

CONFLICTING AGENDAS: THE POLITICS OF SEX IN AGED CARE

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ABSTRACT

Despite legal protections, couples in Australian residential aged care facilities experience institutional interference in their intimate and sexual relationships. Panoptic surveillance remains widespread in aged care. Little attention is given to privacy. Some residents' doors are kept open at all times. Couples may be separated or provided with single beds only, unable to push them together. Staff frequently enter without knocking, commonly ignore 'do not disturb signs' and often gossip about residents. This culture has its origins in colonial institutions. Attempts at legislative reform to redress this situation have been met with mixed responses, with the most vociferous opposition coming from religious conservatives. A recurrent source of conflict is the tension between the 'rights' of religious and political institutions versus those of individuals. This article identifies systemic issues faced by partnered aged care residents, their historical origins, and the legislation that is designed to protect residents. Using a thematic analysis methodology, it reviews political debates in the past 40 years, in both federal Parliament and newspapers, and provides a critical analysis of recurrent themes and ideologies underpinning them. It concludes with recommendations for legislation that is consultative and 'person-centred' and recommends proscriptive privacy protections. Adoption of these ideas in future policy reforms has the potential to create more positive outcomes for partnered aged care residents.

Keywords: aged care; nursing homes; couples; sexual relationships; aged care legislation; separation of couples

B. INTRODUCTION

Sexuality in aged care environments is a fraught topic. Traditionally, aged care providers have determined moral standards and 'acceptable' behaviours in their facilities. However, some politicians and professionals have argued that aged care residents have the same civil rights as all citizens¹ and

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have advocated for residents' sexual relationships to be respected and accommodated.² Some contend that cultural change is long overdue and will only happen if the Government legislates for providers to actively protect residents' sexual relationships by training staff to respond appropriately and compassionately to residents' sexual expressions.³ What prevents this from happening?

A review of the literature suggests entrenched cultural patterns in aged care practice have their roots in colonial institutions. This article begins by briefly reviewing current problems faced by partnered residents, followed by an historical overview of institutional aged care in Australia, tracing recurrent themes and persistent problems for couples. With this background, discussion turns to the history of attempted reforms to protect couples and the corresponding political debates in the period 1974 to 2015.

B. Partnered residents – the current situation

Some Australian residential aged care facilities still segregate sexes, including married couples⁴ and many ignore the needs of lesbian, gay, bisexual, transgender and intersex residents.⁵ The experience of de facto couples is unclear, however, one might reasonably assume they face similar discrimination.

In 2011, 21 per cent of women and 44 per cent of men in residential aged care facilities self-identified as being married or in a de facto relationship.⁶ It is unknown how many couples entered care together. The majority of facilities lack formal policies or practice guidelines stating their position on residents' expressing themselves sexually.⁷ Research also indicates that the physical environment within

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¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 December 1990, 4903 (Peter Staples, Minister for Housing and Aged Care).

² Chris Ronalds, Phillipa Godwin and Jeff Fiebig, *Residents' Rights in Nursing Homes and Hostels* (Department of Community Services and Health, 1989).

³ Alison Rahn, Amy Lykins, Cary Bennett and Tiffany Jones, 'Opening a Can of Worms: Consenting Adults in Aged Care' in *Bringing Research to Life: 14th National Conference of Emerging Researchers in Ageing Program & Proceedings* (National Ageing Research Institute 2015) 56.

⁴ See Russell Shuttleworth, Cherry Russell, Patricia Weerakoon and Tinashe Dune 'Sexuality in Residential Aged Care: A Survey of Perceptions and Policies in Australian Nursing Homes' (2010) 28 *Sexuality and Disability* 187. While a search of <http://www.myagedcare.gov.au/> indicates that some Australian aged care facilities cater for couples, by providing adjoining rooms or double beds for instance, the authors were unable to find evidence that double beds are provided to married or de facto individuals who enter care alone and who may wish for their partner to accompany them in bed or stay overnight occasionally. Fortunately, some establishments exceed the minimum requirements and aim for best practice. However, residents are often unable to establish the institutional attitudes within a facility until after admission, hence the need for legislated protections.

⁵ Maria Brown 'LGBT aging and rhetorical silence' (2009) 6(2) *Sexuality Research and Social Policy* 65.

⁶ Australian Institute of Health and Welfare, *Residential aged care in Australia 2010–11: a statistical overview* (2012) <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422896>>

⁷ A recent study in 2015 provided evidence that few aged care facilities have any formal policy on the sexual health needs of resident couples - see Linda McAuliffe, Michael Bauer, Deirdre Fetherstonhaugh, & Carol Chenco 'Assessment of sexual health and sexual needs in residential aged care' (2015) 34(3) *Australasian Journal on Ageing*, 183. See also Michael Bauer, Linda McAuliffe, Rhonda Nay and

facilities influences residents' ability to freely conduct their intimate relationships by either enabling or restricting intimate activities.⁸

Currently, no government policy addresses the sexual needs of aged care residents, especially couples. Some experts believe the aged care sector is unlikely to address this situation without proscriptive legislated measures in place to direct them.⁹

Van den Hoonaard¹⁰ has identified systemic ageism in Australia's aged care system. Butler¹¹ defines 'ageism' as a combination of three connected elements: prejudicial or derogatory attitudes; discriminatory practices; and institutional practices and policies perpetuating ageist stereotypes. This article considers all three elements.

Ageism is evident in the lack of attention to residents' privacy needs, which manifests in invasive practices by some providers. Examples include 'open door' policies (where residents' doors are kept open at all times), housing partners either in separate rooms or in single beds only (refusing to push couples' beds together), staff entering residents' rooms without knocking, ignoring 'do not disturb signs', management refusing to put locks on doors, and staff gossiping about residents.¹² These practices originate from conservative ageist attitudes and past paradigms of aged care.

B. Historical Context

The Australian residential aged care facility is a post-World War Two phenomenon.¹³ Previously, institutions mainly took the form of large generic asylums for society's refugees, predominantly funded by churches and charitable organisations.¹⁴ They were places of 'overcrowding and misery' where 'incarceration almost invariably meant the separation of married couples'.¹⁵ People of all ages

Deirdre Fetherstonhaugh, 'Sex in the City and Older People' (2009) 13(Supplement 1) *The Journal of Nutrition, Health and Aging* S173; Linda Kirkman, Amanda Kenny and Christopher Fox 'Evidence of absence: Midlife and older adult sexual health policy in Australia' (2013) 10(2) *Sexuality Research and Social Policy* 135; Linda McAuliffe, 'Sexuality: Policy and Education in Australian Residential Aged Care' (Paper presented at the 48th National Conference of the Australian Association of Gerontology, Alice Springs, November 2015).

⁸ Deborah Osborne, Catherine Barrett, Clare Hetzel, Joan Nankervis and Robyn Smith, *The Wellness Project: Promoting Older Peoples' Sexual Health* (July 2002)

<http://www.mednwh.unimelb.edu.au/research/service_rac.htm>

⁹ Rahn et al., above n 3, 57.

¹⁰ Deborah van den Hoonaard 'Ageism' in Jodi O'Brien (ed.), *Encyclopedia of gender and society* (SAGE Publications, 2009) 20.

¹¹ Robert Butler 'Age-ism: Another form of bigotry' (1969) 9(4) *The Gerontologist* 243.

