



# **Aged Care Amendment (Security and Protection) Act 2007**

**No. 51, 2007**

**An Act to amend the law relating to aged care, and for related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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## **An Act to amend the law relating to aged care, and for related purposes**

[Assented to 12 April 2007]

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *Aged Care Amendment (Security and Protection) Act 2007*.

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## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	12 April 2007
2. Schedule 1	1 May 2007.	1 May 2007
3. Schedule 2	1 July 2007.	1 July 2007

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

## 3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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## Schedule 1—Investigations

### *Aged Care Act 1997*

#### **1 Paragraph 56-4(1)(e)**

Repeal the paragraph, substitute:

- (e) comply with any requirement made of the approved provider under the Investigation Principles.

Note: The repeal and substitution of paragraph 56-4(1)(e) of the *Aged Care Act 1997* by this Schedule does not affect an obligation an approved provider had under that paragraph before its repeal to comply with a determination of a complaint by a committee. See section 8 of the *Acts Interpretation Act 1901*.

#### **2 Section 84-1**

Repeal the section, substitute:

##### **84-1 What this Chapter is about**

This Chapter deals with the following matters relating to the administration of this Act:

- (a) reconsideration and administrative review of decisions (see Part 6.1);
- (b) protection of information (see Part 6.2);
- (c) record-keeping obligations of approved providers (see Part 6.3);
- (d) powers of officers in relation to monitoring compliance and offences (see Part 6.4);
- (e) investigations of matters relating to this Act or the Principles made under section 96-1 (see Part 6.4A);
- (f) recovery of overpayments by the Commonwealth (see Part 6.5);

- |   |
|---|
| <p>(g) the Aged Care Commissioner, whose functions include examining certain matters relating to investigations (see Part 6.6).</p> |
|---|

### 3 Subsection 86-9(3)

Repeal the subsection.

### 4 After Part 6.4

Insert:

## Part 6.4A—Investigations

### Division 94A—Investigation Principles

#### 94A-1 Investigation Principles

*Provision for investigation of matters*

- (1) The Investigation Principles may make provision relating to the investigation of matters (including complaints) relating to this Act or the Principles made under section 96-1, including provision relating to one or more of the following:
  - (a) which matters are to be investigated;
  - (b) how investigations are to be conducted;
  - (c) considerations in making decisions relating to investigations;
  - (d) procedures for reconsideration or examination of decisions relating to investigations.

Note: The Investigation Principles are made by the Minister under section 96-1.

*Provision for action if investigation finds non-compliance*

- (2) The Investigation Principles may make provision relating to actions that may be taken (including the making of requirements of an approved provider) if it is found in an investigation that an approved provider has not complied with its responsibilities under Part 4.1, 4.2 or 4.3.



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*Transitional provisions relating to complaints*

- (3) The Investigation Principles may make provision of a transitional or saving nature relating to complaints that:
- (a) related to this Act or the Principles made under section 96-1; and
  - (b) were being dealt with under the Committee Principles immediately before the commencement of this section.

Note: Part 6.6 also provides for Investigation Principles to do certain things.

*Relationship with other provisions*

- (4) To avoid doubt, this Part and the Investigation Principles do not affect any of the following:
- (a) paragraph 56-4(1)(d) (about giving people authorised to investigate complaints access to an \*aged care service as specified in the User Rights Principles);
  - (b) the User Rights Principles;
  - (c) Part 4.4 (Consequences of non-compliance);
  - (d) the Sanctions Principles;
  - (e) the other Parts of this Chapter (except Part 6.6).

**5 At the end of Chapter 6**

Add:

**Part 6.6—Aged Care Commissioner****Division 95A—Aged Care Commissioner****95A-1 Aged Care Commissioner**

- (1) There is to be an \*Aged Care Commissioner.
- (2) The functions of the \*Aged Care Commissioner are as follows:
  - (a) to examine decisions that are made by the Secretary under the Investigation Principles and are identified by those Principles as being examinable by the Aged Care Commissioner, and make recommendations to the Secretary arising from the examination;

- (b) to examine complaints made to the Aged Care Commissioner about the Secretary's processes for handling matters under the Investigation Principles, and make recommendations to the Secretary arising from the examination;
- (c) to examine, on the Aged Care Commissioner's own initiative, the Secretary's processes for handling matters under the Investigation Principles, and make recommendations to the Secretary arising from the examination;
- (d) to examine complaints made to the Aged Care Commissioner about:
  - (i) the conduct of an \*accreditation body relating to its responsibilities under the Accreditation Grant Principles; or
  - (ii) the conduct of a person carrying out an audit, or making a support contact, under those Principles;(but not a complaint about the merits of a decision under those Principles), and make recommendations to the accreditation body concerned arising from the examination;
- (e) to examine, on the Aged Care Commissioner's own initiative:
  - (i) the conduct of an accreditation body relating to its responsibilities under the Accreditation Grant Principles; and
  - (ii) the conduct of persons carrying out audits, or making support contacts, under those Principles;and make recommendations to the accreditation body concerned arising from the examination;
- (f) to advise the Minister, at the Minister's request, about matters relating to any of paragraphs (a), (b), (c), (d) and (e);
- (g) the functions (if any) specified in the Investigation Principles.

