HSU NATIONAL

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

Health Services Union

Submission to the Senate Community Affairs Legislation Committee

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Contents

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About Us

The Health Services Union (**HSU**) is a growing member-based union with over 90,000 members nationally. Our members work across the breadth of health and social assistance industries, in the public, private and not-for-profit sectors. HSU members in aged care work in roles including personal care worker (**PCWs**)[1], physiotherapist, occupational therapist, therapy assistant, lifestyle assistant, assistant in nursing, enrolled nurse, food services, laundry attendant, cleaner, and administrative officers. In addition to those directly employed in the aged care sector, the HSU has members working in health professions that require them to interact on a regular basis with older Australians. This includes paramedics, mental health clinicians, disability support workers, and other allied health professionals. Our members work in residential aged care facilities (**RACFs**), community services and home care. While this submission has been prepared by HSU National, it is made on behalf of our branches and members Australia-wide.[2]

Summary of Recommendations

1. The *Aged Care Legislation Amendment (Royal Commission Response No. 2) Bill 2021* (**the Bill**) be amended with particular focus on Schedules 2, 3 and 4.

2. The Government take immediate steps to implement Recommendation 77, with particular attention to 77 (1)-(2). The Government must urgently implement Recommendation 114.

3. Amend the Bill to ensure non-approved "on-demand" operators are captured by the regulatory measures (screening, Code of Conduct, and Serious Incident Response Scheme).

4. Delay passage of Schedule 2 until it can be tabled with full detail. Concerns regarding intergovernmental agreement, worker blacklisting, duplication and privacy must be addressed.

5. Passage of Schedule 3 must be delayed until such time that sector-wide consultations have concluded and the Senate has full details of the Code of Conduct.

6. An individual's right to privacy and access to procedural fairness must be protected in any changes to the Rules regarding banning orders and the SIRS. The Government must provide this assurance prior to passage of the Bill.

7. The application of the civil penalty regime must be adjusted to reflect the different responsibilities and resources of the distinct cohorts to which it is applicable, and penalties must be commensurate to the nature of any breach.

8. The regulator or its authorised officers must be able to consider systemic factors and organisational practices in incident investigation.

9. Providers of aged care services must be required, as part of their responsibilities under any relevant legislation, to provide adequate training to workers regarding their legal rights and responsibilities under the proposed Schedules of the Bill.

[1] Personal Care Workers can also be referred to as Personal Care Assistants or Extended Care Assistants. For the purposes of this submission, Personal Care Workers will be used to capture each of these job titles, and other like job title.
[2] HSU National is the trading name for the Health Services Union, a trade union registered under the *Fair Work (Registered Organisations) Act 2009*.The HSU has registered branches for New South Wales/Queensland/Australian Capital Territory; Victoria (4); Tasmania; South Australia/Northern Territory; and Western Australia.

Executive Summary

The HSU was an active participant to the Royal Commission into Aged Care Quality and Safety (**the Royal Commission**), appearing at four hearings and contributing over three dozen written submissions centred on the workforce. This work follows our participation in myriad other aged care inquiries.

Given the Royal Commission dedicated hearings, submissions and entire chapters to the workforce and governance framework of the aged care system, it is disappointing that the proposed amendments do not reflect the extensive findings and recommendations on these matters. The HSU is concerned that the Bill, if passed without amendments, becomes a missed opportunity to improve the quality of care for older Australians.

The HSU urges the Committee to take a holistic and comprehensive view of the pathway to reform set out by the Royal Commission. Doing so will make apparent that the Bill as drafted does *not* intend to fully deliver the recommendations it references. Most notably, the two Schedules relating to workforce registration only partially deal with Royal Commission Recommendation 77,[3] and are described as 'aligning' with the Recommendation, as opposed to implementing it in full. This is a choice use of words found throughout the Explanatory Memorandum, requiring close consideration when weighing up if the Bill enacts the breadth of reform intended by the final report of the Royal Commission.