¹² See Michael Bauer, Deirdre Fetherstonhaugh, Laura Tarzia, Rhonda Nay, David Wellman, and Elizabeth Beattie "I always look under the bed for a man". Needs and barriers to the expression of sexuality in residential aged care: the views of residents with and without dementia' (2013) 4(3) *Psychology and Sexuality* 296; Daniel Reingold and Nelson Burros 'Sexuality in the nursing home' (2004) 43(2-3) *Journal of Gerontological Social Work* 175; Chris Ronalds, Jeff Fiebig, Phillipa Godwin and Robyn Green, *I'm Still An Individual* (Department of Community Services and Health, 1989).

¹³ See John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating aged care: Ritualism and the new pyramid* (Edward Elgar Publishing, 2007); Elaine Crisp, *In safe hands: A history of aged care in Tasmania* (D Phil Thesis, University of Tasmania, 2012) <<http://eprints.utas.edu.au/15903>>.

¹⁴ See C. Cummins, *A history of medical administration in NSW 1788-1973 (2 ed)* (NSW Department of Health, 2003); Government of South Australia, *Adelaide - Asylums, Reformatories and Homes* <<http://www.slsa.sa.gov.au/manning/adelaide/asylums/asylums.htm>>; Hal Kendig and Stephen Duckett, *Australian directions in aged care: The generation of policies for generations of older people* (The Australian Health Policy Institute at the University of Sydney, 2001).

¹⁵ John Murphy, *A decent provision: Australia welfare policy, 1870 to 1949* (Ashgate Publishing, 2011), 59.

were fed and housed in military-like barracks.¹⁶ Asylums operated as totalitarian regimes¹⁷ or ‘total institutions’,¹⁸ exercising social control through ‘rules, routines, and the fabric of the institutions’¹⁹ in tandem with systems of surveillance and discipline.²⁰

By the 1930s, dedicated institutions for the aged had emerged. Asylums evolved into ‘nursing homes’, ‘geriatric hospitals’ and ‘convalescent homes’. The discourse shifted from ‘incarceration’ and ‘inmates’ to ‘care’ and ‘patients’. Old age became medicalised, requiring nurses in attendance 24 hours a day.²¹

For couples, aged care began emerging from the ‘dark ages’ in the 1950s. A new political narrative was winning favour – that institutions be more ‘homelike’. By 1952 there were ‘140 semi-charitable organisations providing pensioner housing’.²² Hostel accommodation emerged as an alternative to nursing homes, offering supported housing for those not requiring nursing care. As Dargavel and Kendig note: ‘[c]ouples as well as single aged persons were eligible, thus overcoming the problem of couples being separated by admission to an institution, many of which separated males and females’.²³

Services offered included meals, cleaning, bathing, and dressing.²⁴ Demand outstripped supply,²⁵ resulting in the *Aged Persons’ Homes Act 1954*, which provided capital funding for not-for-profit ‘churches and recognized charitable bodies and institutions to assist them in providing homes for aged people’.²⁶ This legislation remains unique by explicitly seeking to protect married couples:

*The purpose of this Act is to encourage and assist the provision of suitable homes for aged persons, and in particular homes at which aged persons may reside in conditions approaching as nearly as possible normal domestic life, and, in the case of married people, with proper regard to the companionship of husband and wife.*²⁷

¹⁶ Ibid, 60.

¹⁷ John Braithwaite, ‘Regulating nursing homes: The challenge of regulating care for older people in Australia’ (2001) 323 *British Medical Journal* 443.

¹⁸ Erving Goffman, *Asylums* (Aldine, 1962).

¹⁹ Crisp, above n13, 12.

²⁰ See Thomas Markus, *Buildings and Power: Freedom and control in the origin of modern building types* (Psychology Press, 1993); Foucault, above n 47; Michel Foucault, *Madness and Civilization* (Pantheon, 1965); Michel Foucault, *The Birth of the Clinic* (Routledge, 1973).

²¹ Crisp, above n 13.

²² Ricki Dargavel and Hal Kendig ‘Political rhetoric and program drift: House and Senate debates on the Aged or Disabled Persons’ and Homes Act’ (1986) 5(2) *Australian Journal on Ageing* 25.

²³ Ibid.

²⁴ Commonwealth, *In a home or at home: accommodation and home care for the aged: Report, October 1982: Standing Committee on Expenditure* (1982).

²⁵ Dargavel and Kendig, above n 22, 23.

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1954, 1 (William McMahon, Minister for Social Services).

²⁷ *Aged Persons’ Homes Act 1954* (Cth), s3(1). No explanatory memorandum could be found to define the reach of the Act however, in the Act’s definitions an ‘aged person’ means ‘a man who has attained the age of sixty-five years or a woman who has attained the age of

II. RECURRENT SYSTEMIC PROBLEMS

From this brief historical review, we now turn to four recurrent historical patterns that continue to interfere in residents' intimate relationships.

B. Dehumanisation

Dehumanisation means to 'deprive of human characteristics' or to 'make impersonal or machine-like'.²⁸ Residents may become dehumanised in a myriad of ways. Examples include being viewed as objects rather than people; negative staff attitudes or ageist beliefs; rigid routines that dominate daily life in the institution; and rosters and staff ratios that allow little time for staff to develop relationships with residents.²⁹ The likelihood of dehumanisation tends to increase in larger institutions.

Some argue that the language we use, such as 'facility' and 'care recipient' dehumanises older people.³⁰ There have been disturbing national and international examples of dehumanisation of aged care residents in recent years. In the period 2012 to 2015, there were at least 35 reported instances in the United States of staff sharing degrading photos on social media, in which residents were partially or totally naked.³¹ A recent example in Australia involved staff photographing residents' genitals and deriving amusement by guessing which resident the genitals belonged to.³² Other dehumanising practices in some Australian institutions include photographic documentation of residents' wounds without regard to their bodily privacy and one particular style of bed bath (where, for convenience, residents are reportedly stripped off, placed in a defenceless position, stark naked, on their back, in an inflatable bath on a trolley and hosed down by a staff member, sometimes in view of other people).³³

sixty years and includes the wife or husband of an aged person residing or desiring to reside with the aged person'. A review of Hansard provided no further guidance.

²⁸ Bruce Moore, *Australian Oxford Dictionary* (2 ed.) (Oxford University Press, 2004)
doi: 10.1093/acref/9780195517965.001.0001.

²⁹ Mary Applegate and Janice Morse 'Personal privacy and interactional patterns in a nursing home' (1995) 8(4) *Journal of Aging Studies* 413.

³⁰ Kathleen Brasher, 'Our elderly need homes, not warehousing', *The Age*, 11 January 2016
< <http://www.theage.com.au/comment/our-elderly-need-homes--not-warehousing-20160110-gm2uoo.html>>.

³¹ Charles Ornstein, 'Degrading photos on social media pose rising threat to nursing home patients', *Sydney Morning Herald*, 22 December 2015 < <http://www.smh.com.au/world/degrading-photos-on-social-media-pose-rising-threat-to-nursing-home-patients-20151221-glsxan.html>>.

³² The Hon. Susan Ryan, Age and Disability Discrimination Commissioner, 'Address to the Elder Abuse Forum: A Human Rights Perspective' (Speech delivered at Auburn Town Hall, 13 October 2015) <<https://www.humanrights.gov.au/news/speeches/elder-abuse-forum-human-rights-perspective>>.

³³ Interview with Dr Michele Chandler, Maevis Group (In-depth phone interview, 24 August, 2015). Written consent to being quoted was provided.

