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4th November 2008

The Committee Secretary,
Community Affairs Committee,
Department of the Senate,
P.O. Box 6100,
Parliament House,
***CANBERRA** ACT 2600.*

Submitted via email: community.affairs.sen@aph.gov.au

Dear Committee Secretary,

Ref: Aged Care Amendment
(2008 Measures No. 2) Bill 2008

Thank you for the opportunity to put forward a submission on the above mentioned proposed legislative amendments.

Sundale is a regional community organisation involved with the delivery of aged care services since 1963. We have some significant concerns in relation to the intent of the legislative amendments, especially those that grant unfetted authority for the Department of Health and Ageing to seek to usurp existing legislation, and to substantively interfere with the rights of both consumers and service providers.

It is submitted that the approach taken does not align with the stated intentions of the Rudd Government in terms of the reduction of red tape to business, and indeed is completely contrary to the basic tests outlined by the Hon. Lindsay Tanner, Minister for Finance and Deregulation.

It would be my pleasure to be able to clarify or expand on any of the content within this submission, and advice in relation to any hearings scheduled with respect to this inquiry would be gratefully appreciated.

Please be assured of our very best intentions at all times.

Sincerely Yours,
Sundale Garden Village, Nambour

Glenn Bunney
Chief Executive Officer

SUBMISSION IN RELATION TO

AGED CARE AMMENDMENT (2008 MEASURES NO.2)BILL 2008

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"The industry is independent. They are independent providers, and, although we have strict conditions on them in relation to quality and also prudential regulations around them for bonds that they hold, ***we do not stand in their shoes as managers*** *and we do not have access to their books. When we commission surveys, such as the one that Bentleys did and that other organisations have done, we do not get information about individual homes from them. That is the condition on which the industry agreed. What we try to do is to treat the industry as responsible until proven otherwise. If they are either too highly geared, too inefficient or use the money that comes to them for certain other purposes and the homes run down, we do not rely on finding out simply at the point of catastrophe, though that can happen if providers are not forthright with us.* ***We are random****." (emphasis added).*

Ms. M. Murnane in evidence to Senate Estimates.

The impact of regulation, in an environment wherein every element of income is controlled by Government, is quite significant. Every dollar intended for the delivery of care to older and frail Australians is at risk when additional regulation is introduced. When there is simply no other source of income, growing compliance costs take funding away from care and therefore impact consumers directly, which is ironic when one considers that the alleged basis for these new impositions is [1] "***to ensure the protection of our frail, older Australians***". (emphasis added).

When one considers the proposals and their intent to substantially extend the reach of the Department of Health and Ageing beyond that intended in the Aged Care Act 1997, to fundamentally alter the primary relationship of Government as the funder and approved providers as service deliverers, one must logically question the validity of what is being proposed. Indeed as will be shown, the intent is indeed to interdict in the Corporate Governance and contracted supply arrangements that approved providers, as private businesses, have established. No other legislation extends the tentacles of command and control by bureaucracy like these proposals. Such intent clearly runs counter to the advice of Ms. Murnane, a very experienced and well respected commentator within the Department of Health and Ageing.

There are enough significant concerns in relation to the proposed legislative amendments for them to be rejected in their current form, required to comply with the deregulation principles of the Rudd Government, and be represented to Parliament as evidence based consumer protections only if and when such hurdles have been passed.

We request that the Senate reject these proposals that drain attention and scarce resources away from the prime focus of service providers – the accommodation, care and aspirations of older Australians.

[1] Second Reading Speech. Aged Care Amendment (2008 Measures No. 2) Bill 2008. Minister J. Elliot.

REGULATORY FRAMEWORK

The proposed legislative amendments have been presented at a time when there has never been greater pressure on the taxpayer dollar, certainly not in the living memory of most of those who will consider its implications. The proposed legislative amendments are supported by purported "evidence" of the need for such amendments, although such evidence is both isolated and apparently anecdotal.

The Rudd Government is to be congratulated on its commitment even before being elected to office, on its stated commitment to the reduction of red tape. Indeed for the first time in our nation's history we have a Minister specifically responsible for deregulation, The Hon Lindsay Tanner MP, Minister for Finance and Deregulation. One could describe the deregulation in these current times as "a hard gig" given the extremes of the finance industry. It has been often said by the Prime Minister that productivity is at the heart of his economic agenda for Australia, and these words have been followed up with action across initial spheres of focus. This essential productivity lift is also supported by the Opposition, and in the best interests of our nation, such a bipartisan approach is to be commended. Leadership in the best interests of our Australian community must over-ride political considerations and point scoring and perhaps the issue of productivity and how this can be achieved by deregulation and reregulation is a solid start.

