

Submission:  
Australian Law Reform Commission  
in response:  
Elder Abuse Discussion Paper 83

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February 2017

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## 1. Introduction

Our main focus is on the proposals for the proposed aged care Visitors Scheme. Our concerns with this are that all of the problems detected are to be managed within the current aged care regulatory framework. This is problematic in Australia as in other countries that have adopted a free market system. They have responded to social failures and rorting by creating a multitude of centralised and process driven regulatory processes that are distant from where services are provided. While this may not have been intentional, they have been designed by government in consultation with industry and consequently seem to serve government and industry, protecting them rather than serving the interests and needs of the community and its members. We see this as a major flaw in the proposed visitors scheme.

The second problem we have is the fragmentation of the regulatory process for aged care and elder abuse between a multitude of regulatory processes. There is a high risk that people will fall through the cracks.

As indicated in our initial submission to the Inquiry, Aged Care Crisis (ACC) is pressing to have all of these processes integrated and managed at a local level with a government supported and mentored local community focused group dealing with coal face issues and then guiding people through the more formal regulatory processes when they are required. Another separate visitors scheme simply adds to the fragmentation. The disability scheme is very similar and might well be better if integrated into this, but we have not examined that in detail.

A worrying consequence of investigations and reviews that focus on only one part of a broad problem is that broad underlying issues are not addressed. Each issue is addressed in isolation resulting in more process and further fragmentation, while core issues remain unaddressed.

Aged Care Crisis and its representatives recently attended public consultation workshops as part of the Aged Care Legislated Review<sup>1</sup> in Melbourne, Sydney and Brisbane. There was much criticism of the accreditation and the complaints systems, as well as the complexity and availability of information for both residential aged care and home care. Some relevant documents were supplied at our meeting.

Comments at the end of an article describing the complexity of the system, written by Associate Professor in Ageing and Health, Lee-Fay Low, '*Seven steps to help you choose the right home care provider*'<sup>2</sup> illustrate that home care has many of the problems described in this submission.

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<sup>1</sup> <https://www.agedcarecrisis.com/news/382-aged-care-legislated-review-public-consultations>

<sup>2</sup> Seven steps to help you choose the right home care provider (27 Feb 2017): Associate Professor in Ageing and Health, University of Sydney Lee-Fay Low: <http://theconversation.com/seven-steps-to-help-you-choose-the-right-home-care-provider-72409>

## 2. A global problem

### Free markets and regulation

Neoliberal policies have placed unprecedented pressure on vulnerable sectors. The response to the threat this created has been for government to regulate, to contract out regulation and to set in place a variety of self-regulatory processes. It is clear that these forms of regulation are proving ineffective in multiple sectors not only in Australia but internationally (eg Wall Street).

#### Examples:

- **Wall Street:** Citigroup on Corporate Medicine web site  
[https://www.uow.edu.au/~bmartin/dissent/documents/health/access\\_citi.html](https://www.uow.edu.au/~bmartin/dissent/documents/health/access_citi.html)
- **Australia:** Failed markets and culturopathy (Inside Aged Care)  
<https://www.insideagedcare.com/aged-care-analysis/cultural-perspectives/failed-markets-and-culturopathy>
- **Australia:** Contracting government services to the market (Inside Aged Care)  
<https://www.insideagedcare.com/aged-care-analysis/cultural-perspectives/contracting-government-services-to-the-market>
- **Australia** Maximising (Rorting) of the Funding system by providers (extract from web page 'Consequences of marketplace thinking' supplied)  
<https://www.insideagedcare.com/aged-care-analysis/aged-care-marketplace/aged-care-in-the-dark/consequences-of-marketplace-thinking>

The most effective front line form of prevention and regulation is where concerned citizens exercise control over one another's thinking by challenging ill-considered ideas in their day-to-day interaction. This is something that has been undermined by the pressures within the neoliberal state.

#### International failures in aged care:

- Aged care failures (Inside Aged Care)  
<https://www.insideagedcare.com/aged-care-analysis/aged-care-marketplace/aged-care-failures>
- International aged care: (Aged Care Crisis)  
<https://www.agedcarecrisis.com/solving-aged-care/part-4/international-aged-care>

#### Failures in the UK:

- This Is The Shocking Face Of Abuse In Britain's Elderly Care System (Buzzfeed 30 Apr 2014)  
<http://www.buzzfeed.com/alanwhite/this-is-the-shocking-face-of-abuse-in-britains-elderly-care#.jtGYJODJ>
- Whats wrong with CQC (The Centre for Welfare Reform) (supplied in folder)