The Bill foreshadows additional reform in other or delegated legislation, some of which will follow a consultation process.[4] Consultation notwithstanding, it is difficult to assess the full impact of the Bill as details of a Schedule's intended operation will be held in the yet to be determined delegated legislation. For example, the rules accompanying the proposed Code of Conduct will have pertinent details about its operation and intersection with an individual's rights,[5] but are not yet available for scrutiny. The HSU is concerned that by way of design, significant changes proposed by the Bill will be given effect at the discretion of the responsible Federal Minister, at a later date and via legislative instruments, subverting the ability for fulsome examination and feedback.

This submission will primarily deal with Schedules 2 and 3 however, we recognise that some Schedules are designed to work in tandem, and that the issues underpinning each Schedule do not occur in isolation. We will make comment where appropriate on additional Schedules.

We understand, as do all sector stakeholders, that full and thorough implementation of the Royal Commission recommendations is the path to long overdue recognition of older Australians and the profound contributions they have made, and continue to make, to society. Such reform will uplift the aged care workforce who are at the forefront of service provision and who work tirelessly to deliver safe, quality and dignified care every day, in an increasingly complex and stretched care environment.

[3] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, (Final Report), Volume 3A, Chapter 12, pp. 385-401.
[4] *Aged Care Legislation Amendment (Royal Commission Response No. 2) Bill 2021*, Explanatory Memorandum (EM), p. 59
[5] Schedule 3, item 25, proposed subsections 74GI (1-2)

Royal Commission Recommendation 77

Comments on Royal Commission Recommendation 77 are relevant to Schedules 2 and 3 and should be read in conjunction with both. In considering the proposals under Schedules 2 and 3, it is important for the Committee, and voting Senators, to review the relevant Royal Commission recommendation in full and consider the evidence underpinning it. The HSU is particularly concerned with Recommendation 77 (1)-(2) inclusive. We draw attention to the timeframe of 1 July 2022 and recommend that work commence immediately to achieve full delivery. The HSU recommends that Royal Commission Recommendation 114[6] be actioned urgently to support Recommendation 77 (1) (a-c) in particular.

Workforce registration: a positive scheme

Regulation of personal care workers by a registration scheme with a mandatory minimum qualification requirement, ongoing training requirements, a code of conduct, and a complaint process, will help to professionalise and improve the quality of the personal care workforce.[7] Such a scheme provides a means by which the professional background of workers, the workforce's overall skills and training profile, and the human resource practices of organisations can be verified. For workers, the direct link between professionalisation measures including improved wages, training and qualification opportunities and clear career pathways, will make aged care a more attractive career to enter and/or remain in. Addressing organisational practices that drive high staff turnover will also deliver public accountability and stronger care relationships over time, improving the continuity, and therefore quality, of care.[8]

Positive registration schemes also enable labour mobility across like professions by establishing industry-wide standards and providing mechanisms for employers to access relevant information for prospective employees. For aged care, the greatest labour mobility opportunity is with the disability sector. Recommendation 77 follows a clear outlay of the evidence put to the Royal Commission in support of a comprehensive registration scheme,[9] all of which is inextricably linked to wider, systemic workforce pressures. Worker screening and a Code of Conduct are two elements of a registration scheme, but they are certainly not the full picture.

Case study 1: "Sarah"

Sarah has worked in aged care for 27 years. She has worked as an allied health professional and manager and is now a trainer and volunteer coordinator for a large provider in Sydney. Sarah has seen the inadequacy of the current training systems and the impact on care outcomes. Sarah says:

"I believe continuing professional development should be provided by the employer. At present, the only training is presented online and becomes a tick and flick exercise by workers. This is enough to satisfy employers, but this training does not develop the workers' skills. Continued professional development will 'professionalise' carers and hopefully lead to better pay and conditions and therefore better care outcomes.