In his [2]speech to the Sydney Institute, the Hon Lindsay Tanner MP, Minister for Finance and Deregulation made a number of points including:

- [3]Relieving businesses and consumers of the burden of inappropriate, ineffective or unnecessary regulation will build Australia's productive capacity and create a stronger economy;
- [4]Procedures will be strengthened to ensure new regulation is enacted only where absolutely necessary at a minimum cost to consumers and business, and that a culture of continuous improvement in regulatory activity is implemented;
- [5]My target is regulation which is outdated, excessively burdensome on business or unfair to consumers;
- [6] As well as imposing specific compliance costs, regulation can also have a choking effect on entrepreneurship, risk taking and innovation;
- [7] Prior to the election we committed to a one-in one-out principle for new regulation. When Minsters bring forward new regulatory proposals, they will be required to also identify other areas where regulation can be modified or removed to reduce compliance costs for business.

No fair mined individual could argue with the comments made by the Minister, nor with the spirit and intent of the Government as a facilitator and moving away from the "command and control" emphasis of the past. The simple question of course is how do these legislative amendment proposals align with these deregulation ideals?

[2] Relieving the burden on business – Labor's deregulation agenda. 26th February 2008.
[3] Ibid. Page 2.
[4] Ibid. Page 2.
[5] Ibid. Page 2.
[6] Ibid. Page 3.
[7] Ibid. Page 4.

SUBMISSION APPROACH

Rather than simply address the content of the Bill in isolation, we will make some general observations about the aged care regulatory environment generally and challenge some of the assumptions behind this and other similar regulation.

We therefore comment on both the contents of the Bill and its impacts on consumers and service providers in terms of demonstrable benefits and fairness/natural justice.

BACKGROUND

The aged care sector is more highly regulated than any other in Australia. The irony that this legislation is being submitted prior to the Conditional Adjustment Payment inter-departmental inquiry being finalized should not be lost to Members of Parliament. The CAP Inquiry purported to focus on industry "efficiency" and yet these proposed amendments add to, not reduce compliance requirements and therefore represent a clear creation of further regulatory inefficiency.

Further, the report from the Probity Review is also due, and many aspects of this report one would imagine would impact upon these proposed amendments.

Whilst the Aged Care Act amendments come before Parliament, the Principles can be amended a priori any reference at all to Parliament, and it is within the context of the Principles and "business rules" established by the Department of Health and Ageing that the regulatory and compliance burden is established. As a consequence the full impact of these legislative amendments is not provided to Parliament. Hence it is essential that Parliament is made aware of the implications "on the ground" rather than simply being provided with the opinion of the Department.

The *Aged Care Act 1997* and the *Aged Care Principles* plus supporting regulation, determine the following;

- the nursing, personal care and hotel services aged care providers must deliver;
- the numbers of residents these services can be provided to;
- the type of buildings the services must be provided within;
- the region in which the service must be provided;
- the nature and content of the contract entered into between provider and resident;
- the price providers can charge for these services;
- the type of staff who must deliver these services;
- the type of records providers must maintain and;
- the level of services individual residents require et al.

Coupled with the capacity for the major contractor/funder (the Commonwealth) to impose any additional cost or requirement on providers on virtually any pretext without recourse by the provider, it is fair to say that virtually complete control of the sector is exercised by government through the Department of Health and Ageing.

This is indeed at odds with the stated intention of the Rudd Government as expressed by the Hon. Lindsay Tanner [8] when he said, "***For a decade now I have been arguing that globalisation and technological change have altered the role of government. The old model of command and control is giving way to a new model where government acts as a facilitator***".

As will be highlighted in the following comments, command and control is alive and well within the Aged Care Act and indeed continues to be sought to be expanded and enhanced through these proposed amendments.

Oversight of the industry occurs at Commonwealth, State and local levels.

To investigate resident complaints, protect resident rights and oversee the provision of quality services by providers there are currently in existence the following agencies;

- The Department of Health and Ageing

The Complaint Investigation Service

The Aged Care Accreditation Standards Agency

State police services

State Departments of Fair Trading

- Commissioner for Complaints

- State based bodies such as the Health Quality and Complaints Commission in Queensland

It is universally acknowledged that comprehensive and all-encompassing regulation more often than not stifles productivity improvements, limits efficiency dividends and quality innovation.

Consequently it is necessary to examine carefully the necessity for and benefit of further regulatory impositions upon aged care providers and the associated impact on our consumers.