#### Failures in the USA:

- Unmasked: How California's largest nursing home chains perform. Series of articles in The Sacramento Bee 8 Nov 2014 <http://media.sacbee.com/static/sinclair/Nursing1c/index.html>
- Fault Lines - Elderly Incorporated 20 Sept 2013 by Al Jazeera on You Tube (after documenting failures this analyses the system)  
[https://www.youtube.com/watch?v=L8cY\\_ZxW3aA&feature=share](https://www.youtube.com/watch?v=L8cY_ZxW3aA&feature=share)
- A CNN Investigation: Sick, dying and raped in America's nursing homes - The unthinkable is happening at facilities across the country: Vulnerable senior citizens are being raped and sexually abused by the very people paid to care for them. CNN quantifies the problem using data analysis and documents the systemic failure of nursing homes and state regulators to stop it: <http://edition.cnn.com/interactive/2017/02/health/nursing-home-aide-rape-charges>

### 3. Aged Care in Australia

The proposed aged care Visitors Scheme relies on the existing regulatory framework. This is a regulatory system that manages issues on behalf of government and service providers. This is managed in their interests rather than for seniors, family members and the community.

Aged Care Crisis also voiced their concerns of the aged care regulatory framework when speaking to the Community Affairs References Committee in February 2014 where we emphasised the importance of separating roles of education, oversight and regulation<sup>3</sup>.

#### Some examples of regulatory failure

The most reliable information originates not from the regulators, but from staff or family whistleblowers, and occasionally from investigative journalists posing as staff. For example, Rosie Squires, a journalist undertook an undercover investigation of nursing homes in 2010<sup>4</sup>. Another case was when a nurse exposed the cover-up death operated by another nursing home<sup>5</sup> - the coroner was extremely critical. Other examples are where family members have taken matters into their own hands to have their concerns addressed. Some have gone to extreme measures.

##### **Example 1: Mentone Gardens** (*articles supplied at meeting*)

The Community Visitors Scheme was aware of problems, but no action was taken. At the age of 90, one plucky resident defied all odds to right the wrongs of a proprietor and a bureaucracy that didn't seem to care. The failure of government regulators, their attempts to obstruct the ombudsman from obtaining documents and political obstruction compounded by an upcoming election, is an example of just how bad it can get. The subsequent Ombudsman's report was extremely critical of government oversight and ruled in the resident's favour<sup>6</sup>.

##### **Example 2: Family member's taking responsibility** (*summary of accounts supplied at meeting*)

One daughter had been suspicious about her father's bruises but lacked proof to back her complaints that he was being abused in his Adelaide nursing home. Her efforts to appeal to management were ignored. A hidden camera in the nursing home revealed problems in care including captured footage of a staff member apparently trying to suffocate her 89-year-old father<sup>7</sup>.

##### **Example 3: Multiple failures at a nursing home**

Whilst newspaper reports were highly critical of failures in this nursing home, the only type of report available to the public was the fully compliant assessment report where the home in question had passed 44/44 standards (*This accreditation report supplied at meeting*).

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<sup>3</sup> Community Affairs References Committee (14 Feb 2014): <http://bit.ly/2IAN6YS>

<sup>4</sup> Scandal after scandal - 2010 to 2014:  
<https://www.insideagedcare.com/aged-care-analysis/19-years-of-care/scandal-after-scandal>

<sup>5</sup> Death in a five star nursing home (21 Sep 2014, ABC): <http://www.abc.net.au/radionational/programs/backgroundbriefing/2014-09-21/5753372>

<sup>6</sup> Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service (Apr 2015)  
<https://www.ombudsman.vic.gov.au/getattachment/ac62f72a-28b3-4ffe-9894-80440ccb5678>  
At 90, Allan Lorraine FCPA geared up for the fight of his life <https://intheblack.com/articles/2017/02/01/allen-lorraine-90-gears-up-to-fight>

<sup>7</sup> Secret camera captures abuse of elderly man in nursing home including attempted 'suffocation' (25 Jul 2016, ABC)  
<http://www.abc.net.au/news/2016-07-25/secret-camera-captures-nursing-home-attempted-suffocation/7624770>

#### **Example 4: Claims of understaffing by family members at a for-profit nursing home**

In a 2017 example more than one family spoke out around their experiences and claims of systemic understaffing<sup>8</sup> and are calling for higher staff numbers. One family member detailed her complaint over the treatment of her husband: “*including being called in to help clean him when he was covered in his own faeces and being told by a nurse of bleeding on his scrotum after he was left in a wet nappy for 12 hours*”.

Some family members have resorted to media and online petitions appealing to government to try and address staff shortages. There are now numerous online petitions<sup>9 10 11</sup> from concerned citizens across Australia regarding staffing issues in aged care.

#### **Example 5: Private equity (some documents supplied at meeting)**

This private equity owned group sacked staff and cut costs in preparation for listing on the share market when the right moment arrived. This home had been purchased from a non-profit provider and care had deteriorated since then. A residents support group lodged an extensively documented complaint to the Complaint’s Commissioner. Instead of being investigated, this was referred to the Quality Agency. The only response received to their complaint by the residents support group was when the provider sent out a newsletter stating that they had ‘*passed all standards with flying colours*’.

