meet its refund obligations to residents.\(^{28}\)

**Schedule 2—Complaints Principles**

**Schedule 2** relates to the new Complaints Principles replacing the existing *Investigation Principles 2007* (Investigation Principles).\(^ {29}\)

Currently, the Office of Aged Care Quality and Compliance within the Department of Health and Ageing (the Department) manages the Aged Care Complaints Investigation Scheme (the CIS), under which care recipients, their families and members of the public may lodge complaints about aged care services and the Department investigates these complaints in accordance with the Investigation Principles.\(^ {30}\)

As previously noted, the Government accepted the recommendations of the Walton Review and decided that, among other things, the CIS should shift its focus from conducting investigation to focusing on care recipients and on resolving complaints to achieve the best outcomes for those recipients.\(^ {31}\)

**Item 6** proposes to repeal and replace **subsections 94A-1(1)–(3)** in the Act.

Existing section 94A-1 sets out what the Investigation Principles may address.

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31. See Explanatory Memorandum, op. cit., p. 28 and Associate Professor M Walton, op. cit.

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Proposed subsection 94A-1(1) provides that the Complaints Principles may provide a scheme for managing and resolving complaints and other concerns about aged care services provided by approved providers.

In particular, the note under proposed subsection 94A-1(1) in item 6 states that the Complaints Principles would be made by the Minister under section 96-1 (see items 16–18 below).

Under proposed subsection 94A-1(2) in item 6, Complaints Principles may deal with particular matters, which include:

- how complaints and concerns are resolved
- various ways of receiving, managing and resolving complaints
- roles, rights and responsibilities of complainants and approved providers
- considerations that are relevant to making decisions under these Principles, and
- review of such decisions.

The amendments proposed in items 16–18 enable the Minister to make by legislative instrument, the Complaints Principles in place of the existing Investigation Principles.

Item 16 proposes to amend subsection 96-1(1) so that the Minister would have discretionary power to make principles listed in the table of subsection 96-1(1) by legislative instrument.\(^{32}\)

Items 17 and 18 propose to amend the table in subsection 96-1(1) so as to insert a new reference to Complaints Principles and delete the existing reference to Investigation Principles.

Items 8–14 propose consequential amendments to other sections in Part 6-6 of the Act, which relate to the Aged Care Commissioner, essentially removing references to the Investigation Principles and replacing those references with references to the new Complaints Principles.

**Concluding comments**

At the time of writing, the two issues: (i) relating to offences of non-permitted use of a bond and (ii) timeframes for providing information, raised by the Scrutiny of Bills Committee have yet to be addressed by the Minister. It is recommended that this occurs before these provisions are agreed.

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32. This means that the Complaints Principles may be subject to parliamentary scrutiny under Part 5 of the *Legislative Instruments Act 2003*.

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