

**WILLS AND ESTATES ACCREDITED SPECIALISTS
ANNUAL DINNER**

A QUESTION OF DIGNITY

8 NOVEMBER 2010

Justice PA Bergin

- 1 My good friend and colleague the late Peter Hely, who died far too young whilst serving as a Judge of the Federal Court of Australia, identified the greatest attribute of an after dinner speaker as “brevity”. Although I will do my best to attain that attribute this evening I do wish to discuss an aspect of life in which our performance as a community appears wanting - it is how we look after the elderly.

- 2 Many elderly members of our society are vulnerable and in this regard have needs that are not unlike the needs of children. They require supervision so that they do not hurt themselves and they need love and reassurance so that in this phase of their lives they feel secure. As a community we have expectations of how parents should treat children however we seem to find it difficult to develop expectations of how children will treat elderly parents or other relatives. A lifetime has passed and so much can happen that can affect the relationship between parents and adult children and other relatives.

- 3 Some cultures do not need multi-million dollar bureaucracies to take care of the elderly because their families take care of them. In our culture this is in the main not so. Many elderly people - together with a spouse or a partner or alone - move (or are moved) into long term care “facilities” when they find it difficult to get around unaided and/or become a little

confused. There is a myriad of reasons for the development of this phenomenon – not the least of which is the profit for those who operate these facilities. It is important to commence this discussion from the premise that this is a phenomenon of our culture without in any way appearing to be judgmental. There are many adult children and others who would much prefer to take care of their relatives but who simply cannot provide or perhaps afford the intensive care that is needed.

- 4 It is a phenomenon that also exists in the United States of America. In some aspects of life it seems that the Americans do it first. Forty-five years ago the *Older Americans Act* 1965 (the Act) was passed. An “older” American is defined as an individual who is 60 years of age and older. The “Declaration of Objectives for Older Americans” in s 101 of the Act refers to the concept “of the inherent dignity of the individual” and the entitlement of older people to secure equal opportunity to the full and free enjoyment of objectives including “Retirement in health, honor, dignity – after years of contributing to the economy”: s 101(6).
- 5 “Elder justice” is defined as “efforts to prevent, detect, treat, intervene in, and respond to elder abuse, neglect, and exploitation and to protect older individuals with diminished capacity while maximizing their autonomy” and “the recognition of the individual’s rights, including the right to be free of abuse, neglect and exploitation”: s 102 (17).
- 6 In 1972 a federal framework for the Long-Term Care Ombudsman Program was established under the Act at both federal and state level (the Program). The Ombudsman identifies, investigates and resolves complaints that are made by, or on behalf of residents in long-term care facilities that:

Relate to action, inaction, or decisions that may adversely affect the health, safety, welfare, or rights of the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of providers, or representatives of providers, of long-term care services; public agencies; or health and social service agencies.¹

7 The Ombudsman also:

Provides services to assist the residents in protecting health, safety, welfare, and rights of the residents;

Ensures that the residents have regular and timely access to the services provided in the Program and ensures that the residents and complainants receive timely responses from the representatives of the Office to complaints;

Represents the interests of the residents before governmental agencies and seeks administrative, legal and other remedies to protect the health, safety, welfare and rights of the residents;

Analyses, comments and monitors development of and recommends changes to laws, regulations and policies relating to the health, safety, welfare and rights of the residents with respect to the adequacy of the available long-term care facilities and services.²

- 8 The *Elder Justice Act of 2009* signed by the President in March 2010, established an “Elder Justice Coordinating Council” to coordinate activities and initiatives between various departments and agencies at the federal, state and local level. An “Advisory Board on Elder Abuse, Neglect, and Exploitation” was also established with responsibilities for strategic development in the field and making recommendations to the Council. There was also an allocation of US\$26 million over four years for grants in relation to the development of forensic methodologies, expertise and collection of evidence in relation to abuse, neglect and exploitation of the elderly. As part of this package there were programs for training and recruitment of additional long-term care staff with additional funds for training modules for detecting elder abuse.