EVIDENCE BASED REGULATION

Given the benefits to quality, productivity and innovation which flow from a solely needs-based regulatory regime, there should be a clear onus on the Commonwealth to provide evidence of the necessity for further regulation to address a demonstrated significant, systemic and a wide spread negative consequence or a reasonably based evidence lead assumption that further regulation was required to prevent systemic, significant or widespread adverse outcomes for residents and relatives.

Ratcheting up already stifling regulatory regimes in the absence of such evidence for the purposes of creating a further "band-aid" for an already ramshackle regime, addressing isolated and unrepresentative outcomes, remedying negative fallout from the previously poor application of existing regulation or as a diversion to draw attention away from serious under resourcing should be rejected by Parliament and the community.

[8] Ibid. Page 5.

Indeed as observed by quote attributed to the Minister for Ageing, Justine Elliot, [9] "***nursing home operators have a legal and moral obligation to provide proper care for nursing home residents***". Whilst this is not an unreasonable position and would be agreed with by the Australian community in general, there is, and never has been, any acknowledgement by the Australian Government at any stage, as the regulatory and financial controller of the industry, that they indeed have the paramount legal and moral obligation.

It would appear that the proposed increase in legislative compliance and control measures proposed become necessary in the vacuum of Governmental legal and moral obligation. The fact that the Aged Care Act 1997 does not specifically mention a guarantee of Government funding for the delivery of aged care services affirms this belief.

The comprehensive and overwhelming control imposed by the existing regime, includes a prohibition on providers from passing on additional costs to their customers – an extraordinary imposition when coupled with the capacity of the Commonwealth to impose additional costs arbitrarily and without recourse.

Clearly therefore there exists an economic and moral obligation on the regulatory authorities to ensure that the direct and indirect costs of regulation on both providers and consumers are underpinned by additional resources.

It is completely unsatisfactory for determinations of financial or other impact to be made arbitrarily by Departmental Officers again without any objective and public evidence provided or indeed Parliamentary scrutiny (until after the event), in the case of the "Principles".

If aged care services had the capacity to set their fees according to the cost of the regulatory regime this would be a moot point but as this is not so, it is absolutely vital that the Parliament satisfy itself as to be efficacy and objectivity of the process undertaken to measure these costs.

PROPER CONSIDERATION OF ALL STAKEHOLDER RIGHTS

While it is essential that a robust regulatory regime exist to protect the rights of frail, elderly residents who often cannot advocate on their own behalf, to simply assume that providers have no rights to fair and just treatment is bureaucratic ideology gone mad, and such a paradigm of prejudice has no place in our modern society..

Aged care providers under the most considerable comprehensive controls and restrictions imaginable, provide an overwhelmingly high standard of care to over 170,000 frail and elderly Australians every day in residential care and a further 800,000 via in-home care. Additionally these same providers in many cases successfully provide tens of thousands of accommodation units for older Australians without the interdiction of the Department of Health and Ageing.

We deliver the care which families are no longer prepared or able to provide them.

The imposition of further regulation matched with significant punitive measures against providers constantly, publicly and its obvious political intent does nothing to enhance protections for residents and indeed may be self-defeating in the long run as using such measures to mask an unpreparedness to critically examine the expectations of the community in comparison with the resources provided to meet those expectations could lead to significant collapses in the future resulting in

[9] Nursing Homes Crisis Deepens, Courier Mail 31st October 2008

negative consequences financially and emotionally for providers, consumers and indeed our community generally.

CONSULTATION

The Explanatory Memorandum states that a consultation paper was circulated and that consultation occurred in June 2008 with the Ageing Consultative Committee which includes both national peaks.

Unfortunately, that statement, when read by members of Parliament could be taken to represent an assurance that the Bill is acceptable to providers.

This is not the case.

The fact is that the consultation paper and minutes of the Committee were unknown generally within the industry. Indeed it appears that the Department of Health and Ageing interpretation of consultation is restrictive and selective, borne out by the fact that issues rejected in the Ageing Consultative Committee remain within the proposed changes being presented to Parliament. This underscores the criticality that Members of Parliament are made aware of the balanced view and consider this in their deliberations.

ANALYSIS AND IMPACTS OF THE AGED CARE AMENDMENT (2008 MEASURES NO.2) BILL 2008

There are 7 proposed amendments to be Aged Care Act 1997 which represent significantly increased regulation and scrutiny of the sector.