B. Surveillance

Surveillance in modern nursing homes often resembles the ‘disciplinary space’ of 19th century institutions, allowing staff ‘to be able at each moment to supervise the conduct of each individual’.³⁴ In such institutions individuals were isolated and distributed with gatekeepers strategically placed to surveil their activities.³⁵ Currently, many staff characterise residents as ‘frail, dependent, and in need of constant supervision’.³⁶ Rooms are often shared, distributed along long corridors, with doors kept open. Hallways busy with residents, staff, and visitors are visible from a central nursing station³⁷ or from surveillance cameras.³⁸ A disturbing trend in America is the increasingly common practice of installing surveillance cameras in residents’ rooms.³⁹ Some are calling for similar measures in Australia,⁴⁰ resulting in ethical guidelines having been formulated.⁴¹ In such an environment ‘couples can encounter difficulty when trying to find a time and place to be intimate’.⁴² They are limited by lack of privacy⁴³ or private space, especially ‘couple space’.

C. Management and social control

Institutions exercise social control through management structures and building design. The term ‘facility’ speaks of this, meaning ‘a place, amenity, or piece of equipment provided for a particular purpose’, which derives from the French *facilité*, or Latin *facilitas*, meaning ‘easy’.⁴⁴ In other words an aged care facility is designed to make care of the aged easy to manage.

Sexuality is one of the most controlled aspects of human behaviour within institutions. As a result, it has been actively repressed and silenced ‘to constrain severely the powerful sexual impulse in order to maintain social stability’.⁴⁵ Given that a person’s sexuality is fundamental to their identity,⁴⁶ denying it creates one of two reactions: (1) a compliant, withdrawn, non-person who is easy to manage,⁴⁷ or (2) a person who acts out in ‘inappropriate’ ways due to sexual frustration. Experts report that

³⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books, 1995) 143.

³⁵ Ibid.

³⁶ Daniel Reingold ‘Rights of Nursing Home Residents to Sexual Expression’ (1997) 5 *Clinical Geriatrics* 52.

³⁷ Ramzi Hajjar and Hosam Kamel ‘Sexuality in the nursing home, part 1: attitudes and barriers to sexual expression’ (2004) 4 *Journal of the American Medical Directors Association* 152.

³⁸ Braithwaite et al., above n 13.

³⁹ Lauren Hermon, ‘Hidden cameras to prevent elder abuse’, *DPS News* <<https://news.agedcareguide.com.au/2011/09/28/hidden-cameras-to-prevent-elder-abuse/>>.

⁴⁰ Julia Medew, ‘Call for cameras in nursing home rooms’, *The Age*, 13 June, 2012 <<http://www.theage.com.au/victoria/call-for-cameras-in-nursing-home-rooms-20120612-208a8.html>>.

⁴¹ Malcolm Fisk, ‘Surveillance technologies in care homes: seven principles for their use’ (2015) 19(2) *Working with Older People* 51.

⁴² Douglas Edwards, ‘Sex and Intimacy in the Nursing Home: Among Many Issues, Resident Privacy Is Key’, (2003) 52 *Nursing Homes* 20.

⁴³ Jeffrey Berger ‘Sexuality and Intimacy in the Nursing Home: A Romantic Couple of Mixed Cognitive Capacities’ (2000) 11(4) *Journal of Clinical Ethics* 314.

⁴⁴ Angus Stevenson, *Oxford Dictionary of English* (3 ed.) (Oxford University Press, 2010)

doi: 10.1093/acref/9780199571123.001.0001.

⁴⁵ John Gagnon and William Simon as cited in Jeffrey Weeks, *Sex, Politics and Society: The Regulations of Sexuality Since 1800* (Routledge, 2014), 6.

⁴⁶ United Nations Economic and Social Council, *Economic, Social and Cultural Rights: The right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Report of the Special Rapporteur, Paul Hunt* (2004).

<[http://daccess-ddsny.un.org/doc/UNDOC/GEN/G04/109/33/PDF/G0410933.pdf](http://daccess-ddsny.un.org/doc/UNDOC/GEN/G04/109/33/PDF/G0410933.pdf?)>.

⁴⁷ Michel Foucault, *The History of Sexuality Volume I: An Introduction* (Pantheon Books, 1978).

assessing people's sexual and physical contact needs and including solutions in their care plan reduces unwanted behaviours and leads to happier outcomes for both residents and staff.⁴⁸

In residential aged care facilities, sexuality is controlled largely through various preventative measures, including leaving residents' doors open,⁴⁹ separation of couples,⁵⁰ and chemical restraint to reduce sexual desire (examples include oestrogen injections, androgen reducing medications, and anti-psychotics).⁵¹

D. Contested spaces

Residents' rooms are contested spaces, arising from a conflict of worldviews and practices.⁵² Residents retreat to their rooms for private time, rest, relaxation and recreation.⁵³ For staff, residents' rooms are their workplace, governed by occupational health and safety, professional duty of care, rosters, routines and tasks to be achieved.⁵⁴ Rarely is there a clear boundary between the two. Control predominantly rests with staff.

III. METHODS

A search was conducted of parliamentary documents and Australian newspapers in the period following the *Aged Persons' Homes Act 1954* relating to proposed legislation that might potentially affect the experience of partnered aged care residents. Search terms included 'aged care', 'nursing homes', 'married', 'couples', 'privacy', 'sex', 'sexual', 'sexual needs', and 'sexual expression'. Given that no documents were found between 1955 and 1974, the search was revised to the period from 1974 to 2015. Comprehensive electronic searches revealed over 200 documents, including 40 Hansard records, 11 parliamentary bills and bills digests, 21 enacted laws and regulations, reports and submissions from six senate committees and two royal commissions, 11 government and consultant reports, eight government digests and yearbooks, and over 90 newspaper articles and press releases.

Documents were then analysed qualitatively using a thematic analysis methodology. A summary of political debates, followed by a critical analysis of the themes and ideologies underlying them, is presented below.

⁴⁸ This was reported in interviews conducted by the principal author in 2015 with Emeritus Professor Rhonda Nay, Dr Drew Dwyer and two research fellows who did not consent to be named. See above n 3.

⁴⁹ Hajjar and Kamel, above n 37.

⁵⁰ Shuttleworth et al., above n 4.

⁵¹ Inese Tucker 'Management of inappropriate sexual behaviors in dementia: a literature review' (2010) 22(5) *International Psychogeriatrics* 683.

⁵² Lise-Lotte Dwyer, Birgitta Andershed, Lennart Nordenfelt and Britt-Marie Ternstedt 'Dignity as experienced by nursing home staff' (2009) 4(3) *International Journal of Older People Nursing* 185.

⁵³ Solveig Hauge and Hegggen Kristin 'The nursing home as a home: a field study of residents' daily life in the common living rooms' (2008) 17(4) *Journal of Clinical Nursing* 460.

⁵⁴ Rosemary Bland 'Independence, privacy and risk: two contrasting approaches to residential care for older people' (1999) 19(5) *Ageing and Society* 539.

IV. FINDINGS

This summary is limited to reforms that influenced, or had the potential to influence, the marital or sexual relationships of couples in residential aged care facilities since 1974.