- 9 There was also an allocation of US\$72.5m over four years to the Ombudsman Program - US\$32.5m for grants to improve the Program's capacity to respond to and resolve complaints about abuse and neglect as well as conducting pilot programs (such as the establishment of a national long-term care ombudsman centre) - US\$40m to provide and improve Ombudsman training.
- 10 The Ombudsman Program has been closely monitored and evaluated over the last 38 years. Early criticisms have been accommodated, and there has been an effort to focus more on the needs of the elderly rather than getting lost in the administrative processes of complaint handling. However the Program appears to be reactive to complaints.
- 11 In Australia the *Aged Care Act 1997* (Cth) ("the Act") regulates the provision of government-subsidised aged care and also establishes a scheme for the handling of complaints in relation to approved aged care providers under the Act. The original Complaints Resolution Scheme was the subject of a Senate Inquiry into 2005. Although there were strong views expressed in support of an independent complaints scheme the Inquiry fell short of recommending a separate body to operate the complaints scheme.
- 12 In 2006 the Office of Aged Care Quality and Compliance was established within the Department of Health and Ageing (the Department) with the aim of improving the quality of care and services for the aged.
- 13 On 1 May 2007 a new complaints system was established known as the Aged Care Complaints Investigation Scheme ("CIS") within the Department. A dedicated Aged Care Commissioner (the Commissioner) was also established with powers to investigate the investigators and investigations of the CIS, and make recommendations to the Secretary of

the Department. The Commissioner's powers are limited and there is no capacity to require staff participation in interviews or require the production of documents. The system is totally reactive to complaints. If the investigators wish to audit a service provider by entering the premises and reviewing either the clinical care or administrative and financial services, they must approach the court for a warrant to do so unless such entry is by consent.

- 14 In June 2009 the ABC's Four Corners published a program entitled "End of the Line" in which it exposed serious flaws in the CIS and instances of seriously compromised care for the residents in certain facilities. It referred to hundreds of complaints of assaults of residents the outcome of which were unknown. The Commissioner informed the Four Corners program that "investigative processes were often poor and complainants were denied natural justice". The Commissioner also referred to the fact that there was a failure to give reasons for rejecting complaints.

- 15 This exposure appears to have prompted the Government to commission a Review of the CIS conducted by Associate Professor Merrilyn Walton who produced her report in October 2009 (the Walton Report). The Walton Report noted the complexity of the management structure of the CIS, with its functions spread across all State and Territory Offices and different sections of the Department. It found that:

The lack of a clear management structure for the national complaint scheme and the overly complex reporting and accountability requirements has led to different complaints management arrangements developing across the [State and Territory Offices]...The fragmentation of responsibility for the national complaints scheme dilutes the integrity of the CIS.³

- 16 The Commissioner advised Associate Professor Walton that over the previous two years the capacity to effect change and drive quality had been limited. The Report included the following:

In 2007-08, the Department disagreed with approximately 12% of the Commissioner's recommendations and for the financial year 2008-09 the figure is in the order of 10%. Submissions noted that the current limitation on the Commissioner did not engender confidence in the system by providers and residents alike. Others refer to the Commissioner as 'toothless tiger'.⁴

- 17 The Walton Report recommended the establishment of a separate statutory authority, thus removing aged care complaints management from the Department. The reasons for this were stated to be:

The Department is responsible for the overall management and delivery of aged care services which means that the focus is on services for the community rather than individual complaints.

The Department is a large and complex bureaucracy and this is not conducive to effective complaint management.

Having the bureaucracy manage complaints creates trust issues and, at the very least, the lack of an appearance of independence.

Having the same organisation responsible for complaints and regulation lessens the will or capacity to admit failures, creates transparency issues and provides an incentive to limit data about complaints.⁵

- 18 The Walton Report was not released to the public until April 2010.
- 19 On 12 April 2010 the Prime Minister, the Minister for Health and the Minister for Ageing jointly announced⁶ that the "Rudd Government will invest \$25 million to improve consumer focus and strengthen protections for residents of aged care as part of its improvements to aged care services to better support older Australians". The recommendation made by

Associate Professor Walton for an independent statutory body to investigate complaints was not adopted. Rather it was announced that the Government would provide "additional resources" to the CIS. Those "additional resources" were not identified in this announcement.

- 20 The Prime Minister and the Ministers referred to the \$9 billion of aged care residents "life's savings held in aged care accommodation bonds" with the announcement that the Government would legislate from 1 July 2011 to clearly articulate the permitted uses of the bonds; improve reporting requirements; introduce criminal penalties for misuse of bond funds; and put in place a prudential regime in respect of aged care providers who hold accommodation bonds.
- 21 On 20 April 2010 the Prime Minister and the Minister for Health announced⁷ that from 1 July 2010 the Government would start delivering \$5.3 billion in what was described as "Historical Health Reform" including "A Commonwealth takeover of aged care". There were no details as to how such a "takeover" would be implemented or what it would mean for the residents of aged care facilities. However the announcement recorded that the Government would fund all aged care services. In New South Wales \$240 million of the \$5.3 billion was allocated to Aged Care with only \$1 million allocated to "strengthening investigation and handling of aged care complaints".
- 22 On 21 April 2010 the Assistant Treasurer and the Minister for Ageing announced⁸ that the Government had asked the Productivity Commission to "develop detailed options for redesigning Australia's aged care system". A draft report is expected by December 2010 with a final report by April 2011. The Terms of Reference make no express mention of the Complaints Investigation System. It is not clear whether the Commonwealth