The sanctions provision in particular is quite extreme as both the criteria of paramount consideration and the deterrent criteria introduce a complete shift in emphasis. It brings into question the purpose of sanctions and the how that determination is arrived at by the Secretary. The amendment imposes no obligation on the Department to consult families or residents or the residents or GP's in a structured manner, to reach a documented conclusion that a provider is unable or unwilling to rectify severe risk and the reasons for that inability.

Members of Parliament should consider the well-publicised emotional distress caused to many residents and relatives due to the closure of aged care facilities in recent times, as facilities collapse under the financial and compliance burden endured by the industry in Australia. Of course, Departmental Officers who have never had the experience of managing an aged care business simply put such collapses down to "failure of management", and expression which is superfluous and requires no further justification.

Permanently closing a facility should only ever be considered as an absolute measure of last resort due to an unresolvable, ongoing and severe threat to the health, welfare and safety of residents and the clear burden of proof to demonstrate such lies with the Commonwealth.

It is understood that politically it will be difficult to oppose amendments supposedly aimed at protecting and enhancing resident rights. However purporting to represent consumer protection is vastly different to actually considering the needs and aspirations of older Australians. No Parliament should remove the rights of individuals to choice, unless those individuals have indeed surrendered such rights by their actions. In witnessing the enforced removal of older Australians from their homes on national television, one is lead to the obvious question of "how does this enhance resident rights"? Such a paternalistic approach to our elders is an anathema to the concept of what it is to be Australian.

Nonetheless, good government requires robust and transparent mechanism of consultation, good-faith dealing and evidence based decisions before measures as extreme as these become law.

PROPOSED SECTION 8-3A MEANING OF KEY PERSONNEL

The proposed section 8-3A is to supplement the existing section 8-3 by broadening the definition of Key Personnel to include:

(a) any other person who has authority or a responsibility for (or significant influence over) planning, directing or controlling the activities of the entity;

(b) persons likely to be responsible for the nursing services or day-to-day operations of the services whether employed by the operator or not.

Further, the term 'Key Personnel' is expanded to operate at 'particular times' therefore including those people who have intermittent or transient impact on the executive decisions of the entity or have authority or responsibility for (or a significant influence over) planning, directing or controlling the activities of the entity.

The intention of the Government in broadening the definition appears to be to capture influences beyond the approved provider.

The proposed section does however move well beyond this by capturing all decision-making within the commercial change, including, for example, financiers whose influence, while essential, would traditionally fall outside what was considered relevant and operational.

The proposed legislation also focuses on discrete decision-making 'at a particular time'. Whether a particular person held significant influence over planning, directing or controlling an activity at a particular time is an analysis which will even for routine commercial decision-making be enormously complex and often only able to be determined in retrospect.

The change of this definition leads to difficulty in application of section 9.1 where the approved provider is obliged, on the standard of strict liability, to notify a change of circumstances or a change of any of the provider's key personnel.

By broadening the definition of Key Personnel to include those who are sporadically involved in decision-making, makes notification of change to these personnel practically extremely difficult, although failure to do so leads to severe financial and potentially investigative penalties. It should also be highlighted that the manner in which such notification is required to take place can only be via paper copy, the most time consuming and inefficient option available in this time of electronic communication.

For private sector organisations at least, company searches will reveal directors and shareholders who ultimately have fiduciary and legal responsibility for the operations and actions of the organisation.

In church and charitable organisations, boards of management are ultimately responsible for the operation and actions of the aged care organisation they oversee and again it is unclear what the Commonwealth is seeking to achieve with these changes.

Has there been any evidence of individuals not known to the Commonwealth making decisions on behalf of an approved provider which have impacted negatively on the health and well-being of residents?

If so, the current arrangements clearly make the approved provider and existing key personnel accountable for these outcomes so it is not clear why the Commonwealth would seek to broaden and by necessity lessen the responsibility of these individuals?

The underlying intent of the legislative amendments appears to seek to go beyond the existing relationship between the Government on one hand, and the Approved Provider on the other, with the effect of usurping other legislation relate to the Corporate Governance of an organisation. A hypothetical example may best illustrate the point.

As a purely hypothetical example, should BHP as a good corporate citizen, and as part of their extensive ESG (Environmental, Social and Governance) priorities decide to support a 10 bed indigenous aged care service in a remote part of Australia, this proposed legislative amendment would give the Department of Health and Ageing (the Secretary designate in effect) the right to assess the capacity of each Director of BHP to be involved with the operation of a small aged care service. Is the Department of Health and Ageing or indeed the Minister suggesting that the Corporations Act is somehow inappropriate in establishing the standards related to the Governance of a Corporation and that the opinion of the Department of Health and Ageing would somehow be superior to the established and operational legislation? Regrettably this type of interdiction in decision making by a service provider and duplication of effort is a common feature throughout the Aged Care Act 1997. Any serious reform agenda would address such inefficiencies rather than add to them in the manner proposed by these legislative amendments.