### **95A-2 Appointment**

- (1) The \*Aged Care Commissioner is to be appointed by the Minister by written instrument.
- (2) The \*Aged Care Commissioner may be appointed on a full-time basis or on a part-time basis.

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- (3) The \*Aged Care Commissioner holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

### **95A-3 Acting appointments**

- (1) The Minister may appoint a person to act as the \*Aged Care Commissioner:
- (a) during a vacancy in the office of the Aged Care Commissioner (whether or not an appointment has previously been made to the office); or
  - (b) during any period, or during all periods, when the Aged Care Commissioner is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
  - (b) there was a defect or irregularity in connection with the appointment; or
  - (c) the appointment had ceased to have effect; or
  - (d) the occasion to act had not arisen or had ceased.

### **95A-4 Remuneration**

- (1) The \*Aged Care Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Aged Care Commissioner is to be paid the remuneration that is prescribed by the Investigation Principles.
- (2) The \*Aged Care Commissioner is to be paid the allowances that are prescribed by the Investigation Principles.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

### **95A-5 Leave of absence**

#### *Full-time Commissioner*

- (1) If the \*Aged Care Commissioner is appointed on a full-time basis:
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- (a) he or she has the recreation leave entitlements that are determined by the Remuneration Tribunal; and
- (b) the Minister may grant the Aged Care Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

*Part-time Commissioner*

- (2) If the \*Aged Care Commissioner is appointed on a part-time basis, the Minister may grant leave of absence to the Aged Care Commissioner on the terms and conditions that the Minister determines.

**95A-6 Other terms and conditions**

The \*Aged Care Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

**95A-7 Restrictions on outside employment**

*Full-time Commissioner*

- (1) If the \*Aged Care Commissioner is appointed on a full-time basis, he or she must not engage in paid employment outside the duties of the Aged Care Commissioner's office without the Minister's approval.

*Part-time Commissioner*

- (2) If the \*Aged Care Commissioner is appointed on a part-time basis, he or she must not engage in any paid employment that conflicts or may conflict with the proper performance of his or her duties.

**95A-8 Disclosure of interests**

The \*Aged Care Commissioner must give written notice to the Minister of all interests, pecuniary or otherwise, that the Commissioner has or acquires that could conflict with the proper performance of the Commissioner's functions.

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**95A-9 Resignation**

The \*Aged Care Commissioner may resign his or her appointment by giving the Minister a written resignation.

**95A-10 Termination of appointment**

- (1) The Minister may terminate the appointment of the \*Aged Care Commissioner for misbehaviour or physical or mental incapacity.
- (2) The Minister must terminate the appointment of the \*Aged Care Commissioner if:
  - (a) the Aged Care Commissioner:
    - (i) becomes bankrupt; or
    - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
    - (iii) compounds with his or her creditors; or
    - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
  - (b) the Aged Care Commissioner is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
  - (c) the Aged Care Commissioner is appointed on a full-time basis and engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
  - (d) the Aged Care Commissioner is appointed on a part-time basis and engages in paid employment that conflicts or could conflict with the proper performance of the duties of his or her office; or
  - (e) the Aged Care Commissioner fails, without reasonable excuse, to comply with section 95A-8.

**95A-11 Delegations of Aged Care Commissioner's functions**

- (1) The \*Aged Care Commissioner may delegate in writing all or any of his or her functions to an APS employee in the Department.
- (2) In exercising his or her powers under subsection (1), the \*Aged Care Commissioner is to have regard to the function to be performed by the delegate and the responsibilities of the APS employee to whom the function is delegated.

- (3) In performing functions delegated under subsection (1), the delegate must comply with any directions of the \*Aged Care Commissioner.

**95A-12 Annual report**

- (1) The \*Aged Care Commissioner must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report on the Aged Care Commissioner's operations during that year.

Note: See also section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about annual reports.