“takeover” of the aged care services is to await the “redesigning” of the system as proposed. Nor is it clear when the \$240 million is to be allocated.

23 Meanwhile a reporter with the Sunday Telegraph worked “undercover” as a volunteer in a number of aged care facilities. A series of articles published on 30 May 2010 identified a permeating “culture of passive neglect” with a lack of respect for the dignity of the elderly residents.⁹ It should be said that there are obviously many aged care facilities that have not been the subject of any adverse exposure in these publications. However it has been accepted that understaffing is a problem across the system.

24 One of the problems identified by this short history is that the system is totally reactive – it is complaint driven – the CIS investigates complaints (apparently poorly) – the Commissioner investigates the investigators and investigations as a “toothless tiger”.

25 The Four Corners program in 2009 and the Sunday Telegraph articles in 2010 exposed serious problems that have not been denied. Indeed the admissions made by the Commissioner as reported both in the Four Corners program and in the Walton Report establish beyond doubt the very serious flaws in the complaints handling system. The Ombudsman system in America is very reliant on volunteers. Unless it is accepted that it is necessary to involve volunteers in any similar program adopted here, it will always be deficient in resources and funding. We seem nervous about this involvement because of concerns about the responsibilities and liabilities for the actions of volunteers. However with appropriate vetting and training the use of volunteers will enhance any such programme.

26 You may think it difficult to understand why Associate Professor Walton’s recommendation for the establishment of an independent complaints

regime has not yet been adopted. You may also think that the reasons given for such an independent regime are compelling. May I suggest that if such a system is established it would be imperative to remove the bureaucratic impediments that are presently preventing the proper administration of the complaints handling system.

27 It must be recognised that there are facilities in which professional, competent and compassionate aged care services are provided. However it is probable that the only way the community will be confident that such services will be replicated across the system is if an independent statutory entity or institute with medical/clinical expertise is established to deal with complaints coupled with an educational function, with objectives and powers that include the auditing of clinical, administrative and financial services that are provided in aged care facilities.

28 The problem for the older Australians who are presently residents in these facilities is that improvement may not occur soon. As can be seen from this short chronology (a 2005 Senate Inquiry, the 2009 Walton Review and now a 2010/2011 Productivity Commission Inquiry) inquiries and reports, rather than action, may appear to be the focus.

29 Dignity is an attribute of life that becomes more elusive and more valuable with age. If we use it as one of the touchstones for measuring whether we are treating our older Australians properly we may have more realistic reforms in the aged care system.

30 May I suggest that you as specialist accredited lawyers are exquisitely placed to assist in guiding government policy by advocating for change that will protect the older Australian residents in care from neglect and establish and foster processes that will provide the greatest opportunity for a dignified life. I urge you to do so.

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- 1 *Older Americans Act 1965 s 712(3)(A)(ii)*
2 *Older Americans Act 1965 s 712*
3 Marilyn Walton, Review of the Aged Care Complaints Investigation System, October 2009, 28
4 Marilyn Walton, Review of the Aged Care Complaints Investigation System, October 2009, 66
5 Marilyn Walton, *Review of the Aged Care Complaints Investigation System*, October 2009, 12-13
6 Media Release by the Prime Minister, Minister for Health and Minister for Ageing, *Building an
Australian Aged Care System Improving Consumer Focus and Protection in Aged Care*, 12 April 2010
7 Media Release by the Prime Minister and Minister for Health, *Historic Health Reform*, 20 April 2010
8 Media Release by the Assistant Treasurer and Minister for Ageing, 21 April 2010
9 Rosie Squires, “Unfed and unwashed: Nursing home residents ‘living in hell’”, *The Sunday
Telegraph*, 30 May 2010; Rosie Squires, “This is how we care for the aged”, *The Sunday Telegraph*,
30 May 2010; Rosie Squires, “Aged-care residents in living hell”, *The Sunday Telegraph*, 30 May
2010