[6] Final Report, Volume 3B, pp. 649-650.
[7] Final Report, Volume 3A, p. 392.
[8] Meagher, G, Cortis, N, Charlesworth, S & Taylor, W 2019, *Meeting the social and emotional support needs of older people using aged care services*, Macquarie University, University of New South Wales and RMIT University, p. 31.
[9] Final Report, Volume 3A, pp. 381-410.

I think registration is important to try and prevent the 'bad apple carers' just working their way around different providers. There needs to be a register that providers must check before recruiting but the register should reflect a high standard of training and qualifications.

The cost to the employee to be registered has to be a consideration. Maybe the cost could be split between the employer and employee? If the required training or certification in registration is too expensive, this will further hurt aged care workers who are already struggling financially. Down the track, in relation to ongoing training for the employee to remain on the register, there needs to be some accountability on the side of the employer: care staff simply do not make enough money to pay for continuous education. High costs might prevent good workers from leaving their jobs or choosing a different job.

It's hard to get well qualified and trained staff now, if we make the registration process too difficult and expensive for employees, then employers will have even less choice when recruiting making it very difficult to provide excellent care."

Schedule 2 Amendments relating to screening of aged care workers and governing persons of approved providers, and establishing a screening database

Screening of aged care workers

At present, approved providers must ensure that a national police check (**NPC**) showing nil relevant convictions, as specified in the relevant legislative instrument,[10] is provided and kept on record for relevant staff and volunteers. It is up to the individual worker to pay for the NPC as and when required, for example for each employer they work for. There is no nationally consistent process for obtaining, verifying and recording the NPC. This leads to gaps in the thoroughness of employment reference checking and may pose a subsequent risk to the safety of older Australians. It also inhibits the ability for employers in other sectors, namely those in the disability sector, to conduct employment checks under the relevant National Disability Insurance Scheme (**NDIS**) screening scheme.

Schedule 2 amends the *Aged Care Act 1997* (**the Act**) and the *Aged Care Quality and Safety Commission Act 2018* (**the QSC Act**) to ensure approved providers meet screening obligations for defined categories of workers and governing persons, to be set out under the *Accountability Principles 2014*.[11] Under the changes to the QSC Act, the powers of the regulator will be expanded to include worker screening requirements, with a national database and additional authority to share information. There will be a 'suitable' transition period while states and territories negotiate with the Commonwealth as to the details of screening law.

[10] A person cannot be engaged in aged care as a staff member or volunteer if they have been convicted of murder or sexual assault or convicted of, and sentenced to imprisonment for, any other form of assault.
[11] Schedule 2, Item 1, proposed subsections 63-1(1)(l), to *Aged Care Act 1997*

Amendments to the QSC Act

Application to approved providers only

The new screening requirements will apply to workers and governing persons of approved providers. Approved providers are those who have made a successful application to the Commissioner under the QSC Act demonstrating they deliver a specified aged care service and meet other suitability criteria. The HSU is concerned by the growing portion of non-approved providers offering services in aged care. These organisations, often operating as labour-hire or on-demand platforms, can circumvent their regulatory and safety obligations as they are not approved providers. While such platforms claim to offer consumer directed care[12] and worker flexibility, they do so that at the cost of genuine and protected employee relationships. Particular attention must be paid to ensuring that screening requirements are stringent and extend far enough to capture these operators. The concept of 'cover-all' provider and worker screening is not new. State and territory rules can and do ensure that working with children checks / working with vulnerable people checks extends to anyone providing relevant services. Such an approach acknowledges various modes of employment, types of work, and enshrines the core principle to minimise the likelihood that vulnerable persons will be exposed to people who pose a risk to their safety and wellbeing. This becomes particularly important when service delivery is hidden out of sight in a person's home (see also Schedule 4 below).

The HSU notes that Schedule 3 proposed section 7 (a-b) references contract and sub-contracted individuals. It is essential this is applied to non-approved 'on-demand' providers. If it is not, older Australians who self-manage their care, as is increasingly common in home care, may be exposed to greater risk of harm.