A. 1974-77: Royal Commission on Human Relationships

The earliest mention of aged care residents having sexual needs was the Whitlam Government's *Royal Commission on Human Relationships*⁵⁵ which was predicated on the concept of intimate citizenship; that is 'all those areas of life which appear to be personal but that are in effect connected to, structured by, or regulated through the public sphere'.⁵⁶

Commissioner Evatt (former Chief Justice of the Family Court) said they were 'concerned with the quality of life of those who have no unions to speak for them'.⁵⁷ One finding was that:

*(...) institutions which care for old people on a long-term basis too often ignore their sexual needs, even to the point of separating husbands and wives. Double beds may be excluded from nursing homes and hostels, there may be no privacy and overnight visits from members of the opposite sex may be forbidden.*⁵⁸

Recommendations included:

*10. ... institutions ... should provide information, education, rehabilitation and counselling services for the handicapped, disabled and aged in sexual matters.
13. Professionals and institutions concerned with the care of the ageing should avoid isolation and segregation of the sexes.*⁵⁹

The Royal Commission provoked media controversy. A Catholic archbishop expressed 'concerns about the incursion of the state into family life'.⁶⁰ The Fraser Government (1975-83) distanced itself from the Commission's final report, timing its release to coincide with the 1977 election campaign.⁶¹ Few recommendations were acted on, however, it did help open public discussion about private

⁵⁵ Commonwealth, *Royal Commission on Human Relationships Final Report Volume 3* (1977).

⁵⁶ Ken Plummer, *Intimate Citizenship. Private Decisions and Public Dialogues* (University of Washington Press, 2003) 70.

⁵⁷ Michelle Arrow, 'Public Intimacies: Revisiting the Royal Commission on Human Relationships 1974-77' in Lisa Featherstone, Rebecca Jennings and Robert Reynolds (eds) *Acts of Love and Lust: Sexuality in Australia from 1945-2010* (Cambridge Scholars Press, 2014) 37.

⁵⁸ Commonwealth, above n 55, 8.

⁵⁹ *Ibid*, 248.

⁶⁰ Arrow, above n 57, 36.

⁶¹ *Ibid*, 24.

sexual relationships.⁶² Forty years on, Australia still has no specific legislation to protect the sexual needs of residents, to ensure their access to sexual health information and services, or that prevents involuntary separation of couples.

B. 1982-87: National Aged Care Standards

Following the McLeay Report⁶³ in 1977, the Hawke Government (1983-91) engaged in substantial public consultation on minimum national standards. This garnered bi-partisan support in Parliament, ensuring the adoption of *Outcome Standards* for nursing homes,⁶⁴ later extended in 1991 to include hostels. Objectives included maintaining residents' 'social independence', 'freedom of choice' and 'privacy and dignity'. However, the McLeay Report precipitated:

*[a] period of major confrontation between the Government and the nursing home industry over fees and profitability ... Nursing home proprietors from all around Australia joined the newly formed Australian Nursing Home Association ... The Association's aim was to present the views of nursing home proprietors more forcefully to the Government.*⁶⁵

C. 1988-90: Residents' rights

The Hawke Government commissioned human rights lawyer, Chris Ronalds, to investigate issues affecting residents in nursing homes and hostels. Submissions and interviews with 667 residents provided a unique insight into their experiences. Accounts included couples' difficulty in entering care together, forced separation of couples, interference in residents' sexual relationships, lack of privacy and private space, and pressure to conform to the religious practices of providers.⁶⁶ A Charter of Residents Rights and Responsibilities was proposed, along with a Draft Model Contract between residents and providers, proposing that residents become tenants with clearly defined spatial boundaries.⁶⁷ A 'right' relevant to partnered individuals was:

⁶² Australian Policy Online, *Royal Commission on Human Relationships* <<http://apo.org.au/resource/royal-commission-human-relationships>>.

⁶³ Commonwealth, above n 55.

⁶⁴ Commonwealth, *Living in a Nursing Home: Outcome Standards for Australian Nursing Homes: Commonwealth/State Working Party on Nursing Home Standards* (1987).

⁶⁵ Roxanne Le Guen *Department of the Parliamentary Library Background Paper Number 32 1993. Residential Care for the Aged: An overview of Government policy from 1962 to 1993* (24 November, 1993) 8.

⁶⁶ Ronalds et al., above n 12.

⁶⁷ Ronalds, Godwin and Fiebig, above n 2.

*the right to be treated with dignity and respect, and without harassment, abuse or neglect, including the right to have religious, cultural, sexual and emotional needs and preferences accepted and treated with respect.*⁶⁸

The Charter formed part of the *Community Services and Health Legislation Amendment Bill (No. 2) 1989*, however the Contract was omitted in favour of the following:

*The Minister may determine a common form of agreement that may be entered into between an eligible organisation and an eligible person, being a form of agreement relating to the accommodation and care of the person as a resident of a hostel operated by the organisation.*⁶⁹

This Bill had a ‘stormy and slow passage through Parliament’.⁷⁰ A subsequent report by McDonald and Bates⁷¹ identified potential conflicts between the Charter and nurses’ duty of care. Towards the Bill’s final stages, a media frenzy ensued; fuelled by the Australian Catholic Bishops⁷² Conference who belatedly realised its contents. Because they were not nursing home proprietors, they were not consulted. However, in their view, because they oversaw religious protocols in all Catholic institutions they felt they should have been consulted. Headlines such as ‘Catholic nursing homes threatened by new law’,⁷³ ‘Anglicans buy into nursing home row’,⁷⁴ ‘Knickers in a knot over sex for aged’,⁷⁵ and ‘Church and sex: Govt backs off’⁷⁶ featured daily. Church organisations used the media to lobby for public support and sent deputations to ministers, senators, and the Prime Minister. Religious organisations characterised sexual relations within residential aged care facilities as immoral and abhorrent. In an interview with Bishop Edward Kelly, it was reported that:

*The church objected to the passage of the charter which said "the resident shall be treated with respect and has the right to have language, sexual and emotional needs and choices accepted and treated with respect ..."*⁷⁷

Mother Mary John from the Little Sisters of the Poor threatened to close six nursing homes if forced to adopt the Charter:

We wouldn't be able to implement our homes' philosophy. The draft agreement aims to give residents the right to indulge in adultery, fornication and sodomy in our homes,

⁶⁸ Ibid, 104.

⁶⁹ Commonwealth, above n 55, 2.

⁷⁰ Le Guen, above n 65, 23.

⁷¹ Tracey McDonald and Philip Bates, *Commonwealth Nursing Home Outcome Standards - A Practical Guide to Duty of Care* (Australian Government Publishing Service, 1989).

⁷² Original punctuation, not the authors’.

⁷³ Megan Bird, ‘Catholic nursing homes threatened by new law’, *Canberra Times*, 1 November 1990, 3.

⁷⁴ Pilita Clark, ‘Anglicans buy into nursing home row’, *Sydney Morning Herald*, 2 November 1990, 2.

⁷⁵ Tom Connors, ‘Knickers in a knot over sex for aged’, *Canberra Times*, 6 November 1990, 8.

⁷⁶ ‘Church and sex: Govt backs off’, *Canberra Times*, 8 November 1990, 2.

⁷⁷ ‘They said it’, *Canberra Times*, 3 November 1990, 9.