#### **Example 6: Residents banned (discussed at meeting)**

Family members are seen as the problem and denied access to family<sup>12</sup>.

#### **Example 7: Industry benchmarks flawed**

A coronial inquest in 2016 heard that staff at a nursing home where a resident died in March 2012, were so busy on the night that they could only glance at residents to check them. She was found lying face down with her head and neck stuck between her mattress and bed pole, with her knees on the floor<sup>13</sup>. The nursing home claimed that staffing levels at the time were “*above industry benchmarks*” quoting the benchmarks in a 2010 document entitled the ‘*Stewart Brown Aged Care Financial Performance Survey*’.

The Coroner concluded that:

“*... staffing levels around the period of Mrs xxx’s death were in accordance with expected levels in the industry. I am reinforced in this conclusion by the generally held view of the staff members who gave evidence that (nursing home) was a ‘better place to work’ than other facilities. Nevertheless they universally stated that they were not able to provide the optimum care. Whilst these staff members were caring and dedicated, I did not gain the impression that they sought to provide residents with a level of care that was unrealistic. They simply articulated that they were not able to fulfil their duties. Their evidence was given independently of each other and they bore no malice towards (nursing home). I accept their evidence.*” (page 47<sup>14</sup>)

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<sup>8</sup> Aged care nightmare: man's scrotum 'left bleeding' (20 Feb 2017)  
<https://www.news-mail.com.au/news/aged-care-nightmare-mans-scrotum-left-bleeding/3145839/>  
'Get me out of here': Mum's plea to daughters (23 Feb 2017)  
<https://www.qt.com.au/news/mum-called-crying-new-claims-on-care-at-nursing-ho/3146833/>

<sup>9</sup> Stop Nursing Home Negligence (change.org petition): <http://bit.ly/2lxgb7G>  
<sup>10</sup> <https://www.change.org/p/australian-human-rights-commissioner-advocate-rights-video-surveillance-cameras-vulnerable-peoples-safety>  
<sup>11</sup> <https://www.change.org/p/mandate-aged-care-staff-resident-ratios>  
<sup>12</sup> Aged care claims of neglect and intimidation with families barred from seeing parents <http://www.abc.net.au/7.30/content/2015/s4328120.htm>  
<sup>13</sup> Coroner - Magistrates Court of Tasmania - pg 45: [http://www.magistratescourt.tas.gov.au/\\_data/assets/pdf\\_file/0007/354724/Westcott,\\_Barbara.pdf](http://www.magistratescourt.tas.gov.au/_data/assets/pdf_file/0007/354724/Westcott,_Barbara.pdf)  
<sup>14</sup> Coroner - Magistrates Court of Tasmania - pg 45: [http://www.magistratescourt.tas.gov.au/\\_data/assets/pdf\\_file/0007/354724/Westcott,\\_Barbara.pdf](http://www.magistratescourt.tas.gov.au/_data/assets/pdf_file/0007/354724/Westcott,_Barbara.pdf)

The coroner continued stating that:

*"... the industry benchmarks for adequate staffing did not provide for a realistic workload of the staff nor the ability to fulfil all of their tasks. On a wider scale, the evidence suggests that staffing levels are often inadequate across the aged care industry. The evidence also indicated that staff absenteeism was a significant factor in reducing staffing levels to below what was adequate to provide proper resident care. Again, the evidence gives me no reason to believe such an issue is confined to (nursing home)".*

The StewartBrown benchmarks are contrasted with international standards for staffing in bar graphs on pages 21 and 22 of our final supplementary submission to the *Future of Australia's Aged Care Sector Workforce Inquiry*<sup>15</sup> (*supplied to you at our meeting*). The international data referred to in that submission shows that, at the benchmark levels, significant amounts of required care would be missed and a significant number of residents would be at risk of harm. As both Bentley's and StewartBrown's reports show, probably over half of all nursing homes have levels below this benchmark and yet these facilities are fully accredited.

#### **There are two issues here:**

1. The first is the issue of when a failure to provide adequate staff to provide care becomes elder abuse.
2. The second is when the working conditions, the pressure on staff and organisational culture leads to a task focused and callous approach to care and sometimes to frustration that is taken out on the residents.

The home remained fully accredited.

This is not the first time that a resident's death has been linked to poor staff levels and remained fully accredited. In February 2009, a nursing home had 'trialled reduced staff numbers' after being warned of a heatwave and the need for more oversight. A resident died after she wandered into the home's courtyard and could not re-enter the home, as the door to the courtyard only opened from the inside. On the day she died, temperatures reached 46 degrees Celsius<sup>16</sup>.