- (2) The \*Aged Care Commissioner must include in the report:
- (a) the number of decisions made by the Secretary under the Investigation Principles that the Aged Care Commissioner examined during the financial year; and
  - (b) the number of complaints about the following matters (*examinable complaints*) that were made to the Aged Care Commissioner during the financial year:
    - (i) the Secretary's processes for handling of matters under the Investigation Principles;
    - (ii) the conduct of an \*accreditation body relating to its responsibilities under the Accreditation Grant Principles;
    - (iii) the conduct of a person carrying out an audit, or making a support contact, under those Principles; and
  - (c) the number of examinable complaints that the Aged Care Commissioner started to examine during the financial year; and
  - (d) the number of examinable complaints that the Aged Care Commissioner finished examining during the financial year; and
  - (e) a summary of the nature of the examinations made by the Aged Care Commissioner during the financial year of examinable complaints; and
  - (f) the number of examinations made by the Aged Care Commissioner on his or her own initiative during the financial year; and

- (g) a summary of the nature of examinations made by the Aged Care Commissioner on his or her own initiative during the financial year; and
- (h) the number of requests for advice the Minister made to the Aged Care Commissioner during the financial year; and
- (i) a summary of the nature of those requests; and
- (j) a summary of the nature of advice given by the Commissioner to the Minister during the financial year in response to requests by the Minister; and
- (k) any other information required by the Investigation Principles to be included in the report.

## **6 Subsection 96-1(1) (after table item 16)**

Insert:

16A	Investigation Principles	Parts 6.4A and 6.6
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## **7 Subsection 96-2(1)**

After “Department”, insert “, or to the \*Aged Care Commissioner,”.

Note: The heading to section 96-2 is altered by adding at the end “**of Secretary’s powers and functions**”.

## **8 Subsection 96-3(2)**

Repeal the subsection.

## **9 Clause 1 of Schedule 1**

Insert:

***Aged Care Commissioner*** means the Aged Care Commissioner holding office under Part 6.6.

## Schedule 2—Reporting assaults

### *Aged Care Act 1997*

#### **1 After section 63-1**

Insert:

#### **63-1AA Responsibilities relating to alleged and suspected assaults**

- (1) This section sets out the responsibilities of an approved provider of residential care relating to an allegation or suspicion of a \*reportable assault (see subsection (9)).

##### *Reporting reportable assaults*

- (2) If the approved provider receives an allegation of, or starts to suspect on reasonable grounds, a \*reportable assault, the approved provider is responsible for reporting the allegation or suspicion as soon as reasonably practicable, and in any case within 24 hours, to:
- (a) a police officer with responsibility relating to an area including the place where the assault is alleged or suspected to have occurred; and
  - (b) the Secretary.
- (3) Subsection (2) does not apply in the circumstances (if any) specified in the Accountability Principles, but the approved provider is responsible for complying with the requirements (if any) that those Principles make of the provider in relation to any of those circumstances or the alleged or suspected \*reportable assault.
- (4) To avoid doubt, subsections (2) and (3) do not:
- (a) affect any obligation the approved provider has under a law of a State or Territory to report a \*reportable assault or an allegation or suspicion of a reportable assault; or
  - (b) prevent the approved provider from reporting to a police officer or the Secretary a reportable assault or an allegation or suspicion of a reportable assault.



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*Requiring staff members to report reportable assaults*

- (5) The approved provider is responsible for taking reasonable measures to require each of its staff members who provides a service connected with the approved provider's residential care service and who suspects on reasonable grounds that a \*reportable assault has occurred to report the suspicion as soon as reasonably practicable to one or more of the following chosen by the member:
- (a) the approved provider;
  - (b) one of the approved provider's \*key personnel;
  - (c) another person authorised by the approved provider to receive reports of suspected reportable assaults;
  - (d) a police officer with responsibility relating to an area including the place where the assault is suspected to have occurred;
  - (e) the Secretary.

Note: Subsection (9) defines *staff member* of an approved provider.

*Ensuring staff member informants are not victimised*

- (6) The approved provider is responsible for ensuring, as far as reasonably practicable, compliance with paragraphs 96-8(2)(b) and (3)(b) and subsections 96-8(6) and (7) in relation to a person who:
- (a) is one of the approved provider's staff members; and
  - (b) makes a disclosure that qualifies for protection under section 96-8.

Note 1: Under section 96-8, some disclosures of information qualify for protection if they are made by a staff member of an approved provider and the member has reasonable grounds to suspect that the information indicates that a reportable assault has occurred.

Note 2: The responsibility under subsection (6) covers not only compliance by the approved provider itself with the relevant provisions of section 96-8, but extends to the approved provider ensuring as far as reasonably practicable that there is also compliance by others, such as:

- (a) other staff members of the approved provider; and
- (b) other parties with whom the approved provider contracts (for example, an employment agency).