*provided they do not do so in public.*⁷⁸

Such statements made no distinction between the conjugal relationships of married couples (as consecrated by the Church) and other activities that churches may consider sinful or deviant. The Minister for Housing and Aged Care, Peter Staples, responded:

*This has not been the work of militant sexual Rambos ... We're not seeking to give people rights, simply to ensure that people retain the rights they've always had outside nursing homes.*⁷⁹

The media coverage had repercussions in Parliament. Until then, the Bill had bi-partisan support. The Minister bargained with Catholic bishops, offering exemptions for religious groups to maintain their ethics and codes of conduct.⁸⁰ Unsatisfied, the Catholic bishops precipitated the removal of 'sexual and emotional needs and choices' from the Charter. Senator Florence Bjelke-Petersen encapsulated their argument:

*Mr Staples, while claiming that his charter extends rights to behavioural choices evenly to all nursing home inmates, was in fact denying aged people with Christian principles the right to choose a morally acceptable environment. Worse still, he insists that an environment in which moral deviance is welcome should be imposed on all, whether they like it or not ... [religious providers] are entitled to expect that as their nursing home residents enter their care voluntarily, they will agree to the standards laid down. If not, the solution is simple - they are free to seek care elsewhere.*⁸¹

The *Community Services and Health Legislation Amendment Act (No. 2) 1990* was enacted in December 1990, including the Charter, and remains current, although it is due to be repealed in 2016. While references to sexual needs were removed, indirect protections of residents' sexual relationships remain, including the right to 'select and maintain social and personal relationships with any other person without fear, criticism or restriction'.⁸²

The Act includes a preamble to the Charter which, while offering no legal protections, illustrates the intentions behind the Charter:

Every person has the right to freedom and respect and the right to be treated fairly by others... Australian society has a strong commitment to social justice principles They form the basis of a society which is free of prejudice and is caring, just and humane. This Charter affirms those social justice principles. The personal, civil, legal and consumer

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 December 1990, 4901 (Raymond Braithwaite, Member for Dawson).

⁸¹ Commonwealth, *Parliamentary Debates*, Senate, 8 November 1990, 3777 (Florence Bjelke-Petersen, Senator).

⁸² *Community Services and Health Legislation Amendment Act (No. 2) 1990* (Cth), 6.

rights of each resident are not diminished in any way when he or she moves into a hostel.
83

D. The Human Rights (Sexual Conduct) Act 1994

Prior to the *Human Rights (Sexual Conduct) Act 1994*, Australia had no specific human rights legislation, nor any legislation that protected the civil liberties of all Australians to choose how, and with whom, they conduct their sexual relationships.

This landmark legislation responded to a successful challenge of Tasmanian anti-homosexual laws under the *International Convention on Civil and Political Rights*.⁸⁴ Tasmania's subsequent refusal to repeal sections of their criminal law resulted in swift action by the Keating Government (1991-96) to enact legislation consistent with international law.

*Laws which say what kind of sex adults may agree to have and with whom, in the privacy of their own homes, are no longer acceptable to most reasonable-minded Australians.*⁸⁵

There was considerable debate of this Bill in Parliament, which was strategically designed by the Government to split the conservative opposition three ways.⁸⁶ Supporters concentrated on citizens' right to privacy and the protection of civil liberties. Opposing views related to states' rights to determine their own laws⁸⁷ and those opposed to homosexuality. Opposition came from the National Party; three state governments;⁸⁸ religious organisations and anti-gay lobby groups. Attorney-General Michael Lavarch asserted that 'Governments exist to protect rights, not to enjoy them at the expense of the individual'.⁸⁹ Tasmanian minister, Silvia Smith, reported:

*scaremongering and ... misinformation ... as an emotive deception by anti-homosexual groups ... [in] an insidious attempt to enlist the support of moderate-thinking people to their bigoted cause.*⁹⁰

Most newspaper coverage supported the Bill, with religious groups' views receiving minimal attention. Headlines included 'God's guidance needed on smiting of sodomites'⁹¹ and 'Lavarch's Privacy Mini-Bill Challenges Religious Right'.⁹² Ministers were lobbied directly⁹³ and representatives

⁸³ Ibid, 5.

⁸⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 October 1994, 1782.

⁸⁵ Ibid, 1775.

⁸⁶ Peter O'Keefe, 'Parliament, Sex and Conscience: A case study of Australia's Human Rights (Sexual Conduct Bill 1994 (1995) 76 *The Parliamentarian*, 196.

⁸⁷ Commonwealth, above n 81, 1775.

⁸⁸ Tasmania, Victoria and Western Australia.

⁸⁹ Commonwealth, above n 85.

⁹⁰ Commonwealth, above n 85, 1785.

⁹¹ Ian Warden, 'God's guidance needed on smiting of sodomites', *Canberra Times*, 26 September 1994, 14.

⁹² 'Lavarch's Privacy Mini-Bill Challenges Religious Right', *Sydney Morning Herald*, 7 December 1994, 19.

from bodies such as the Australian Catholic Bishops Conference, the Alliance to Defeat the Human Rights Bill, the Knights of the Southern Cross and the Network for Christian Values attended the Senate's constitutional committee.⁹⁴

Moral panic occurred in some quarters, centring on fears that criminal laws on incest, abortion, bestiality, sadomasochism, prostitution, and pornography would be overridden.⁹⁵ Senator Chapman added:

*representations by many mainstream churches are an urgent plea to the government to allow more time for scrutiny of this contentious and ill-conceived legislation which threatens the dignity and sanctity of marriage and the procreation of children. It is yet another part of the continuing attempts to undermine and destroy the traditional family structure.*⁹⁶

The Attorney-General made concessions to the Australian Catholic Bishops Conference by re-writing the explanatory memorandum to address their concerns, expressly stating 'that the law will not extend to laws dealing with termination of pregnancy or pornography'.⁹⁷ This is noteworthy since it is unusual for an explanatory memorandum to focus on what a Bill *will not* do.⁹⁸ The Bill subsequently passed on 19 December, 1994. It stipulates that:

*Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.*⁹⁹

Article 17 states:

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks.*¹⁰⁰

Since aged care residents are entitled to the same civil liberties as all Australian citizens, this law applies equally to them. Not all residents wish to be sexual however, for those who do, lack of

⁹³ Commonwealth, above n 85.

⁹⁴ Commonwealth, *Parliamentary Debates*, Senate, 9 December 1994.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, 4355.

⁹⁷ O'Keefe, above n 86, 198.

⁹⁸ *Ibid.*

⁹⁹ *Human Rights (Sexual Conduct) Act 1994* (Cth), 1.

¹⁰⁰ United Nations General Assembly, *International Covenant on Civil and Political Rights* (1966), 177 <[https://treaties.un.org/doc/Publication/UNTS/ Volume 999/volume-999-I-14668-English.pdf](https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf)>.

privacy, intrusion by staff, management policies and practices in aged care facilities have the effect of limiting resident couples' opportunity to express themselves sexually by limiting their privacy.¹⁰¹ Applying this legislation to aged care settings invites the question of what is public and what is private space within the facility.¹⁰² The interpretation of public/private space impacts significantly on this discussion. According to Bronitt,¹⁰³ the right to a private life, including one's private relationships, is covered by Article 8 of the European Convention on Human Rights. This is broadly interpreted to mean 'the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfillment of one's own personality'.¹⁰⁴ He argues that this approach

*extends beyond the negative conception of privacy as freedom from unwarranted state intrusion into one's private life, to include the positive right to establish, develop and fulfill one's own emotional needs.*¹⁰⁵

In Australia, at least, this interpretation is yet to be tested in the courts.

E. The Aged Care Act 1997

The Howard Government (1996-2007) deregulated the nursing home industry and increased private sector participation.¹⁰⁶ To facilitate this vision, they introduced the *Aged Care Bill 1997*, which is essentially a funding instrument. Simultaneously, the Outcome Standards of 1987 were replaced with new accreditation standards.

The Australian Labor Party initially opposed this Bill, concerned that financially disadvantaged older people would receive a lower standard of care. Public representations to the Senate committee insisted that consumers needed to be put at the centre of the discussion, that minimum standards ought to be more clearly defined and providers made more accountable. One provider complained that the new standards were too open to subjective interpretation.¹⁰⁷

Judith Moylan, Minister for Family Services, made the following case for couples:

Even in 1997, nearly 40 per cent of residents share a room of four or more beds, with the loss of dignity and privacy which that entails ... People who enter hostels are forced to move to a nursing home as they become increasingly frail. Couples are very often forced

¹⁰¹ See Hajjar and Kamel, above n 37; Shuttleworth et al., above n 4; Tucker, above n 50.