## **Australian Aged Care Quality Agency (AACQA)**

*(previously named the Australian Aged Care Standards and Accreditation Agency)*

### **Accuracy of reporting**

Since 1999 the Government has explained its decision to remove probity provisions in 1997 on the basis that ownership has no impact on care. The approved provider system established in its place only considers the suitability of 'key personnel' who control the care provided. They may not have a criminal record. However, it would be a stretch to assume that owners who appoint 'key personnel', would have no influence. In the face of overwhelming evidence to the contrary, government have insisted that ownership has no impact on care.

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<sup>15</sup> Final supplementary submission (ACC) to Inquiry into Human Services (Productivity Commission):  
<http://www.aph.gov.au/DocumentStore.ashx?id=2b325908-0cc9-439d-adc5-21b65b741681&subId=414405>

<sup>16</sup> <https://agedcaresite.wordpress.com/2013/03/18/case-study-joan-ambrose-noble-manor-nursing-home-victoria/>  
Coroners Court of Victoria 1 August 2012  
[http://www.coronerscourt.vic.gov.au/resources/38577fca-7b47-40d8-bff9-4218480135e3/joanambrose\\_071109.pdf](http://www.coronerscourt.vic.gov.au/resources/38577fca-7b47-40d8-bff9-4218480135e3/joanambrose_071109.pdf)

This is a politically sensitive issue. In the face of readily available international data, this has been consistently supported by the Quality Agency and evidence to the contrary ignored. They have adopted a system of reporting that under-reports the true incidence of failures.

## 2008: Aged Care Report Card

**1. Under-reporting data:** Aged Care Crisis had been collecting data and had performed an analysis on homes that had failed one or more standards during 2007-2008. Our records indicated that at least 108 homes had failed. ACC were concerned when the tabled annual report (released 26 Nov 2008) indicated that only 1.6% (46 homes) had failed to meet accreditation standards and this figure was quoted by the minister.

We wrote and asked the Minister to explain the unqualified figure she had quoted in parliament. She later admitted that 199 homes (7%) had failed during the year. In her reply dated 16 Jan 2009, she indicated that: *"The (Agency's Annual) Report correctly indicates that, on 30 June 2008, 46 aged care facilities were operating with some level of non-compliance with the Accreditation Standards. The Report does not include instances of non-compliance in cases where the non-compliance was rectified prior to 30 June 2008".*

In other words, the figures in the tabled annual report provided reported only those facilities that had failed to correct failures and claim full reaccreditation on a target date, which they were aware of. In spite of this misrepresentation of the true incidence, the Agency has continued to report data in this way and has not reported the annual number of failures.

**2. Misrepresenting data about ownership:** Over the years, the Agency have consistently reported figures showing that there is no difference in performance between for-profit owned homes when compared with non-profit owned homes. This conflicts with international data in countries that do not have remote rural sectors. They also reported figures showing much poorer performance in rural and remote areas when compared with metropolitan areas. There are very few for-profit owned facilities outside metropolitan areas. Almost all of the care is provided by non-profits. It was obvious that to be performing equally well, non-profit owned facilities must be performing much better in metropolitan areas.

When the variable of distance was taken into account, our analysis showed that, as in international studies, non-profit homes performed 2-3 times better than for-profit owned homes in Metropolitan areas. In spite of our study, the Agency has continued to report data in this way. Many academics with some statistical knowledge on the Agency's board, would have signed off on these poorly analysed figures over the years<sup>17</sup>.

## 2014: UTS study

A study by academics at the Sydney University of Technology<sup>18</sup> into the risk of sanctions in nursing homes showed that for-profit homes were more than twice as likely to be sanctioned when compared with non-profit homes. In response to the study, the Agency (AACQA), at an aged care industry conference, reported it's data in the same way as in the past and in addition stated "*but certainly we are seeing no discernible difference between the for-profit and not-for-profit sector*".

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<sup>17</sup> Aged Care Report Card - <https://www.agedcarecrisis.com/news/research/108-aged-care-report-card>

<sup>18</sup> Quality failures in residential aged care in Australia: The relationship between structural factors and regulation imposed sanctions (Baldwin, R., Chenoweth, L., dela Rama, M.J. & Liu, Z. 2014, (Faculty of Health, University of Technology, Sydney, New South Wales, Australia). <https://www.agedcarecrisis.com/news/research/218-quality-failures-in-racfs-in-australia>

When the Agency were challenged via telephone, correspondence and publicly about the way they analysed their data, they refused to respond by explaining their figures<sup>19</sup>.

**3. An industry friendly initiative:** Whilst legislation allowed for the publication of 'improvement outlines' from service providers, the then Agency responded to ACC that not one 'improvement outline' over a 12-month period was amongst them. The Agency responded to our FOI request: "*In practice, very few homes have ever submitted an improvement outline<sup>20</sup>, and none did so in 2007/08. Their usual practice is to simply make a submission*". We later found out that the Agency actively encouraged service providers to label their responses as "submissions", which were not subject to FOI at that time.