Indeed the Mayor (and all Councillors since they vote on development applications) of the local Council has an impact or significant influence over the planning activities of an aged care service provider. By implication, is the Secretary seeking to have a right to veto the ability of such people to undertake such work, let alone giving the responsibility to a service provider to ensure that changes in such key personnel are notified to the Department of Health and Ageing?

The extension of the definition under proposed section 8-3A(1)(d) to persons who are ‘likely to be responsible’ for nursing services or day-to-day operations means that, in effect, an operator must (on the standard of strict liability) notify of a change of personnel who are not yet placed in the job or who might be required as a matter of succession planning be required to fulfil the role at some time for whatever reason.

This is an impractical and onerous obligation.

In summary, this extension of the definition imposes duties on providers for no practical result. On that test alone the proposals are clearly unfair, unjust, unreasonable and unnecessary.

A further fundamental difficulty which arises from the proposed legislation is that it imposes on the Secretary of the Department of Health and Aging, an obligation to undertake an extraordinary high level of diligence before determining whether an entity is suitable for the provision of aged care.

In section 8-3(1), the Secretary must (not may) consider the suitability and experience of the applicant’s key personnel. As the proposed changes significantly expand this definition, the Secretary will be obliged to identify and scrutinise:

(a) those who were traditionally considered key personnel;

(b) those who fall within the expanded definition as having authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the entity;

(c) those who are sporadically involved in the decision-making process; and

(d) those who may be involved in nursing services or day-to-day operations of the service now or in the future.

The Act precludes States, Territories and Local Government from the requirement that they establish themselves as approved providers, as they are deemed to be so under section 8.6. However, under section 10.3, a State, Territory or Local Government must have approval revoked in circumstances where they cease to be suitable for approval.

The difficulty, both in terms of logistics and cost in maintaining compliance with the notification section, is acknowledged in proposed section 14(3)(a) where government controlled entities are excluded, although of homes under sanction this year, state government owned and operated facilities are included.

This is unexplained as presumably the quality of care which, according to this proposed legislation, is improved by increased level of scrutiny must logically apply to all aged care facilities, not just non-government facilities.

There is significant problem in the broadening of these sections and their practical application to the aged care sector. The broadening of the definition takes a level of scrutiny to a level beyond that which is expressed in the Minister's second reading speech.

The key personnel responsible for the nursing service should be limited to the clinical governance responsibilities of the approved provider. As it currently stands, the proposed amendments would require that any registered or enrolled nurse on roster would be required to be reported as key personnel. Consequently there would be a compliance requirement to advise the Department of Health and Ageing of all roster changes and additionally, details of registered nurses available through a nursing agency who are not an employee in relation to information currently not available to the approved provider. Is the legislative intent of such a requirement absolutely justified and does it seriously assist in the quality of care of an approved provider? The answer to both of these questions must invariably be in the negative.

This extension of the definition imposes duties on providers for no practical result other than providing an absolute guarantee that the complexities and lack of real world reality will ensure the failure of service providers to comply in absolute terms. In that sense the industry is being set up for failure.

AMENDMENT TO SECTION 8-5

This amendment creates the additional capacity for the secretary to provide a conditional approved provider status.

Unlike a refusal of the grant of approved provider status, under section 8(1)-1 of the Aged Care Act 1997 a condition imposed by the Secretary cannot be the subject of a review under section 85-1 of the Aged Care Act.

An applicant who does not meet the criteria in the Secretary's view to achieve Approved Provider status is entitled to a review of the decision. But an applicant who

achieves conditional Approved Provider status cannot seek to have the conditions imposed upon them reviewed. This is inequitable and illogical.

In relation to practical management decision making, the explanatory memorandum states that owners may use a separate and unrelated management company to deliver care and it asserts that a change from an existing management company to a new company could pose risks for care recipients and the federal government.

The current Act requires the approved provider to comply with the key personnel provision and other existing criteria in the Act. Owners who use management companies remain responsible for compliance under the Act and not the management company. The use of a management company is a commercial decision made by the provider and such a provider would establish both control and the capacity to sever the contract in the event of a breach of the Act by the management company.

The amendment, Sections 8-5(3) and (4) grant the Secretary wide powers under the phrase '*any circumstance that the Secretary is satisfied materially affects suitability to provide care'.* 8-5 (4) restricts the operation of the business, removes the owners discretion and overrides the compliance function of the Accreditation Agency.