¹⁰² The original version of this article included lengthy discussion on privacy and private space, including privacy legislation. However, for reasons of brevity this material has been held over for a separate article. Research into couple privacy in aged care facilities is currently being undertaken by the principal author as part of her PhD thesis.

¹⁰³ Simon Bronitt, 'The Right to Sexual Privacy, Sado Masochism and the Human Rights (Sexual Conduct) Act 1994 (Cth) (1995) 2 (1) *Australian Journal of Human Rights* 59.

¹⁰⁴ Decision of the European Commission of Human Rights, Application No.6825/74 in *Decisions and Reports*, Vol 5, 87.

¹⁰⁵ Bronitt 1995, above n 103, 63.

¹⁰⁶ Braithwaite et al., above n 13.

¹⁰⁷ Commonwealth, *Report on the Funding of Aged Care Institutions: Community Affairs References Committee* (1997) <[http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ Completed_inquiries/1996-99/aged/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/1996-99/aged/report/index)>.

to separate under this particular system.¹⁰⁸

Her Liberal colleague, Bruce Billson, continued:

*Under our model ... a couple's care needs can be differentiated. Under Labor's arrangement, the husband could be in one facility in a nursing home and the wife could be in a hostel. Occasionally they could organise to get together to meet one another. Under this reform package, those couples need not be separated. That is a humane improvement in response to a problem that has been left to us.*¹⁰⁹

Despite the rhetoric, proscriptive measures preventing forced separation of couples were not included. One effect of the Act was to blur the boundary between supported hostel accommodation and nursing care, allowing hostels to become more medicalised and less homelike. The following decades saw a proliferation of larger, commercial institutions.¹¹⁰

In 2011, the *Aged or Disabled Persons Care Act 1954*¹¹¹ ceased, removing the only explicit protection for couples. Recommendations from the Human Rights Commission¹¹² and the Productivity Commission,¹¹³ the *Living Longer Living Better*¹¹⁴ reforms and the *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy*¹¹⁵ resulted in further amendments to the *Aged Care Act*.

1. Amendments 2013-15

Changes to the *Aged Care Act* included (1) a more consumer-directed policy direction in community care; (2) removal of distinctions between 'low care' and 'high care', effectively amalgamating hostels and nursing homes into a medical model; and (3) inclusion of lesbian, gay, bisexual, transgender and intersex people as 'special needs' group.

¹⁰⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, February 10, 1997, 478 (Judith Moylan, Minister for Family Services).

¹⁰⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, October 28, 1997, 9946 (Bruce Billson, Member for Dunkley).

¹¹⁰ Braithwaite et al. 2007, above n 13.

¹¹¹ The *Aged or Disabled Persons Care Act 1954* was the amending Act to the *Aged Persons' Homes Act 1954*.

¹¹² Australian Human Rights Commission, *Respect and choice: A human rights approach for ageing and health* (2012) <https://www.humanrights.gov.au/sites/default/files/document/publication/human_rights_framework_for_ageing_and_health.pdf>.

¹¹³ Commonwealth. *Caring for older Australians: Productivity Commission Report* (2011). <<http://www.pc.gov.au/inquiries/completed/aged-care/>>.

¹¹⁴ *Aged Care (Living Longer Living Better) Act 2013* (Cth).

¹¹⁵ Department of Health and Ageing, *National Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Ageing and Aged Care Strategy* (2012) <https://www.dss.gov.au/sites/default/files/documents/08_2014/national_ageing_and_aged_care_strategy_lgbti_text_version_0.pdf>.

Amendment of sex discrimination laws removed exemptions for religious aged care organisations.¹¹⁶ The Australian Catholic Bishops Conference¹¹⁷ voiced opposition, citing the *International Covenant on Civil and Political Rights*:

*Freedom of religion is a fundamental human right ... While the rights of everyone must be respected, including the right to be protected from unjust discrimination, this should not be pursued in a way which undermines religious freedom. The language of exemptions and exceptions is misleading and fails to recognise that religious freedom is not a special permission to discriminate granted by government but a fundamental human right that government is obliged to protect.*¹¹⁸

The Uniting Church disagreed, saying '[f]or some churches, freedom of religion does not mean the freedom to discriminate'.¹¹⁹

Public outcry about religious exemptions was vociferous, featuring headlines like 'Danger in placing some above law'¹²⁰ and 'Churches fail to put reasoned argument'.¹²¹ One view was that discrimination might be acceptable by self-funded religious institutions, but not if 'funding comes from the taxes of atheists, adulterers, unmarried copulating couples and homosexuals'.¹²² In another letter, the contributor wrote 'churches want to be allowed to discriminate against people who have normal, legal sex lives, yet protect priests who rape children. What strange belief systems'.¹²³

The Gillard Government (2010-13) argued:

*Aged care is a service that is subsidised by the Commonwealth so that all Australians, if they need care and support, can access an aged-care service. Not all Australians have a choice about the kind of aged-care institution that they would like to access.*¹²⁴

Interestingly, no faith-based providers made submissions to the Senate committee examining these amendments. Submissions from four religious groups and a minority of Coalition Senators were insufficient to prevent the sex discrimination amendments becoming law in June 2013.

¹¹⁶ Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Commencement Proclamation 2013 (Cth).

¹¹⁷ Australian Catholic Bishops Conference, Response to Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper (2012) <[https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation - Discussion Paper - 197 - Australian Catholic Bishops Conference - 2 Feb 2012.pdf](https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation-Discussion%20Paper-197-Australian%20Catholic%20Bishops%20Conference-2%20Feb%202012.pdf)>.

¹¹⁸ Ibid, 2.

¹¹⁹ Elaine Poulos, 'Injustice not an article of faith for all churches', Sydney Morning Herald, 21 January 2013, 9.

¹²⁰ 'Danger in placing some above law', Sydney Morning Herald, 17 January 2013, 8.

¹²¹ 'Churches fail to put reasoned argument', Sydney Morning Herald, 19 January 2013, 14.

¹²² 'Free rein only if churches are fully self-funded', Sydney Morning Herald, 18 January 2013, 8.

¹²³ Ibid.

¹²⁴ Commonwealth, *Parliamentary Debates*, Senate, 18 June 2013, 3279 (Louise Pratt, Senator).

2. 2016 version

Searching the current version of the *Aged Care Act* using the terms ‘relationship’, ‘married’, ‘couple’, ‘intimacy’, ‘intimate’, ‘privacy’, ‘sexual’ and ‘sexual health’, reveals that a ‘member of a couple’, whether married or de facto, is defined as ‘a person who lives with another person’, not ‘separately and apart from the other person on a permanent basis’.¹²⁵ In other words, a resident is not ‘a member of a couple’ where they do not share a room or where only one partner enters care, even with no available option to remain together. This contradicts the *Family Law Act*, where a couple is not considered officially separated simply on the basis of living in separate locations.¹²⁶ ‘Privacy’ is mentioned only in relation to the confidentiality of documents. References to ‘sexual’ were limited to sexual orientation and sexual assault. The words ‘intimacy’, ‘intimate’ and ‘sexual health’ were absent.

A similar search was made of the Act’s appendices. The words ‘married’, ‘couple’, ‘intimacy’, ‘intimate’, ‘sexual’ and ‘sexual health’ were absent. The *User Rights Principles 2014* revealed:

*care recipient[s]/[have]... rights ... (f) to personal privacy; ... (j) to select and maintain social and personal relationships with anyone else without fear, criticism or restriction.*¹²⁷

Omission of these terms in the Act and appendices infers that residents’ sexual health and relationship status are not explicitly protected.

