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30 April 2009

Stephen Lee
Assistant Secretary (acting)
Prudential and Approved Provider Regulation Branch
Office of Aged Care Quality and Compliance
GPO Box 9848
CANBERRA
ACT 2600

Dear Mr Lee.

Approved Provider Status

Thank you for your detailed response to my objection to Milstern and its owner continuing as an approved provider of nursing home care. I appreciate the trouble you have taken in your reply. It reaffirms that there are still limitations in our system and the areas where community pressure is needed in order to address the problems we have. I apologise for the delay in acknowledging your letter.

I note that the regulations do not give your department the powers needed to investigate the situation posed by Milstern as revealed in its other operations, and act if it is found to pose a threat to the welfare of residents.

Your letter indicates that the new regulations for approved provider applications have been broadened to include a wider range of individuals. These changes are a step along the path I advocated to the minister when she was appointed. I feel that they still fall short of what is required to protect residents and improve standards of care.

I also wonder if the minutiae of regulation, as contrasted with guiding principles and regulatory empowerment, have placed obstacles in the department's way, limited their powers, and created loopholes that can be exploited? This makes it difficult for the department to respond sensibly. Milstern is a good example of this.

I note that

1. The word "persons" does not include "corporate bodies". As a consequence corporate culture is not a core consideration. Nor, from your letter does a company's track record in other sectors seem to play a significant part – at least once it has approval status.

   Corporate offenders tend to re-offend even after changing leadership. Corporate culture is a potent driver of conduct – as important as the individuals themselves. Non-conformers do not thrive and are not made directors. I conclude that, provided senior management has been replaced, disturbing companies like Citigroup and its subsidiaries could still become significant corporate owners.

2, Corporate entities acquiring significant financial ownership and control of already approved providers are still not required to seek approved provider status in their own right. Provided that they appoint conforming but "unblemished" individuals to implement their policies in the company they have purchased, and notify the department of this, then it will be permitted.

   As a consequence approved provider status still retains a commercial value that can be traded in the marketplace so increasing the value of entities that have approved provider status. The likelihood remains that they will be targeted by less savoury operators who might not qualify as approved providers in their own right.

   Citigroup could still buy Amity from DCA without seeking approved provider status in their own right. The previous minister for health and the previous minister for ageing had both promised to address this anomaly before they lost power.

3. There is no mechanism for reviewing approved provider status when an already approved corporate operator or owner behaves inappropriately, displaying policies, practices, and a culture that would put residents at risk, when that occurs outside the nursing home sector.

4. Regulation concentrates on ever stricter and more onerous extrinsic oversight by outside bodies and does little to alter corporate culture. This has not worked in a strongly focused commercial environment in health and ageing elsewhere. There are no intrinsic forces in the aged care sector to make it behave differently. The messages coming from the coal face contradict the claims that it is working in aged care in Australia.

5. There is still no tracking and public reporting of easily documented markers of care including staffing ratios, incidence of pressure sores, weight loss etc. Process is a means to an end but monitoring processes is no substitute for measuring outcomes to see if the processes are working. While the intricacy of health care makes care difficult to quantify, nursing home care is more readily documented than other health care sectors. We still need the best documentation we can get, while recognising its limitations.

   Clinical auditing is as important as financial auditing. Without access to this it is impossible for the community to exert its commercial right in this marketplace to balance service and cost - nor to exert its democratic right to debate the issues intelligently.

The legislation you describe seems to tinker with the edges of the problem giving the impression of reform. It ignores the contradictions in the system. These lie at the heart of the problem.

Major deficiencies

The core problem is the provision of humanitarian services through a commercial mechanism whose values and norms are incompatible with those required in the sector. The process is driven by strong commercial competition and financial pressure. This ensures that expected but competing humanitarian norms and values all too often receive only token recognition.

It is illogical to do this and then expend vast sums and human effort in an attempt to contain the consequences. Many have pointed out that there are necessary conditions for a market to operate effectively and that it does not work when these conditions are absent as they are in health and aged care.

When this happens commercial activity must be extensively modified in order to change the values, norms and culture - and so make it comply with the community's expectations for the sector.

I do understand that the commercialisation of health and aged care has become a fact of life. Commercial and not humanitarian considerations now dominate decision making in aged care. If commercial entities are to function for the community in this sector then the balance must be altered.

Unlike the hospital sector, professionals in the aged care sector have no economic leverage and consequently have no impact on corporate culture. The community do not have sufficient information nor in the current situation do they have significant economic leverage. Without knowledge, data about nursing home performance, and a sufficient number of nursing home places in each locality to allow choice, government vouchers will not give them that leverage.

Experience elsewhere suggests that when the aged care bulge is over, an oversupply of places will result in aggressive marketing to fill the beds with consequent over-servicing and increased costs. But that is not a problem we will have for some years.

The system we have is not the current government's fault. We can only be sympathetic as they must deal with a market community that has acquired both strong political and economic leverage. In the face of the aged care bulge it is difficult to make required changes without compromising the service.

Despite this the failure of the government to take even basic measures to modulate the market in misfortune and decrepitude to give the caring community, its culture and its values greater leverage is very disappointing.

Embracing the community

Nursing home care is essentially something that the community provides for its members. Both the government and commercial operators are acting for the community when they provide these services and structure funding for this. They are accountable to them. The community are entitled to a full account of what is being

done on their behalf and to have access to all information (obviously not confidential individual patient information). Acceptance of this principle, and making changes to accommodate it, would go a long way to addressing our current problems.

To accomplish this the community will need far greater access to nursing homes, accurate nursing home data, as well as leverage of some sort. Simple economic leverage using vouchers will not work effectively in the current context.

The obvious means of embracing the community is to move the focus from external oversight and regulation to direct ongoing local involvement within the nursing homes.

The local community and its structures should not only have participatory oversight, but be party to the ongoing collection and reporting of clinical data. Medical and nursing professionals in the community should be involved in this.

If the local community became both the primary mediator in disputes, and the focus of the accreditation and complaints processes then many contentious issues could be amicably resolved.

A strong and effective local presence in the homes would give the community considerable leverage over corporate culture. Staff motivation would benefit and the community could support nurses' reasonable grievances increasing their leverage. Managers would be forced to confront the rationalisations they use to support the application of inappropriate patterns of thinking. Community would have to confront economic reality. Instead of accentuating the divide in perceptions as the current situation does, it would be narrowed.

XXXXXXXXXXXXXXXX some suggestions as to how this might be implemented in section 9 of a submission to the Senate Community Affairs Committee in November 2008. The submission also explored some of the issues referred to in this letter but in greater depth. It can be downloaded (Submission number 16) from http://www.aph.gov.au/senate/committee/clac_ctte/aged_care_amend_2008_measures_no2/submissions/sublist.htm

I appreciate that your department does not make the laws and regulations. It is constrained by these regulations. This does not absolve you of the responsibility to give practical and sensible advice to the political process. Your department's primary task is to serve and protect the community to whom it is ultimately responsible. It does (or should) advise, and indicate to the minister, when policies and legislation are inappropriate and when your efforts are impeded by the structure of the system. You do (or should) suggest changes that would improve the situation.

I appreciate that there may be interpersonal difficulties with ministers or within departments. To assist you I will copy this to the minister.

Yours sincerely,

Copy:- Minister for Ageing the Hon Justine Elliott MP