The effect is to reduce the rights of the approved provider to select or change their management company without the approval of the Department without any regard to the commercial priorities of the provider.

In effect this amendment seeks to usurp the rights of a manager to manage, and the right of the owner of the business to manage its own business, therefore placing the business risk at the foot of the owner but giving control to unaccountable Departmental officers. We do need to remember that service providers are businesses, regardless of their corporate structure, and entitled to make the decisions best suiting their business and existing responsibilities. There is no such imposition on any other commercial activity in Australia, including hospitals which are responsible for over 75% of taxpayer expenditure through the "health" side of the Department of Health and Ageing. It does appear that on the "ageing" side of the same Department there exists a paradigm of prejudice against organisations delivering accommodation and care to older Australians in need. This should not be permitted to be the basis of any legislative consideration, and proposals coming out of such a paradigm should not be permitted unjustifiable success.

If one reflects in practical terms, decisions are made every day through rosters and other resource allocation determinations that influence the operation of the business. The Approved Provider carries the responsibility for every such element currently. The outcome of these amendments is that the Secretary now seeks to have oversight of these decisions as well. Such a proposal would have to be regarded as preposterous and its intent and impossible in its application.

AMENDMENTS TO DIVISION 65

Proposed Section 65-2 (2) permits the secretary to impose sanctions on the basis of a potential non-compliance concerning future residents.

The way the section is currently constructed, threats to the health, welfare or interests of care recipients can constitute grounds under section 65(2) for the secretary to impose sanctions.

As the distinction is made in the amendments, future care recipients do not through the operation of the proposed amendment include existing residents.

The change means that an Approved Provider can be sanctioned on the basis of a potential for a risk to hypothetical residents at some undetermined time in the future.

The affect of the section is that approved provider would have to provide evidence to challenge a hypothetical non-compliance. That is, there could be circumstances where there was no actual or perceived threat to existing residents but rather what could only be a perceived threat to future residents.

This creates an unfairly arbitrary standard lacking in transparency or objectivity.

In addition, the amendment at subsection 2 to section 65-2 creates the potential for conflict. Where previously this Division in the Aged Care Act focused on the risks to care recipients, the requirement that the secretary must (again, not may) consider the interests of future care recipients can only dilute the duty towards existing residents in circumstances where the two duties are not aligned.

As a practical example, a sanction causing the approved provider to move out residents because it was the best result for future residents may not be the best result for existing residents. It is impossible in these circumstances to determine that both classes of residents can be of 'paramount' consideration.

Other Amendments

As Members of Parliament are aware, the Aged Care Act 1997 incorporates a variety of "Principles" which do not have the same level of Parliamentary oversight as does the legislation. Indeed the Minister has the power to amend the Principles with substantial impact on the consumers and providers of aged care services, without any timely Parliamentary oversight.

With respect to these issues, in the Minister's second reading speech, two issues are raised that do not appear in the proposed legislative amendments. It is assumed that it is intended by the Minister to introduce such changes via the mechanism of the Principles. Under the heading of "Ensuring the health, welfare and other needs of care recipients are met", the Minister introduces amendments to

- [10]Strengthened police check requirements; and
- [11]A new requirement requiring service providers to "raise the alarm" when residents are absent without a reason from the home, and have been reported to police as missing.

Strengthening Police Checks

Whilst no one would argue the need to ensure the best possible protection for older frail Australians, there is no evidence produced as a background that justifies the extension of police check coverage as proposed in this legislative extension. Under the previous regime introduced by the previous Government, only those employees likely to have unsupervised access to elders were required to have police clearances. At the time it was estimated that this requirement would have an annual cost to industry in excess of $ 50m, or $ 200m across the budget time frame, potentially increased should staff turnover exceed existing levels.

[10] Minister's second reading speech, Page 5.
[11] Minister's second reading speech, Page 6.

There was no allowance for either the direct cost of introducing these requirements, or for the infrastructure costs essential to maintain yet another system and process. Advice received from the Australian Federal Police confirmed that the cost applied by the AFP for such clearances increased by 37% in 2008, in an environment whereby subsidy increases were less than 4%. It is indeed a matter of deep regret that one arm of Government has actively sought to benefit from the mandatory regulation of another arm, at the expense of older Australians. None of this is visible to Parliament so the impact on the ground remains hidden.