## Additional concerns around accreditation and complaints data

- The Agency does not publish failures by company ownership. When multiple homes owned by a provider fail, it is left to community groups to investigate and warn potential residents<sup>21</sup>.
- Plans to reduce the regulatory burden by extending the period between formal accreditation visits from 3 to 5 years were trialled in South Australia by choosing a number of homes claimed to have a good track record. A community group challenged the suitability of several of them because of their chequered pasts, throwing into question the validity of the trial<sup>22</sup>. When we consider the extensive regulation in countries like the USA, the claim to 'burdensome regulation' rings hollow.
- The vast majority of published reports are the result of the cyclical accreditation site audits (or re-accreditation audits) performed once every 3 - 5 years at the request of the nursing home, at a convenient time, after the homes have spent weeks or months preparing. Such reports tell us that the management of the aged-care home knows what it is supposed to do but gives no information about what happens on the other 1,093 - 1,825 days of the cycle.
- Any failures revealed as a result of unannounced visits or assessment contacts are not publicly disclosed nor subject to public scrutiny<sup>23</sup>. For example, visits to homes by the Agency in 2015-2016 included 2,866 unannounced visits and 514 assessment contacts<sup>24</sup>. The results of these visits are not made publicly available.
- There are two versions of the published reports, with the more detailed report (that includes staffing information) labelled as 'SENSITIVE', given to providers but withheld from the public. Staff levels and skills in a home are one of the most important determinants for residents making choices.
- It is not possible for anyone in the public to find out the (total) number or nature of substantiated complaints by the Aged Care Complaints Commissioner for any particular home.

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<sup>19</sup> Quality Agency rejects ownership factor on accreditation Australian Ageing Agenda 25 March 2015 (see Comments at foot of page) <http://www.australianageingagenda.com.au/2015/03/25/quality-agency-rejects-ownership-factor-on-accreditation/>

<sup>20</sup> [https://www.aacqa.gov.au/providers/residential-aged-care/copy\\_of\\_processes/reconsiderations-and-reviews](https://www.aacqa.gov.au/providers/residential-aged-care/copy_of_processes/reconsiderations-and-reviews)

<sup>21</sup> Aged Care Disgrace - The Voice July 2010 [http://www.cpsa.org.au/files/The\\_Voice/Voice%20July%202010%20for%20web1.pdf](http://www.cpsa.org.au/files/The_Voice/Voice%20July%202010%20for%20web1.pdf)

<sup>22</sup> ABC: South Australian nursing homes trial increased autonomy amid reports of lowering standards (28 Jan 2015) <http://bit.ly/2lVeNG>  
Government cans quality checks: <http://www.cpsa.org.au/aged-care/1165-government-cans-quality-checks>

<sup>23</sup> Unannounced visits: [https://www.aacqa.gov.au/providers/residential-aged-care/copy\\_of\\_processes/unannounced-visits](https://www.aacqa.gov.au/providers/residential-aged-care/copy_of_processes/unannounced-visits)

<sup>24</sup> AACQA 2015-2016 Annual Report: <https://www.aacqa.gov.au/about-us/annual-reports/annual-report-2015-2016/AACQ%20Annual%20Report%202016%20ACCESSIBLE%20WEB.pdf>

- All unannounced visits and assessment contacts are kept confidential - as are facility responses to adverse findings.
- The Quality Agency's reports are largely based on processes. The important data that would reveal actual outcomes is not collected.
- **Basic entitlement to data:** In accreditation, consumers should be entitled to disclosure of all past, as well as present, reports. Information needs to be presented in a digestible format. Providers should be profiled as well as individual facilities.

Frail older people are one of the most vulnerable groups in society and their protection should outweigh all other considerations. In order to achieve this protection, community members must be able to see what the company or provider is capable of when no one is watching - not just when they have been given time to prepare for a cyclical pre-announced visit and not simply after providing a response to an adverse finding in order to stay in business.

For more about data collection, see Aged Care Crisis submission to the Inquiry into Human Services - section **J. The Importance of Data** (pg 19)<sup>25</sup> and attached.

Aged Care Crisis is pressing for a community organisation to work with nursing staff and management in collecting data so preventing gaming and ensuring total transparency. Because the data would be collected in the context of an overall ongoing on site objective and subjective assessment by those assisting prospective residents Campbell's Law would not apply.

(Campbell's Law states that '*The more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor.*' eg. Quality Indicators).

## FOI: Getting blood out of a stone

**Freedom of information:** The Department of Health and Ageing (now Department of Health) has a reputation for being secretive and obstructive. Aged Care Crisis's (ACC) experience defied belief. It illustrates just how difficult it is to get any type of information in aged care<sup>26</sup>.

ACC asked the department for the addresses of all facilities providing aged care. We needed the information to help those who approach us (not comfortable or able to access a computer) for guidance to find the facilities nearest to them. We did not anticipate that it would take an FOI, let alone appealed, to supply such basic information.