*Protecting informants' identities*

- (7) If a person reports a suspected \*reportable assault to the approved provider, the provider is responsible for taking reasonable

measures to ensure that the fact that the person was the maker of the report is not disclosed, except to one or more of the following:

- (a) a police officer with responsibility relating to an area including the place where the assault is suspected to have occurred;
  - (b) the Secretary;
  - (c) a person, authority or court to which the approved provider is required by a law of the Commonwealth or a State or Territory to disclose the fact;
  - (d) one of the approved provider's \*key personnel.
- (8) If a person reports a suspected \*reportable assault to someone (the **report recipient**) who is one of the approved provider's:
- (a) \*key personnel; or
  - (b) staff members authorised by the provider to receive reports of suspected reportable assaults;

the provider is responsible for taking reasonable measures to ensure that the report recipient does not disclose the fact that the person was the maker of the report, except to the provider or a person described in paragraph (7)(a), (b), (c) or (d).

*Definitions*

- (9) In this section:

**reportable assault** means unlawful sexual contact, unreasonable use of force, or assault specified in the Accountability Principles and constituting an offence against a law of the Commonwealth or a State or Territory, that is inflicted on a person when:

- (a) the person is receiving residential care in respect of which the provider is approved; and
- (b) either:
  - (i) subsidy is payable under Chapter 3 for provision of the care to the person; or
  - (ii) the person is approved under Part 2.3 as the recipient of that type of residential care.

Note: The Accountability Principles may specify an assault by reference to a class: see subsection 13(3) of the *Legislative Instruments Act 2003*.

**staff member** of an approved provider means an individual who is employed, hired, retained or contracted by the approved provider

(whether directly or through an employment or recruiting agency) to provide care or other services.

## **2 After section 96-7**

Insert:

### **96-8 Protection for reporting reportable assaults**

#### *Disclosures qualifying for protection*

- (1) A disclosure of information by a person (the *discloser*) qualifies for protection under this section if:
  - (a) the discloser is:
    - (i) an approved provider of residential care in respect of which the provider is approved; or
    - (ii) a staff member (as defined in section 63-1AA) of such an approved provider; and
  - (b) the disclosure is made to:
    - (i) a police officer; or
    - (ii) the Secretary; or
    - (iii) the approved provider; or
    - (iv) one of the approved provider's \*key personnel; or
    - (v) another person authorised by the approved provider to receive reports of alleged or suspected \*reportable assaults; and
  - (c) the discloser informs the person to whom the disclosure is made of the discloser's name before making the disclosure; and
  - (d) the discloser has reasonable grounds to suspect that the information indicates that a reportable assault has occurred; and
  - (e) the discloser makes the disclosure in good faith.

#### *Immunities for disclosure*

- (2) If a person makes a disclosure that qualifies for protection under this section:
  - (a) the person is not subject to any civil or criminal liability for making the disclosure; and

- (b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person on the basis of the disclosure.

Note: This subsection does not provide that the person is not subject to any civil or criminal liability for conduct of the person that is revealed by the disclosure.

- (3) Without limiting subsection (2):
  - (a) the person:
    - (i) has qualified privilege in proceedings for defamation relating to the disclosure; and
    - (ii) is not liable to an action for defamation at the suit of another person relating to the disclosure; and
  - (b) a contract to which the person is a party may not be terminated on the basis that the disclosure constitutes a breach of the contract.
- (4) Paragraphs (2)(a) and (3)(a) do not affect any other right, privilege or immunity the person has as a defendant in proceedings, or an action, for defamation.
- (5) Without limiting paragraphs (2)(b) and (3)(b), if a court is satisfied that:
  - (a) a person (the *employee*) is employed in a particular position under a contract of employment with another person (the *employer*); and
  - (b) the employee makes a disclosure that qualifies for protection under this section; and
  - (c) the employer purports to terminate the contract of employment on the basis of the disclosure;the court may:
  - (d) order that the employee be reinstated in that position or a position at a comparable level; or
  - (e) order the employer to pay the employee an amount instead of reinstating the employee, if the court considers it appropriate to make the order.

*Prohibitions on victimisation for disclosure*

- (6) A person must not cause detriment (by act or omission) to another person because the other person makes a disclosure that qualifies for protection under this section.

Note: If the other person is a staff member (as defined in section 63-1AA) of an approved provider, the provider has a responsibility under that section to ensure, as far as reasonably practicable, compliance with subsections (6) and (7). Sanctions may be imposed on the provider under Part 4.4 if the provider does not comply with the responsibility.

- (7) A person must not make to another person a threat (whether express or implied or conditional or unconditional) to cause any detriment to the other person because the other person:
- (a) makes a disclosure that qualifies for protection under this section; or
  - (b) may make a disclosure that would qualify for protection under this section.

### **3 Clause 1 of Schedule 1**

Insert:

*reportable assault* has the meaning given by section 63-1AA.

### **4 Application**

The amendments made by this Schedule apply in relation to reportable assaults first alleged or suspected on or after the commencement of this Schedule to have occurred before, on or after that commencement.

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*[Minister's second reading speech made in—  
House of Representatives on 8 February 2007  
Senate on 26 February 2007]*

(5/07)

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