V. ANALYSIS

The parliamentary debates reveal a cycle of conflicting agendas and partial solutions to systemic problems experienced by couples in residential aged care facilities. Debates around residents’ sexual needs have been heated and often sensationalist, with opposing groups arguing in their own interests to limit reforms. Consequently, the needs of ordinary married and de facto couples have been overlooked.

¹²⁵ *Aged Care Act 1997* (Cth) (2016) 176.

¹²⁶ Robyn Carroll, ‘Family law, involuntarily separated couples and their property’ (2015) 33(2) *Law in Context* 87.

¹²⁷ *User Rights Principles 2014* (Cth), 21.

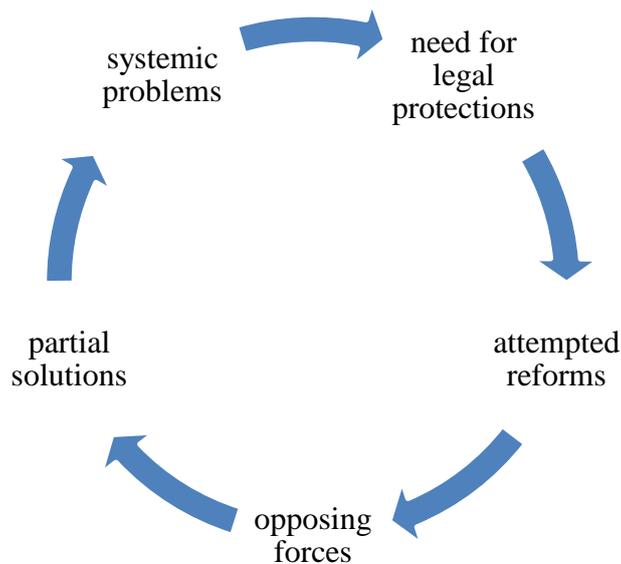


Figure 1: Cycle of Parliamentary Debates on Sexual Rights in Aged Care.

The recurrent pattern has been that problems are identified and brought to the notice of the Government. Consultant reports are commissioned, bills drafted, and new reforms introduced into Parliament, often followed by protracted periods of political debate. Parties with vested interests fuel debates by privately lobbying politicians and using news media to garner public support. This often results in tinkering with the wording of the legislation until a consensus is reached. However, some of these compromises fail to protect the people originally intended.

There are examples of religious institutions aggressively lobbying to override residents' needs (e.g., by dictating the moral standards of residents). In the case of residents' rights, church groups succeeded in exercising social control of residents both within their own facilities and more widely across the entire aged care sector. Likewise, politicians who opposed residents' sexual rights often expressed our society's ageist and religious beliefs. Conversely, there have also been occasions where politicians supported reforms for what they perceived to be the common good¹²⁸ in spite of vocal opposition, such as with the *Human Rights (Sexual Conduct) Act 1994*.

An inherent problem in politics is poor communication. Effective communication is two-way, giving all parties an opportunity to speak and be heard, while attempting to understand *from the speaker's point of view*. Without that, mutually satisfying negotiated solutions are virtually impossible. All parties affected by proposed changes need to be consulted, especially residents themselves. Instead we have an adversarial system of people competing to be heard.

¹²⁸ For instance, Peter Staples, Minister for Housing and Aged Care, when advocating for residents' rights in 1990; and support for the *Human Rights (Sexual Conduct) Act* in 1994 from Leader of the Opposition, Alexander Downer, and Shadow Attorney-General, Senator Amanda Vanstone, issued via press releases.

Analysis of the political debates outlined above identifies seven significant themes.

A. Social Justice

The majority of reforms presented expressed a desire for social justice, aimed at giving older people and minority groups the same civil liberties as other Australians. Notable examples of social conscience rising above political manoeuvring include the *Charter of Residents' Rights and Responsibilities*, the *Human Rights (Sexual Conduct) Act 1994* and the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*. A shared understanding of social justice, it seems, is not only a great motivator but has the power to unify both sides of politics.

B. Political Manoeuvrings

There were several references to political trickery, usually positioning the opposition in a no-win situation.¹²⁹ The opposition repeatedly expressed the desire for greater consultation. A noteworthy example was the *Human Rights (Sexual Conduct) Bill 1994*, where the Government manoeuvred the Opposition into choosing between two important principles – fundamental human rights; and commonwealth and state sovereignty to enact laws without external interference. Senator Abetz voiced this:

*the Attorney-General was met with a general fanfare of media commentary, indicating how clever and shrewd he was introducing a bill of this nature ... At the end of the day the Attorney-General was too clever by half.*¹³⁰

C. Economic Imperative

Successive governments have insisted that funding be linked to standards of service. This was apparent in the development of the *Outcome Standards, Quality of Care Principles* and the removal of religious exemptions from the *Aged Care Act*. In the latter, the Government dismissed calls for religious freedom, citing its responsibility to all Australians to ensure equal access to government funded aged care services.

D. Power in Numbers

¹²⁹ O'Keefe, above n 86.

¹³⁰ Commonwealth, *Human Rights (Sexual Conduct) Bill 1994: Senate. Legal and Constitutional Committee Report* (Senate Printing Unit, 1994), 57.

Historically, the majority of residential aged care providers have been religious and charitable institutions.¹³¹ They currently provide 57.1 per cent of residential care places,¹³² down from 66 per cent in 2005.¹³³ This majority position has been used as political leverage, such as when closure of residential aged care facilities was threatened in response to the *Charter of Residents' Rights and Responsibilities*. This misuse of power not only made politicians listen, but also cast residents as political pawns. In either case, residents were the losers - they either risked losing their 'home' or their rights, while having no direct voice in this stage of the process.

E. Human Rights

The human rights of religious freedom and privacy have been used to argue, in an adversarial manner, for or against reforms. These rights extend to individuals, not organisations, and are protected by the *International Covenant on Civil and Political Rights*.¹³⁴ The Australian Catholic Bishops Conference (2012) cited religious rights when arguing against anti-discrimination amendments when, in fact, such rights are limited:

*Freedom to manifest one's religion or beliefs may be subject ... to ... limitations ... to protect ... the fundamental rights and freedoms of others*¹³⁵

Rather than being adversarial, with effective communication, it is conceivably possible to arrive at a negotiated solution that maintains everyone's human rights.

F. Moral Deviance

Some religious organisations incited followers to support their cause by decrying 'moral deviance'. However, this drew attention away from the plight of ordinary married couples, whose sexual relationships are sanctioned by both church and state.¹³⁶ By forcing removal of the right for 'sexual and emotional needs and choices' from the *Charter of Residents' Rights and Responsibilities* and failing to insist on protections for couples, the amendments pushed through by churches created an opportunity for institutions, faith-based or not, to override the civil rights of couples, including the practice of forcibly separating them.

G. Choice

¹³¹ Ronalds et al., above n 12.

¹³² Aged and Community Services Australia, *2016-17 Pre-Budget Submission* (5 February 2016) <<http://www.agedcare.org.au/national-report/acsa-national-report-issue-372-4-february-2016/from-the-national-office/acsa-2016-17-pre-budget-submission-5-feb-2016>>.

¹³³ Aged and Community Services Australia, *Annual Report 2005* (2005) <<http://www.agedcare.org.au/publications/annual-reports/acsa-annual-report-2005.pdf>>.