After some nagging by ACC, we received a response refusing the request on the grounds that addresses were "*Protected Information*" under the *Aged Care Act 1997*. ACC examined the *Act* and it was clear that this was not the case. The department did not respond to a request for clarification. A politician kindly offered to help ACC get the information, but he too was refused. The addresses were only released after the politician appealed the decision.

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<sup>25</sup> [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0018/205146/sub273-human-services-identifying-reform.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0018/205146/sub273-human-services-identifying-reform.pdf)

<sup>26</sup> Freedom from information: A case study <https://www.agedcarecrisis.com/opinion/articles/115-freedom-from-information-a-case-study>

## Exemptions and secrecy provisions

The exemption relating to secrecy provisions within Acts should be re-examined. S38 of the Act prevents release if disclosure is ‘prohibited under an enactment’, and this section has been subject to criticism from the OAIC. In *A v Department of Health and Ageing* (2011)<sup>27</sup> the applicant sought documents relating to his deceased mother that was held under the Aged Care Act. DOHA refused access to the documents on the grounds that a secrecy provision in the *Aged Care Act* prevented access under s38. In his decision, Commissioner Popple noted from the outset that he was uncomfortable with the current operation of the exemption: “*This IC review requires consideration of the interaction between provisions of the FOI Act and provisions of the AC Act. That interaction is complex and, in this case, leads to a result that does not sit comfortably with the IC review role under the FOI Act.*”

The scope of this section is not limited to the *Aged Care Act*. Schedule 3 of the *FOI Act* lists Acts where secrecy provisions apply, however this list is not exhaustive. The key problem with this exemption is that it removes power from the OAIC to release information, prevents the documents being subject to the normal FOI exemption process and instead provides an overriding discretion to Ministerial officers to release information<sup>28</sup>.

In *Duncan and Department of Health and Ageing*, the Administrative Appeals Tribunal (AAT) held that parts of information protected under the *Aged Care Act 1997* (Cth) could be released to the applicant on the basis of the exception in s 86-3, which permitted the Secretary of the Department to disclose information if he or she certified, in writing, that such disclosure was necessary in the public interest. That information was also denied<sup>29</sup>.

## Family members looking for information

Families do get their heads in a knot and are not always right but they often do have very different views about what happened to those held by the nursing home. Usually those reported in the media seem to have some validity or to reflect poor handling of the situation by the nursing home and/or government's complaints department. Those differences are not being resolved. Families that feel they are right eventually go to the media and nursing homes to their lawyers. The families can then be threatened with lawsuits.

**Against all odds:** Some family members, despite facing a hostile system and facing many unanswered questions around the death of a parent in care, have persisted in an attempt to shine a light on practices that they feel are endemic in the system. John M raised a complaint (with the then Aged Care Complaints Scheme) about his concerns over systematic understaffing of the dementia specific aged care facility where his Mother lived in August 2012<sup>30</sup>.

*“I now know that my complaint was never investigated, but after my identity was made known in that confidential complaint, with no corrective action from the Complaints Scheme or Accreditation Agency, the manager was emboldened to escalate the understaffing situation, whilst carrying out acts of retribution on my Mother and Family”*

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<sup>27</sup> <https://www.oaic.gov.au/freedom-of-information/foi-decisions/ic-review-decisions/2011-aicmr-4>

<sup>28</sup> Excerpt from submission to FOI Act (Paul Farrell) <https://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/Paul%20Farrell.doc>

<sup>29</sup> Duncan & Anor & Department of Health & Ageing [2004] AATA 747 (16 July 2004): <http://www.austlii.edu.au/au/cases/cth/AATA/2004/747.html>

<sup>30</sup> John Mullen and Australian Aged Care Quality Agency (Freedom of information) [2017] AICmr 11 (1 February 2017): <http://www.austlii.edu.au/au/cases/cth/AICmr/2017/11.html>

John Mullen and Australian Aged Care Quality Agency [2016] AICmr 51 (26 Aug 2016) <http://www.austlii.edu.au/au/cases/cth/AICmr/2016/51.html>

**What happened to mum:** Other family members are left to wrestle with an impersonal and legalistic system to try and find out what might have occurred around the death of their parent.

Note that in this published FOI result, all relevant data except for the nature of the request has been deleted. There was no information there to indicate what occurred<sup>31</sup>. This contains no closure for family.

## Comment on data and elder abuse

Elder abuse is occurring in a sector where only limited data is collected, where data is massaged and controlled and where access to data is deliberately obstructed.

If families can't gain access to data explaining how their loved ones died what hope does the community have? Addressing abuse in an environment like this will be difficult.

## 4. Society and elder abuse

### *Rebuilding a society that empathises and takes responsibility*

We can understand that the ALRC will focus on legal aspects when addressing elder abuse, but this abuse occurs within societies. Documenting it and managing it as the ALRC recommends does not address the issues in our society that give rise to it. If we are to address elder abuse we need to look at what in society, in our aged care system and in ourselves predisposes us to ignore the wellbeing and interest of others, and then to abuse them or to exploit society in our own interests.