Lack of clarity: Item 3, new section 7

Proposed new item 3, section 7 sets out the broad definitions that will underpin the database and give rise to the screening process. Little detail is provided however, the definitions are said to correspond with the relevant NDIS legislation and advance the objective of cross-sector harmonisation. The HSU notes an emphasis on worker 'exclusion' as the means to protect care recipients against risk.[13] We recognise exclusion as an important mechanism for egregious acts of abuse and neglect. However, the HSU is opposed to exclusion and individual blacklisting as a default. We advocate for a regulatory authority that is empowered to consider individual worker actions *and* organisational practices and systemic issues.

Intergovernmental consultations and agreement: Item 4, new subsection 7A

Proposed new subsection 7A (1) allows the Federal Minister to make a determination, by legislative instrument, that a law of a State or Territory is an 'aged care screening law.' Through this amendment, the Bill is allowing for the creation of the worker screening system at the Commonwealth level but deferring all details to the negotiations and legislative decisions of the states and territories, following consultation. The provisions set out here are similar to those that enabled the establishment of worker screening laws and units in states and territories under the relevant NDIS legislation. It is concerning that a significant amount of detail is not available for consideration and may only be publicly available after the Bill has passed.

[12] Submission of Mable to the Royal Commission into Aged Care Quality and Safety, July 2020.
[13] See also EM p. 53.

The HSU is encouraged that new subsection 7A (2) (b) makes specific reference to the Federal Minister seeking agreement with the various jurisdictions. We are concerned however that the timeframe provided of 12 months[14] is not sufficient to genuinely consult, determine agreed screening principles, develop legislative detail for each state and territory, reach intergovernmental agreement, and establish well-resourced screening units. The HSU represents workers in the disability sector and can speak to the numerous issues that persist in the NDIS worker screening scheme. As examples, the NDIS rollout was meant to be effective from 1 July 2020. Some jurisdictions are yet to legislate the scheme to give effect to it and as such, this date has been repeatedly delayed. Additionally, HSU members report waiting up to 3 months for their screening check to be completed, delaying them from entering the workforce. It is also common that low-paid disability support workers will still have to pay for an NPC for prospective employers, as the screening unit provides no details on criminal history to the employer. There are lessons to be learned here regarding the volume of work and requisite time to establish a nationally consistent, transparent, effective screening scheme.

Database: Nature and Disclosure of Protected Information

New section 61A sets out to whom the Commissioner may disclose protected information (as contained in the database), including to the NDIS Commissioner and yet-to-be established state and territory worker screening units, and new section 74AG gives the Commissioner powers to establish and maintain the database, as well as outlines the purpose and nature of information that will be contained in the database. The HSU recognises the intent of these amendments is to enable cross-sector and cross-jurisdictional scrutiny of proposed workers and to inhibit worker mobility where that individual is deemed to present a risk. We support this intent but have concerns that some provisions are broad, for example 74AG (3c)(v), and that the Minister can make determinations as to the collection, storage and sharing of information as they see fit (74AG (8)). In conjunction with the concerns of lack of detail as outlined above, the HSU cautions that Schedule 2 will have the perverse outcomes of infringing on personal privacy and providing the Minister with an overreach of powers.

The HSU agrees that the current NPC system requires improvement, in the interests of consistency, cross-sector mobility, improved provider governance, and reduced cost and administrative burdens for low-paid workers. A new approach should also complement a positive registration scheme for workers, one that genuinely measures and assesses care quality/risks. Instead, we are concerned that Schedule 2 does not provide for a system that beyond an exclusionary national database (discussed further below) is any more robust than the current criminal background checks alone, does not have an appropriate level of legislative clarity, and that it relies too heavily on Ministerial discretion.

Schedule 3 Amendments relating to code of conduct and banning orders

We reiterate to the Committee the full Recommendation 77 of the Royal Commission and the evidence on which it is based, and again express our concerns that Schedule 3 implements the bare minimum of this Recommendation. We also note at the outset of this section that a Code of Conduct and Banning Orders will intersect with the Commissioner's screening and database provisions of Schedule 2, however the details of any interface are not clear.