We should never lose sight of the fact that the Australian Government limits the level of income of aged care service providers, and does not permit any cost increase over and above what is allowed for by way of prescribed care fees to be passed on to consumers. The fiscal impact to the aged care industry due to the AFP increased prices will see an additional $ 74m over four years removed from care subsidies. One has to ask whether this is the best use of $ 274m of care funds, or indeed whether the Government should have compensated the industry for this massive cost imposition.

This figure will only escalate further with the requirement that all people within the aged care industry (both employee and volunteer) hold current police checks, at a loss of income which would otherwise be used to provide care to older Australians of an estimated $ 350m, unfunded and unjustified.

There has been no attempt to address such a substantial waste of resources by the establishment of a national scheme as has been proposed by the industry to reduce costs and enhance community confidence in the system.

EXTENSION TO MANDATORY REPORTING

The concept of mandatory reporting was introduced in legislation in 2007. At the time, as is not unusual, the detail of how it would function was not known to the industry and was to be developed by the Department of Health and Ageing. Whilst the concept was supported by the industry and consumers, as with many such concepts, the “devil is in the detail”.

Realities of Mandatory Reporting

It is important to understand the practical implications of what on the surface sounds like a perfectly reasonable and appropriate action. An example of how this can differ from the reality of the situation may assist the reader in understanding concern at this proposed extension of this reporting regime. In the lead up to the preparation of the legislation and so-called “business rules” related to the implementation of mandatory reporting, the industry and consumer groups sought (through the “consultation” process) to exclude mandatory reporting in the circumstance where the aggressor had a diagnosis of dementia, and therefore had little control over their actions.

The “business rules” that were implemented in response to such a plea to take into account the realities of such a disease profile is that the service provider is able to make an assessment whether to report such incidents, however the aggressor’s care plan must be reviewed within 24 hours.

The incidence of such occurrences in a dementia specific unit (such units are secured to prevent wandering and ensure safety to the dementia sufferer as well as others), can vary, and indeed for those experienced in dealing with such behaviours is not unusual. The industry is now faced with the requirement to review a care plan within 24 hours whenever the slightest altercation occurs between residents in a

dementia specific unit. Effectively this means that more resources are allocated to such a process that delivers poorer care outcomes than would have been delivered in the first place by responding appropriately to the behaviour.

Investigators from the Complaints Investigation Scheme, many of whom have no experience in aged care or dementia care, make judgements on a single dimension when considering the action taken by the provider – whether the care plan can be evidenced to have been reviewed within 24 hours of the incident.

In the experience of my organisation, the bullying and abuse of staff that is characteristic of such "visits" is behaviour that should not be tolerated in any modern work place. Indeed if the employer acted in such a manner there would be a case to answer in the courts. The absolute lack of accountability for their actions and their immunity from normal considerations of courtesy sets these investigators apart from what would be considered as normal responsibilities – such is the punitive and heavy handed nature of the Aged Care Act and its Principles.

The focus of attention and resource drain that comes from compliance with an unreasonable and inappropriate "business rule" is significant, and ironically takes the time and attention away from those who need our care and support. The CIS invariably investigates all incidents, and this takes the form of at least 2 investigators often arriving unannounced at the facility, dominating the time of those providing and managing the care, for several hours (usually at least a half day). Considerable hours are absorbed subsequent to that visit with providing substantial volumes of paper and responses, often not associated with the initial incident, but identified as part of the fishing expedition embarked upon to justify the existence of the CIS. Perfection is a noble ideal, but not a practical one. Such investigations are on the basis of absolutes, not probabilities or a balanced view. If a provider gets 9 out of 10 boxes ticked, and even a partial tick in the 10th, they are still deemed to be non-compliant with consequential punitive measures taken.

None of these costs are compensated for under the current legislation, although as indicated they absorb substantial and escalating amounts of the limited resources available to provide care for older Australians. In particular, the escalating costs of staff turnover as a direct result of the abuse at bureaucratic hands is an invisible but serious cost to care.

THE PROPOSED EXTENSION OF MANDATORY REPORTING

During the alleged "consultation" undertaken by the Department of Health and Ageing, as we understand it there was no agreement from any non DH&A participant that mandatory reporting should be extended as is envisaged in the Minister's second reading speech. It should come as no surprise therefore that the industry is sceptical of assertions or proclamations of "consultation" to give Parliamentarians a perception that general consensus has been reached.