**Elder abuse in context:** Elder abuse occurs within the wider context of a society in which we have to lock everything, worry about and coset our children. We have a society where child abuse, family abuse and elder abuse have become major social issues. While much of this was undoubtedly hidden in the past it is clear that these are problems that have grown and continue to do so. We should see elder abuse in context and consider what can be done to address the factors in society and in specific contexts that have led to this or facilitate it.

**The social dimension:** We are social beings. Society and democracy depend on our ability to understand one another, to imagine other's lives and to feel for them. This is the basis for empathy and leads us to care for and assume responsibility for others and for our society. USA critic of free markets, Robert Kuttner, described this as developing 'social selves', an identity through empathic relationships and caring – caring about our society and its members rather than our own personal ambitions. But if we have no opportunity to develop social selves then they atrophy and whither<sup>32</sup>.

Aboriginal society understood the role we play in using social pressures to control the thinking and behaviour of others so keeping them socially responsible. Travel writer Bruce Chatwin in his 1987 book '*The songlines*' described the traditional formal structures developed for supervising one another's responsibilities in that society so ensuring that society and its traditions were cared for.

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<sup>31</sup> [http://www.health.gov.au/internet/main/publishing.nsf/Content/7DD27731D12F76C9CA257F1B007A23D9/\\$File/093-1516%20Document%2027.PDF](http://www.health.gov.au/internet/main/publishing.nsf/Content/7DD27731D12F76C9CA257F1B007A23D9/$File/093-1516%20Document%2027.PDF)

<sup>32</sup> The Limits of Markets Robert Kuttner, The American Prospect, 19 Dec 2001 <http://prospect.org/article/limits-markets>

Sociologist Eva Cox addresses some of these issues in her 1995 Boyer Lectures ‘A Truly Civil Society’<sup>33</sup>. In her 6<sup>th</sup> final lecture Cox mentions many of these issues and talks about “public policy assumptions about competition and privatisation, which are unravelling the social fabric”.

Professor of sociology, Michael Fine, has written several papers over the years about the nature of caring relationships and the way in which differences in power are managed within them. He stresses the difficulties he sees in developing these sort of relationships within the context of the current aged care marketplace. He too expresses an interest in greater community involvement.

- Dependence, independence or inter-dependence? Revisiting the concepts of ‘care’ and ‘dependency’ Michael Fine and Caroline Glendinning *Ageing & Society* 25, 2005, 601–621.
- Care: A Critical Review Of Theory, Policy And Practice By Kirstein Rummery And Michael Fine In *Social Policy & Administration* Issn 0144–5596 Doi: 10.1111/j.1467-9515.2012.00845.X Vol. 46, No. 3, June 2012, Pp. 321–343:  
<http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9515.2012.00845.x/abstract>
- Individualising care. The transformation of personal support in old age Michael D Fine. *Ageing & Society* 2012 doi:10.1017/S0144686X1100131: <https://mq.academia.edu/MDFine>
- Nurturing longevity: Sociological constructions of ageing, care and the body Michael Fine *Health Sociology Review* (2014) 23(1): 33–42.: <https://mq.academia.edu/MDFine>
- Economic Restructuring and the Caring Society. Changing the Face of Age Care Work by Fine, M. (2014), *Soziale Welt*, Sonderband 20, B. Aulenbacher, B Riegraf, H Theobald (Eds): pp269-278  
[https://www.researchgate.net/profile/Michael\\_Fine6/publication/269637082\\_Economic\\_Restructuring\\_and\\_the\\_Caring\\_Society\\_-Changing\\_the\\_Face\\_of\\_Age\\_Care\\_Work/links/549128690cf2d1800d87c850.pdf?origin=publication\\_list](https://www.researchgate.net/profile/Michael_Fine6/publication/269637082_Economic_Restructuring_and_the_Caring_Society_-Changing_the_Face_of_Age_Care_Work/links/549128690cf2d1800d87c850.pdf?origin=publication_list)
- Eva Fedor Kittay: Dependency Work and the Social Division of Care by Fine, Michael D. (2015), in Fran Collyer (ed) *The Palgrave Handbook of Social Theory in Health, Illness and Medicine*, Palgrave, Basingstoke UK: 628-643:  
[http://link.springer.com/chapter/10.1057%2F9781137355621\\_40#page-1](http://link.springer.com/chapter/10.1057%2F9781137355621_40#page-1)
- Cultures of Care by Fine, Michael (2015) in J. Twigg and W. Martin (eds) *Routledge Handbook of Cultural Gerontology*, Routledge: Abingdon UK: 269-276:  
[https://www.researchgate.net/publication/283025823\\_Cultures\\_of\\_care](https://www.researchgate.net/publication/283025823_Cultures_of_care)

**Modern neoliberal society:** The move to urbanisation and to more instrumental relationships has played a part in these changes. We increasingly know people by what they do rather than who they are. Relationships are much more transitory. In a society driven by personal ambition and personal interest there is little to encourage us to engage with the lives of others in an empathic way. Individualism is seen as performance in the marketplace rather than in the service of the community.