[14] Clause 2

Code of Conduct

Schedule 3 extends the functions of the Commissioner under the QSC Act to make and enforce a Code of Conduct applicable to approved providers, governing persons and aged care workers. The Bill provides the Commissioner with the functions to enforce the Code (section 18A) where information is provided that indicates a breach has occurred. It establishes civil penalties where an individual or provider fails to comply with the Code (sections 74AB – AD. See discussion below). 74AE provides a broad scope for application of provisions of the Code.

The Bill is silent on the details of the Code, the obligations of providers under the Act to ensure the Code is met,[15] and the full scope of functions that may be available to the Commissioner (including a scheme for information handling).[16] The Rules of the QSC Act are to contain this information once determined by the Minister. This restricts the ability to assess the Code itself, the obligations of approved providers to achieve compliance, the appropriateness of the Commissioners functions, and the proportionality of the proposed penalty and compliance regime. By allowing for details to be contained in the Rules, it provides the Minister with determinative powers and subverts to opportunity for stakeholders to scrutinise these matters, all of which will have a significant impact on workers, providers and care recipients.

The HSU notes that the Code is intended to be based on the existing NDIS Code of Conduct, to promote cross-sector harmonisation and avoid regulatory duplication. However, the Code will not be finalised until consultation has occurred.[17] The HSU draws attention to consultations already undertaken on matters of workforce regulation, including a Code a Conduct. The final report of this work has been released and it cautions that while there are obvious shared traits between sectors, the NDIS Code of Conduct is not appropriate to directly transpose into aged care. [18] The HSU urges the Government to heed this advice and ensure that any Code is tailored to the specific needs of the workforce and providers delivering care.

Banning Orders

The expanded powers of the Regulator under Schedule 3 include the ability to make banning orders against an individual worker or governing person of an approved provider. Such an order can be issued to people who previously worked in aged care to prevent them re-entering the sector (section 74GB(1)). Banning Orders may wholly prohibit someone from working in aged care or prohibit certain activities being undertaken by an individual (section 74GB(1)(a-b)) and can be in force permanently or for a specified period of time as determined by the Commissioner or their authorised officer. The powers being afforded to the Commissioner are serious and extensive. A banning order is likely to cause serious financial and reputational harm to an individual.

The HSU is concerned that the banning orders and related suitability matters do not provide scope to consider systemic issues. Workers, providers and Government have a shared duty to ensure the

[15] Schedule 3, proposed new subsection 54-1(1)(ga)
[16] Schedule 3, proposed subsection 21(3)(A)
[17] EM, p. 59.
[18] Department of Health, Aged Care Worker Regulation Scheme Consultation, 18 May 2020 to 21 May 2021, https://consultations.health.gov.au/aged-care-reform-compliance-division/aged-care-worker-regulation-scheme-consultation/

delivery of safe and quality care to older Australians. The HSU is alarmed and disturbed by any instance of wilful abuse and neglect or serious misconduct. The imposition of a banning order on an individual in instances such as these would be appropriate. However, there are circumstances where neglect and substandard care arise from structural and systemic issues present in the working environment for which an individual has no influence over, including inadequate funding, low staffing levels, and lack of training and inadequate supervision. In this context, the HSU cautions against the Commissioner having powers to impose a banning order where it cannot weigh up the actions on the part of an individual worker against the environment and organisational context in which they work. The HSU notes that additional suitability matters can be set out under the Rules at any time (Schedule 5, new section 8(C)(i),[19] and this may broaden the scope of consideration for the Commissioner or authorised officer.

Sections 74GC – 74GH (excluding 74GD to be dealt with below) stipulates various provisions relating to notice of the Commissioner's intention to issue a banning order, notice of a banning order having been made, and circumstances under which an order may be varied or revoked, by volition of the Commissioner or application of the individual. Individuals will have 14 days or less to make submissions in writing. The timeframe will be at the discretion of the issuing officer. It is imperative that the rights of an individual to procedural fairness are embedded in the banning order provisions. This is of particular importance to individuals who may speak English as a second language, have limited digital and other literacy, and/or have limited access to the resources required to make applications regarding the review of a banning order.