People residing in care facilities are not prisoners, and have the right to come and go as they please (with the exception of those suffering from the effects of dementia and residing in a special dementia care unit). In fact the industry has been told for many years that facilities should be "home-like", and under the [12]Charter of Resident Rights and Responsibilities it states inter alia, that each resident of a residential care service has the right, amongst other considerations, to:

- full and effective use of his or her personal, civil, legal and consumer rights;

[12] User Rights Principles – Schedule 1 Section 23.12 and 23.14

- live in a safe, secure and homelike environment, and to move freely both within and outside of the residential care service without undue restriction;
- continue his or her cultural and religious practices, and to keep the language of his or her choice, ,without discrimination;
- select and maintain social and personal relationships with anyone else without fear, criticism or restriction;
- maintain his or her independence;
- accept personal responsibility for his or her own actions and choices, even though these may involve an element of risk, because the resident has the right to accept the risk and not have the risk used as a ground for preventing or restricting his or her actions and choices;
- be involved in the activities, associations and friendships of his or her choice, both within and outside the residential care service.

With that backdrop, these "rights" enshrined in the Aged Care Act 1997, are now to be withdrawn without reference or real consultation, by a stroke of the Ministerial pen.

To provide some practical examples within this organisation wherein two residents were indeed reported to the Queensland Police Service as missing. Substantial resources including people off duty were brought into searching for both residents (different facilities and times).

In one case the resident had gone out with his family after lunch and simply didn't advise anyone he was heading out. He took quite an offence at our request that he let us know and stated quite clearly that it was "his right to go wherever and whenever he chose". He returned to the facility in the early evening and had missed his dinner time medication – hence the high level of anxiety in trying to locate him.

In the second case the resident was located in a police station nearby, having been found drunk and not knowing where he was or lived. The police were able to return him to the facility at around 2130 that night due to our reports to them and their involvement in our search attempts.

Both examples demonstrate that residents within aged care services are and remain active participants in our community. They have earned the right to go out and enjoy themselves, and indeed under the User Rights Principles, take risks to pursue such options. These proposed changes not only seek to take that away from them, but will impose "business rules" which will absolutely no doubt require notification to the Department as a priority, which will interfere with the process and resources of trying to locate and ensure the safety of the resident.

We appeal to Members of Parliament to not allow this withdrawal of basic human rights from older Australians, nor to allow punitive and unnecessary interdiction by the Department that removes the focus from our resident and indeed consumes increased resources in reporting simply to tick a bureaucratic box.

There is no doubt that the methodology by which the Department of Health and Ageing will determine the "business rules" to give effect to this withdrawal of civil rights, will not be subject to Parliamentary scrutiny or transparency. One is lead to ponder the question whether older Australians should be treated in such a shabby manner. Given the experience of the implementation of the previous mandatory

reporting regime, one can only imagine the extent to which resources will be further drained from the provision of service to comply with this intrusive and restrictive legislative amendment.

The Minister outlines in her second reading speech that this change will be established by amendments to both the Act and the Accountability Principles, however there does not appear to be prominent coverage of any amendments to the Act within the [13]Explanatory Memorandum.

SUMMARY AND CONCLUSIONS

As stated previously, it is unclear what the stated amendments are meant to achieve or are in response to and in such an environment, speculation as to motive is unhelpful.

If there are genuine problems with existing legislation which have led to demonstrable negative outcomes for residents and relatives or there is a reasonable apprehension of a serious risk in the future then via transparent and comprehensive consultative mechanisms, the Commonwealth is surely obligated to lay this information out clearly for the community and the Parliament in unison to determine what are the best and fairest mechanisms to address any genuine deficiencies.

The burden of regulation on aged care providers is already onerous and unparalleled and under the existing legislative framework, the Secretary enjoys discretion far beyond that in most other Commonwealth portfolios, or indeed the community in general.

question whether it is wise or necessary to extend these existing and extensive powers even further.

It is concerning that despite comprehensive and unprecedented control over private sector organisations, the whole thrust of the legislative amendments is to increase red tape for aged care providers who already find resources insufficient to meet their existing obligations (refer Grant Thornton Review). It is also submitted that the increased legislative framework is contrary to the clearly stated intent of the Rudd Government to address regulatory burden and reduce red tape and its associated costs.

Of utmost concern is the fact that the existing and proposed legislation is silent on the obligation arising from such extensive powers to ensure that the costs of compliance and therefore resource drain from the provision of care for older Australians are covered via the funding mechanisms.

In the absence of such compensation escalating levels of funding intended for care delivery to the benefit of older Australians will be lost to unnecessary excesses in the exercise of bureaucratic control. This surely is a case where the medicine is far worse than any identified disease.

Thank you for the opportunity of putting forward this submission.

[13] House of Representatives. Aged Care Amendment (2008 Measures No.2) Bill 2008 – Explanatory Memorandum.