¹³⁴ United Nations General Assembly, above n 100.

¹³⁵ *Ibid*, 1976.

¹³⁶ The Prime Minister, the Hon. John Howard, 'Address to the National Marriage Forum' (Speech delivered at the Great Hall, Parliament House, Canberra, 4 August 2004) <<http://pmtranscripts.dpmc.gov.au/release/transcript-21439>>.

An argument used by Catholic supporters was that residents choose to abide by their moral standards when choosing a faith-based facility.¹³⁷ This argument is flawed for two reasons. Firstly, rarely do aged care facilities provide documentation of their moral standards; as such, would-be residents often cannot make informed choices. Secondly, with residential aged care dominated by religious and charitable organisations, and waiting lists for vacancies in many locations, there may be no other choices available.

VI. WHERE TO GO FROM HERE?

This article focuses on existing couples (married or otherwise) who enter, or are separated by one or both partners entering, residential aged care facilities. Equally, however, newly formed couples established within such facilities deserve equal respect. In many facilities residents are discouraged from forming new relationships, regardless of whether they have the cognitive capacity to make informed choices.¹³⁸ The first step in protecting older people's relationships begins with legislation that protects the basic human right to 'establish, develop and fulfill one's own emotional needs', as defined by the European Convention on Human Rights.¹³⁹ What must then follow are industry-wide management policies and practices, staff recruitment and training congruent with these basic human rights. Such measures are beyond the scope of this article.

There will always be the need to balance resident privacy with professional duty of care by staff on a case-by-case basis. It is essential that staff maintain awareness of residents in their care to prevent sexual predation and other abuses. Likewise, a balance must be struck between the religious beliefs of an institution and the emotional and sexual needs of the people in their care. Many of these issues can be addressed by (1) requiring facilities to have clear written policies in place in relation to the emotional and sexual needs of residents, privacy, and duty of care; (2) undertaking a written assessment of the needs of individual residents upon admission; (3) developing an individualised care plan agreed upon by all parties; (4) regularly reviewing and updating this plan; and (5) creating a culture where staff and residents have an opportunity to develop personalised relationships and rapport with each other. It is not necessary to have a 'one size fits all' industry-wide approach. It is, however, essential that newly admitted residents and/or their families are able to make informed decisions when choosing a facility.

¹³⁷ Australian Catholic Bishops Conference, above n 117.

¹³⁸ The principal author conducted interviews with key informants in the aged care sector in 2015 and an online survey of the general public in 2016 (still in progress at the time of writing) which revealed the widespread practice of separating residents to prevent new relationships forming.

¹³⁹ Bronitt 1995, above n 103, 61.

At a legislative level, significant progress has been made in the past 30 years in the areas of residents' rights and sexual discrimination. However, Australia has regressed in some areas. The current accreditation standards are less clear and more open to subjective interpretation, particularly with reference to privacy and a homelike environment, which especially affect couples. 'Motherhood' statements in the *Quality of Care Principles*, *User Rights Principles* and the Government's accompanying *Residential Care Manual* and accreditation assessment tools need to be re-written to include explicit statements against which the performance of each facility can be measured. Essentially, for each requirement in the *Aged Care Act* there needs to be an easily quantifiable checklist.

Discontinuation of the original *Outcome Standards* removed requirements for providers to facilitate residents undertaking 'personal activities in private'; having adequate space for 'a reasonable degree of privacy'; and for 'design, furnishings and practices [to be] as homelike as possible ... free of undue noise'.¹⁴⁰ Gone also is the requirement to provide 'conditions approaching as nearly as possible normal domestic life ... with proper regard to the companionship of husband and wife',¹⁴¹ which are essential protections for couples. At minimum, these requirements, together with s 3(1) of the original *Aged Persons' Homes Act 1954*, need to be re-instated. Whether amendments to the *Aged Care Act 1997* are the best vehicle for this is questionable, since it is principally a funding instrument.

Specific human rights legislation for older Australians, as advocated by the Australian Human Rights Commission,¹⁴² might provide greater scope to create a shift to legislation with a person-centred¹⁴³ perspective, specifically designed for the protection of aged care residents and older people generally. The United Kingdom's *Human Rights Act* has existed since 1998. In one very public example, the family of a married couple of 65 years (who became separated because they 'did not fit the criteria' to enter care together) publicly campaigned for them drawing on this legislation. Public support of their case saw the couple re-united in the husband's residential facility.¹⁴⁴ Older Australians, however, have no legal protection from similar bureaucratic or institutionalised separation.

The *Human Rights (Sexual Conduct) Act 1994* poses an interesting question for aged care residents. Can cognitively sound residents engaging in consensual sex in their room, with the door shut and no one else present, be deemed to be 'acting in private'? Common sense would suggest this is so but the courts are yet to test this. Bennett¹⁴⁵ postulates that sexual conduct on private premises may not be considered 'in private' where members of the public have access. This poses a dilemma for couples if they are unable to lock the door or limit entry by others. No evidence was found of this law affecting practices in residential aged care facilities to date.

¹⁴⁰ McDonald and Bates, above n 71, 43.

¹⁴¹ *Aged Persons' Homes Act 1954* (Cth), s3(1).

¹⁴² *Human Rights and Older People* (2012) https://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_older.pdf.

¹⁴³ 'Person-centred' is a term coined by Tony Kittwood that refers to putting the person first. It implies that recognition, trust and respect of people's individual needs are central to decisions made on their behalf. See Tony Kitwood, 'On being a person' in Tony Kitwood (ed.), *Dementia Reconsidered: The Person Comes First* (Open University Press, 1997) 7–19.

¹⁴⁴ British Institute of Human Rights, *The Human Rights Act – Changing Lives* (British Institute of Human Rights, 2nd ed, 2008) 14.

¹⁴⁵ Theodore Bennett, 'Sadomasochism under the Human Rights (Sexual Conduct) Act 1994' (1995) 35 *Sydney Law Review* 541.

And, lastly, investigation of the issues raised in this article invites the question ‘might denial of an older person’s sexuality be considered a form of elder abuse?’ If one’s sexuality is essential to being human,¹⁴⁶ is institutionalised sexual repression in breach of one’s human rights? Should the terms of reference of the Australian Law Reform Commission’s current inquiry into elder abuse perhaps be expanded to include this dimension?

VII. CONCLUSION

Australian aged care legislation has evolved in a piecemeal fashion, resulting in the absence of protections usually afforded to the basic family unit (couples), leaving them vulnerable to the social, political, and institutional manoeuvrings of others. Aged care legislation has historically been influenced by vocal interest groups and attempts to limit expenditure. Reforms such as the *Charter of Residents’ Rights and Responsibilities* have been met with conflicting political agendas, resulting in couples being subjected to the types of social control that reflect 19th century thinking.

In recent decades, commercialisation has meant aged care has moved away from smaller, ‘homelike’ facilities to larger, medicalised, profit-making institutions, increasing the likelihood of dehumanisation and alienation. Because the Government sets the direction, we recommend a person-centred mind-set when drafting legislation to enable a sincere, person-centred aged care industry to evolve. Resident participation is essential to avoid ageist assumptions and exploitation. Our most vulnerable citizens would be better served by politicians who put residents’ needs above religious, political and commercial agendas. Much as the wellbeing of the child becomes the focus in Australian family law decisions, the wellbeing of older Australians must be the guiding principle in political decision-making on behalf of aged care residents. This thinking needs to be broadened to encompass not just singles, but couples, including couples that do not choose to live apart.

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¹⁴⁶ United Nations Economic and Social Council, above n 46.

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