The Bill requires the Commissioner to establish and maintain a database for publication of banning orders, including any no longer in force (new section 74GI). The register will include personal information of the individual to whom the order applies, such as their name, and will show the nature of the order including specific conditions. New subsection 74GI(3) allows the Commissioner to keep the register in any form they deem appropriate. New subsection 74GI(4) allows for the Rules to specify additional information for record in the register as well as for the register and its contents to be made publicly available. We again draw attention to the difficulties in assessing the scope and operation of the Bill where information is yet to be determined under Rules.

The HSU is deeply concerned about the privacy implications for individuals of a publicly available and searchable register containing an individual's personal information. While we again acknowledge that egregious abuse and neglect is unacceptable, we do not believe it is appropriate to infringe upon an individual's right to privacy. If the purpose of the register is to assist care recipients and future employers access information relating to a worker, there are other reporting and governance and mechanisms that can be put in place. We refer the Committee to the Human Rights concerned as raised by the relevant Parliamentary Committee.[20]

Case study 2: "Joan"

Originally from Nepal, Joan has worked in aged care for several years since her arrival in Australia on a temporary visa. Joan describes the difficulties faced by international students, such as herself, and other visa holders to find work in Australia. They are often forced into underpaid, insecure work via

[19] EM, pp. 96-97.
[20] Parliamentary Joint Committee on Human Rights, Scrutiny Report 11/2021, 16 September 2021, pp. 2-6.

complex contracting and sub-contracting arrangements. A lot of the temporary visa and student visa aged care workers that Joan knows have university degrees or other qualifications from their home country. But these are not recognised by the employers and therefore do not assist in securing better working conditions and opportunities.

There is a bad culture in the sector of targeting visa workers who raise their voices against exploitation and underpayment. Joan knows that although these workers are aware of being deliberately underpaid and not being offered other important things such as training, they do not speak out against it because they fear retribution.

Joan sees a full registration scheme as a way to empower workers, give them more confidence and skills for their work, and to help prevent serious incidents - which she has both observed and experienced herself. Joan believes a scheme like this would benefit everyone by contributing to a secure workforce, who in turn can provide high-quality, long-term care.

Civil Penalty regime

Schedule 3 expands the Commissioner's monitoring, investigation and enforcement powers, including civil penalties for breaches of the Code or a Banning Order. New sections 74AB – 74D set out civil penalties for breaches of the Code by approved providers, workers and governing persons of up to 250 units. New section 74GD (1-2) deals with contraventions of banning orders by an individual or a corporation of up to 1000 penalty units.

It is difficult to assess the proportionately of 250 civil penalty units ($55,000) against a breach of the Code without having the details of the Code. That said, the HSU has measured the civil penalty against the wages, conditions and other social and demographic pressures of the aged care workforce (not including the cohort of governing persons here). Given the average aged care worker salary is approximately $35,000/year and that these workers are more likely to be young, female, from a culturally or linguistically diverse background and insecurely employed, a penalty of this magnitude is grossly disproportionate.

There is a decisive policy push from the Government towards temporary migration as a solution to the workforce shortages in aged care and adjacent sectors.[21] Temporary migrant workers are more likely to experience poor and exploitative working conditions. Often, employment arrangements are linked to visa status, creating precarity for the individual's employment and livelihood. The training and development offered to these workers is likely to be less than normal – even less than is experienced by local workers – and not offered in languages other than English. For more complex matters such as a Code of Conduct, there is increased scope for serious financial and/or legal ramifications, should a migrant worker not fully understand or be supported to meet their responsibilities under the Code.

