

21 November 2024

Nat Cook MP – Minister for Seniors and Ageing Well
Government of South Australia
MinisterHumanServices@sa.gov.au
GPO Box 2832, Adelaide SA 5001

Mr Chris Picton MP-Minister for Health

Mr Kyam Maher MP-Attorney General

Dear Ministers,

RE: Surveillance Devices (Prescribed Residential Premises) Amendment Bill 2024

We appreciate the opportunity to provide our submission on the Surveillance Devices (Prescribed Residential Premises) Amendment Bill 2024.

The Aged & Community Care Providers Association (ACCPA) is the national Industry Association for over 1,000 aged care providers offering retirement living, seniors housing, residential care, home care, community care and related services.

Whilst we understand and support the intent to enhance resident safety, we believe this Bill requires further consideration regarding its privacy implications and potential for misuse and misalignment with person-centred care principles. We are concerned that the Bill has significant unintended consequences and these concerns reflect the challenges of recognising and balancing safety, autonomy, privacy and dignity for people receiving aged care, disability and retirement living services.

Privacy implications and consent challenges

The Bill allows for the installation and use of surveillance devices in private residential rooms, including aged care facilities, home care and retirement village dwellings by family members or other individuals associated with ('on behalf of') the resident. Critical in this aspect of the Bill is that the installation, use and maintenance can be undertaken by the person residing at the premises or by anyone 'on that person's behalf'. The Bill therefore expressly authorises installation, use and maintenance of a device without the resident's explicit consent and, in the absence of clarity on the matter, by anyone who claims an entitlement to act 'on the resident's behalf'.

This approach presents a fundamental imbalance between safety and privacy by diminishing the significance of resident privacy, particularly for those who are vulnerable or who may not have full decision-making capacity. This imbalance leaves residents and providers without essential protections, undermining the trust and strong relationships between providers and residents (and their families) that are fundamental in any care setting.

Privacy and autonomy are critical for maintaining dignity within care settings. The Bill, as it currently stands, risks imposing surveillance on individuals without sufficient regard for their consent or preferences. A robust framework that prioritises the rights of residents through explicit consent or through consent provided by the legally appointed decision maker on behalf

of the resident when they do not have the legal capacity to consent is essential to prevent unintended invasions of privacy that could erode autonomy and dignity.

Risk of misinterpretation and media misuse

The nature of surveillance, particularly in aged care settings where cognitive impairment and dementia are prevalent, means that footage can be easily misinterpreted – particularly if viewed without context. Surveillance footage capturing behaviours linked to cognitive decline may not accurately reflect incidents, yet may still be subject to public release, scrutiny and misinterpretation. For instance, residents with dementia may exhibit behaviours such as lashing out or agitation, which can be interpreted differently by those who are unaware of the medical context.

When footage of these incidents is released to media or third parties without proper context or consent, it can quickly lead to reputational harm for both staff and operators and have a negative impact on the wellbeing of the resident themselves. Media coverage, often presented without full understanding, can foster public distrust and damage reputations irreparably. The Bill, as written, allows for individuals to distribute footage based on personal interpretations, leading to an uncontrolled narrative that could compromise public confidence in aged care and retirement living services and humiliate or embarrass the resident

Inconsistent access and control over surveillance data

Currently, the legislation, allows individuals, such as family members, to install and access surveillance devices but establishes very clear parameters for use. Consent of the owner or occupier of the relevant premises is required other than in particular circumstances, as is the consent of any person who is party to an observed or recorded ‘private activity’ being observed or recorded. Permitted circumstances include where the installation, use and maintenance of the device is reasonably necessary for the protection of the lawful interests of the person. This was the accepted justification for the recording by Ms Hausler in 2015 ie in an environment in which she considered there was insufficient action taken in response to her allegations of abuse her installation and recording was considered to be for the protection of her lawful interests.

It must be recognised however that the regulatory environment in aged care now imposes significant incident management and reporting obligations on a provider. These obligations have been significantly enhanced in recent times and extend to allegations of abuse and, to a significant degree, would require a provider to report to police in the *Hausler* circumstances.

Interestingly, in his second reading speech to Parliament in relation to the Bill, Mr Pangallo has not referenced this enhanced incident management and reporting regime nor therefore the impact on the various circumstances he instances to justify the Bill.

We are concerned therefore that privacy and dignity are being significantly diminished by the Bill without full consideration of the regulatory environment in which the relevant sectors operate.

In our view the Act currently provides an acceptable balance between safety on the one hand and privacy and dignity on the other, particularly given the enhanced safety protections in the

form of incident management and reporting in aged care which have been introduced post the Royal Commission into Aged Care Quality and Safety.

It should also be recognised that complaint handling is an important factor in the relationship between care recipient and care provider. Enabling someone on behalf of a care recipient (but without their express authority) to unilaterally deprive a care recipient of their privacy and interfere with their relationship of trust with staff because they are reluctant to address their concerns directly with a provider is further evidence of the imbalance of interests created by the Bill.

Absence of substitute decision-maker provisions

The legislation notably (and critically) lacks a clear provision in relation to those who may act on behalf of the resident of premises – ie clear substitute decision-making parameters are lacking to address installation and use on behalf of residents, including those who lack cognitive capacity. Without this critical safeguard, surveillance devices could be installed and used in entirely unsuitable instances, including where the resident cannot consent and it may not align with the consumer's best interest or care preferences. This is a significant deficiency in the Bill and the capacity for abuse is further evidence of the imbalance between important interests which is evident in the Bill. .