More recently our society has focused on competition, efficiency, hierarchical management, processes and tasks. We find ourselves on a treadmill that allows no space for engaging with the humanity of others or for considering the wider consequences for society. Personal relationships and social interaction are neither competitive nor efficient. They are the glue that builds and binds society. They require time for discourse and even more importantly reflection on that discourse.

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<sup>33</sup> Eva Cox, A truly civil society (Boyer Lectures 1995) [https://www.crcresearch.org/files-crcresearch/File/cox\\_95.pdf](https://www.crcresearch.org/files-crcresearch/File/cox_95.pdf)

Efficient management strategies take control of society and its activities so that the community no longer has a major role in managing its own affairs and caring for others. This has been taken away from them. Our loyalty is to our employer rather than our society. In their book 'The human costs of managerialism: Advocating the recovery of humanity' published in 1995 Stuart Rees and Gordon Rodley edited contributions from 20 authors who described the way in which neoliberal management strategies were destroying our humanity.

## Our concern

Aged Care Crisis argues that if we are to truly address these many issues, including elder abuse, then we need to restore some balance to society. We need to accept that building society and enabling communities to manage their own affairs and contribute has to be balanced against the neoliberal beliefs in competition and efficiency.

For society/community to function effectively in maintaining this balance they need transparent access to information, a balance of power and credibility, and an ongoing discourse that embraces all of its members and prevents silos (eg in nursing homes) from forming.

We are pressing for community to be supported and empowered to assume a controlling interest in aged care.

## Relevance for the ALRC

We are concerned that the ALRC draft submission fails to understand and address the core issues in our society that lead to elder abuse. While data is to be collected by visitors, there is no role for community in addressing and following up on any problems found.

We feel that addressing elder abuse requires more than educating. There needs to be greater direct involvement, an involvement that generates discourse within the community. It is active discourse around real problems that changes attitudes and builds social consciousness and empathy.

We note that Canada is already pursuing this path and is making a far greater effort to engage community in addressing elder abuse. They have set up government funded backbone organisations to support and foster community engagement.

- British Columbia Association of Community Response Networks  
<http://www.bccrns.ca/generated/whatisacrn.php>
- Tamarack Institute: <http://www.tamarackcommunity.ca/communityengagement>  
<http://www.tamarackcommunity.ca/latest/if-you-want-to-build-community-start-where-the-people-are>

We have not had time to examine this Canadian report and the prevalence study underway, which may be of interest to you:

- Full National Seniors Strategy Report by the National Institute on Ageing:  
An evidence-informed national seniors strategy for Canada (Jan 2016)  
[http://cnpea.ca/images/national-seniors-strategy-second-edition\\_jan2016.pdf](http://cnpea.ca/images/national-seniors-strategy-second-edition_jan2016.pdf)
- The National Survey on the Mistreatment of Older Canadians, A Prevalence Study:  
<http://cnpea.ca/en/publications/studies/68-the-national-survey-on-the-mistreatment-of-older-canadians-a-prevalence-study>

## 5. Key points

- Family member's concerns are ignored by nursing home management and in some cases, family members are denigrated.
- Some family members who keep complaining are banned from visiting loved ones.
- The Complaints system is not working for residents and serves to conceal the extent of aged care failures.
- The Complaints system is focused on mediation, which exposes the large power imbalance when residents are left to fend for themselves.
- Families, staff and residents are frightened to complain because they fear retribution. We would like to emphasise the importance of addressing this in relation to elder abuse.
- Accreditation is easily gamed, focuses on process, and lacks transparency.
- **Transparency** is a core problem in relation to data and accreditation. The FOI system is not working.
- **Staffing is inadequate:** Our third and final supplementary submission into the Inquiry into Australian Aged Care Workforce (*supplied*) documents:
  - a) the inadequate and inaccurate data supplied by industry,
  - b) that resident acuity is increasing at the same time as trained staff are being decreased,
  - c) that Australia falls far short of the safe levels of staffing documented by international studies,
  - d) the poor levels of staffing compared with the USA, and
  - e) the important relationship between ownership types for both staffing and standards of care in the USA and Australia.
- **Importance of an ethic of responsibility in vulnerable markets:** Aged Care Legislated Review (*response to workshop - supplied*)  
This response emphasises:
  - a) the importance of social responsibility and its absence from the aged care sector and
  - b) The failures in the regulatory system.
- **The community is unable to exert its important role in social control if it does not have access to data and is not in regular discourse with staff and management providing care in nursing homes and community.**