Additionally, applying the same financial penalties to providers as it does to individual workers, assumes that these workers have access to the same level of resources (financial and otherwise) as a

[21] See Pacific Labour Scheme; Pacific Australia Labour Mobility Scheme; Transcript of Community Affairs Legislation Committee, Senate Estimates, Transcript, 27 October 21, https://www.aph.gov.au/Parliamentary_Business/Senate_estimates/ca/2021-22_Supplementary_budget_estimates

corporation. Banning orders and civil penalties imposed equally upon organisations as they are low paid workers is punitive and reflective of the Government's consistent undervaluing of the people who deliver care to older Australians. These measures under Schedule 3 may act as a deterrent to attracting workers to the aged care sector, at a time where the focus should be on attracting and retaining a large, high-quality, highly skilled workforce to care for older Australians.[22]

Recommendations

Although it is it is difficult to fully engage with Schedule 3 of the Bill given that the details of the Code and various information to be specified in the Rules is currently unknown, the HSU reiterates its recommendations to previous consultations that:

- That Schedule 3 be deferred until such time that the details of the Code and Rules are set out for full consideration.
- A Code of Conduct form one component of a broader, positively geared workforce regulation scheme.
- That such a scheme embeds minimum training and qualification standards, with recognised prior learning and continued professional development.
- That approved providers have explicitly stated and legally enforceable obligations to ensure any reasonable steps to comply with the Code are met (organisational practices and systemic issues e.g. staffing levels; training and support; training and education in the Code itself, including any future changes by the Minister or Commissioner under the Rules).
- That provisions be made to prevent the public disclosure of sensitive personal information and protect an individual's right to privacy.
- That the civil penalties be commensurate to the nature of any breach and the cohorts to which they apply.

Schedule 4 Amendments relating to the extension of incident management and reporting to home care

Schedule 4 of the Bill proposes completing implementation of Royal Commission recommendation 100: Serious Incident Reporting, noting that the first phase of this recommendation was the introduction of the Serious Incident Response Scheme (SIRS) to residential aged care services on 1 April 2021 and that first-round consultations for the expansion of the scheme into home care[23] concluded in August.

Commonwealth witnesses acknowledged in Royal Commission hearings that the regulation of care in the home is less developed than the regime that applies to residential care.[24] The HSU acknowledges the need for improving the quality of care, and its regulation, in peoples home. This is particularly the case as older Australians want to stay in the home longer and the pressures on this system will continue to grow. It is crucial that the SIRS for home care is adjusted accordingly to suit the unique characteristics and challenges of care in the home. Given the SIRS has only been in operation in residential care for approximately 6 months, it is important that sufficient time is allowed to understand opportunities from this scheme that need to be addressed for home care.

[22] Final Report, Volume 3A, pp. 386-421.
[23] For brevity, home care refers to all programs the scheme will apply to, as set out in the EM.
[24] Royal Commission into Aged Care Quality and Safety, 'Interim report: Neglect', p. 64.

The HSU, similar to issues already outlined for other Schedules, is concerned that the detail for how the SIRS will operate in home care is to be contained in delegated legislation, such as rules and principles. This means it is difficult to understand at this point, exactly what exactly the Senate is giving passage to and therefore what older Australians and aged care home care workers can expect from the scheme. We have provided examples below pointing to why a lack of detail is concerning.

A new incident management system: workforce training and support

Aged care providers are required to report on various regulatory matters. These include, as examples, work health and safety incidents and client paperwork for changes to care plans or financing arrangements. In home care, it is most often the care staff who are tasked with this workload. That is, understandably, because they are the person who has the most contact with the care recipient and knowledge of their needs or any changes in circumstance. However, it is common that the home care workforce is not supported to complete work outside of their direct care or support role. Time pressures can adversely impact on the quality of care able to be provided.