Conflict with the Aged Care Act and provider oversight limitations

The Bill introduces a challenging regulatory conflict with the Aged Care Act (and potentially other legislation such as the National Disability Insurance Act), which governs providers on an organisational level. Unlike the Aged Care Act, the proposed amendment enables individuals, rather than organisations to make surveillance decisions. This creates a dilemma for aged care and retirement living organisations as they may lack the authority to oversee or intervene in surveillance practices. The result is a regulatory gap where organisations – as mentioned, already held to strict standards and regulation under the Aged Care Act, the National Disability Insurance Act (and to a lesser extent under the Retirement Villages Act and the Supported Residential Facilities Act) – have limited capacity to ensure compliance with surveillance regulations within their own premises.

This discrepancy could undermine the capacity of care providers to maintain a balanced environment where resident safety is preserved alongside individual privacy of residents, staff and visitors. The Bill provides no legal right for an operator to obtain access to the recording taken. Contrast this with the significant number of other people to whom a person can provide the recording. It means that an operator does not have a clear legal right to the recording which may be otherwise provided to government authorities and the media in edited or unedited form.

Similarly, professionals such as doctors, allied health practitioners and lawyers regularly visit residents in these settings to give medical, allied health or legal advice. Those professionals have no legal right to access the recording. The recording of these meetings when the professional has no control over the use of the recording is likely to lead to them refusing to assist residents in these settings. The loser is the resident.

Conflict with the Summary Offences Act

The Summary Offences Act makes it a criminal offence to indecently film a person without the person's consent. Indecent filming includes filming of genitalia, exposed breasts and other private parts. Surveillance devices which record activity in a person's bedroom and bathroom and other parts of the premises will inevitably record filming which is regarded as indecent under the Act.

The Act-quite properly- specifically prohibits consent being given on behalf of a person who lacks cognitive ability and treats that person in the same way as a child.

Aged care facilities, retirement villages, disability homes, supported residential facilities and so on have a disproportionate number of people compared to the community who have limited or no cognitive ability.

Therefore, this Bill will expose the installers of the surveillance equipment to a cognitively impaired resident to criminal sanction as it is legally impossible to obtain the consent of the cognitively impaired resident to the indecent filming.

Restriction on removal of device

Once installed, there is a prohibition in the Bill on any person removing the surveillance or listening device. This includes a resident who has had the device installed against his or her wishes. There is not even the ability for a court to grant permission for the removal of the device.

This is a clear example where the Bill purports to protect residents, but in reality the power is given to those who purport to act on behalf of the resident.

Rights under existing laws regarding surveillance devices

The Bill is in stark contrast to the remainder of the Surveillance Devices Act which is to only allow surveillance in limited lawful circumstances and with significant safeguards. What the Bill does is reverse that to allow surveillance in particular settings with limited oversight.

Cognitive residents (and appropriately authorised substitute decision-makers or attorneys) already have the power under existing legislation to consent to surveillance devices being installed in their premises subject to any contrary contractual obligations such as a prohibition in a retirement village contract or aged care contract. Residents who are not cognitive but who have a properly worded power of attorney and advance care directive are in the same position, although criminal liability would still attach to such installations under the Summary Offences Act if the device recorded indecent filming.

The only people that do not have the power are unauthorised persons who purport to act on behalf of the resident. It is these people that the Bill seeks to empower.

Exemption of hospitals and unequal privacy protections

The Bill's exclusion of public or private hospitals from its purview introduces an inconsistency in privacy protections across different care settings. It suggests that residents in aged care or retirement village homes, may be subjected to a different standard of privacy than those in public or private hospital settings. This could have the unintended consequence of ageism. Why do older people and those with reduced capacity have less right to privacy and dignity than others in different care settings.

Notably, the Bill applies to a retirement village residents irrespective of whether care is being delivered which is in contrast to all of the other settings which are defined as 'prescribed residential premises'. This would allow video and audio surveillance at large, and is in conflict with the Bill's professed desire to protect residents in vulnerable settings.

Conclusion

We believe that this Bill is ultimately unnecessary, representing an overreaction likely influenced by recent negative media coverage and specifically, the Oakden incident in South Australia. It may also be in response to individual consumers' personal experiences where complaint resolution was poorly managed. This legislative approach seems excessive and risks imposing significant privacy intrusions on residents. It is important to recognise that, as in any industry, there will be isolated cases involving bad actors and outliers - these instances should not drive widespread surveillance policies that compromise privacy and trust.

The aged care, disability and retirement living sectors are already subject to extensive and increasing regulation under the new Aged Care Act and the Retirement Villages Amendment Bill, the Supported Residential Facilities Act and the National Disability Insurance Scheme Act. Introducing additional surveillance requirements adds unnecessary burdens to already highly regulated sectors. This Bill, which seems to be driven by the need to respond to media pressure and individuals' experiences rather than a proven policy gap, may result in unintended negative consequences that could ultimately impact the quality of care and resident wellbeing.

Moreover, the introduction of surveillance in such a far-reaching and intrusive manner is inconsistent with Australian values. Respect for individual privacy, fairness and the principle of mutual trust are cornerstones of our society. This legislation risks creating a culture of suspicion and overregulation, which is contrary to the Australian ethos of protecting personal freedoms while addressing wrongdoing in a measured and balanced way.

We would welcome the opportunity to meet with you to discuss our concerns further. Please contact Mark Prosser, Director Retirement Living & Seniors Housing at mark.prosser@accpa.asn.au.

Yours sincerely,



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