Training in such systems can be as little as a one hour 'tick and flick' online module. This approach is driven by inadequate and fragmented funding arrangements, which are reflected in chronically low wages and poor working conditions such as unpaid travel time between visits, safety hazards in people's homes, working in isolation, and lack of time to undertake training and administrative tasks.[25] Home care workers must be provided comprehensive training in the SIRS, as well as fully funded training in delivery of care that will minimise the risk of serious incidents, for example specialist dementia training. All training must be available in a range of formats and languages, and participation should be funded by the Federal Government.[26]

Amendments to the Aged Care Act 1997 at section 54-1(1)(e) will give rise to approved home care providers responsibility to manage serious incidents, including the reporting framework and system which will form part of a provider's operational processes and responsibilities. The introduction of new and additional reporting systems must be accompanied by adequate funding and changes to organisational practices, to ensure that affected workers are trained and given enough time to understand and meet their new responsibilities. It is important that the system and processes set out in the delegated legislation are not onerous and that paperwork does not detract from care provided. A guarantee must be made that 'unforeseen implementation issues and sector feedback'[27] will capture any concerns and needs of the workforce. This is an appropriate acknowledgement that workforce pressures are likely to arise during the expansion of the SIRS.

Systemic drivers of serious incidents

The HSU recognises that neglect and substandard care can arise from a complexity of contributing factors, including the aforementioned funding, wages and working conditions pressures. Systemic pressures of this nature can become a precursor to more serious incidents. The HSU has previously raised concerns that the current legislative and regulatory framework in aged care, despite being voluminous and complex, does not contain the level of detail required for the aged care system to effectively safeguard against serious incidents. The proposed amendments to the Act at sections 54-

[25] Final Report, Volume 3A, p.425.
[26] Final Report, Volume 3B, pp. 649-650.
[27] EM, pp. 73-74.

1(1)(e) and 54-3(5) provide that under the SIRS, home care providers will now be required to take 'reasonable steps' to manage and prevent incidents and will have clarity here as to what does or does not constitute a reportable serious incident. It is essential that the legislation allow consideration of whether misconduct or neglect is attributable to an individual workers behaviour or if the behaviour arose from systemic shortcomings of a provider e.g. not enough staff or training to enable the workforce to deliver safe and quality care. Therefore, the regulatory body must have the ability to view situations holistically with the appropriate investigatory powers. Aged care workers must be afforded access to advocacy and representation rights during any SIRS investigations.

Regulating non-approved providers

The use of 'independent contractors' and non-approved providers is of particular prevalence in home care. In the intimate environment of a person's home, the absence of regulation afforded through approved providers (however currently lacking) poses increased risks to the safety and wellbeing of older Australians. The responsibilities of providers under the SIRS will only apply to 'approved providers' as defined under Act. It is not clear if or how it will be extended to subcontracted labour-hire organisations. If it does not extend, it will not capture on-demand organisations and individuals. Stringent measures must be in place to ensure these arrangements are captured, including that any individual working as an independent contractor, has access to training - in the SIRS itself and otherwise.

Case Study 3 "Fran"

Fran is a nurse with specialist training and experience in older persons mental health, based in Victoria. Fran describes a system that is not equipped to provide adequate, specialised care that meets the unique needs of older Victorians living with a mental illness. Fran has watched the system be placed under increasing pressures, including from persistent staffing cuts, lack of funding, growing workload demands, and reduced access to ongoing training and development.

Fran describes her work as requiring high volumes of documentation and case reporting Fran recognises how important these processes and records are, but says they end up not fulfilling their intended purpose because staff are not trained to complete reports accurately and are not given enough time to complete paperwork. Staff will often have to stay behind in their own time to complete incident reports and case notes. The only other option is to reduce time spent with their client, which negatively impacts the amount and quality of care able to provided.

In a complex and stretched care environment, where staff have less and less access to specialised training and work with little to no formal supervision – especially in community mental health services – Fran says there is a higher rate of serious incidents including occupational violence. This may occur between clients, of clients to staff, or of staff to client. In Fran's experience, employing preventative measures is critical to reducing such serious incidents and making sure the system appropriately captures and responds. Fran advocates in her workplace for more training and development, more specialist training including in work health and safety incident management, more staff, dedicated time for paperwork and administrative tasks, and wages that attract a high-quality and appropriately skilled workforce.