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SENATE

STANDING COMMITTEE ON COMMUNITY AFFAIRS

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

FRIDAY, 14 NOVEMBER 2008

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SENATE STANDING COMMITTEE ON

COMMUNITY AFFAIRS

Friday, 14 November 2008

Members: Senator Moore *(Chair)*, Senator Siewert *(Deputy Chair)*, Senators Adams, Bilyk, Boyce, Carol Brown, Furner and Humphries

Participating members: Senators Abetz, Arbib, Barnett, Bernardi, Birmingham, Mark Bishop, Boswell, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Eggleston, Ellison, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Ian Macdonald, McEwen, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Adams, Boyce, Carol Brown, Furner, Humphries, Moore and Siewert

Terms of reference for the inquiry:

To inquire into and report on: Aged Care Amendment (2008 Measures No. 2) Bill 2008

WITNESSES

Committee met at 11.34 am

MUNDY, Mr Gregory Philip, Chief Executive Officer, Aged and Community Services Australia

YOUNG, Mr Rod, Chief Executive Officer, Aged Care Association Australia

CHAIR (Senator Moore)—Good morning. These are public proceedings. The committee may agree to a request for evidence to be heard in camera or may determine that certain evidence should not be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to the committee. Both Mr Young and Mr Mundy are very experienced as evidence givers at these things, but we still have to run through this. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

We have your submissions; thank you very much. Would either of you like to make an opening statement before we go to questions?

Mr Mundy—I would like to make a brief one, if I may. One of the things I have felt the need to do in our submission, just because it is a matter of public record, is to put our slant on a couple of the things that were set out in the explanatory memorandum. That is usually the document that sets the flavour for a bill, and it did not quite accord with our view of the world.

Firstly, yes, it is certainly true that there was consultation with the aged-care sector on the detail of the material that was in the bill. What is not recorded in the explanatory memorandum is that we did not agree with all of it. We were spoken to, but there were a couple of issues—and one issue in particular that I have highlighted in this submission—where, from my recollection, no-one agreed with the proposition. I thought it was worth while making that point because silence is sometimes taken as assent, and we did not assent.

Secondly, the explanatory memorandum has a very unusual description of the aged-care industry in its introductory paras. I normally skip over those, but what it said about the composition of the industry and the changes that have taken place was quite inaccurate, and that was surprising to me. I do not want to labour the point, but I thought it was probably appropriate to correct that impression of the aged-care industry and how it is comprised.

CHAIR—Have you raised those two points with the deputy or with the minister?

Mr Mundy—No, because there has not been time—

CHAIR—You raised those in your submission; I was just wondering whether you had, because you start right out with those two clear comments in your submission. That is fine—there will be a chance later.

Mr Mundy—In terms of the specific measures that are in the bill, the bill to us represents a tightening up of some areas that have been regarded as loose in the past. I think some of the measures are an appropriate response to changed circumstances and some are a response to the department's and the government's reaction to specific incidents. It does trigger a general wariness about how far we go in extending the capacity for the potentially arbitrary exercise of administrative power and triggers a desire to make sure that we do have appropriate transparency around the making of those decisions and appropriate channels for redress where people do not agree.

I think it is true that the changing composition of the private sector in the industry is something that was not anticipated in 1997 and that refining the definition of 'approved provider' and the circumstances is probably necessary in that regard. There has been some ambiguity around what an approved provider is, and there was a case in recent history in Queensland where that came into play. The question was: was this organisation approved by the government or was it not? The bill goes some way towards resolving that ambiguity by linking the full approved provider status to organisations that are funded by the Australian government to deliver services. That probably accords with what most people would have thought was the case anyway, so we are broadly in support of that.

Similarly, there has been some lack of clarity around which payments by residents enjoy the protection of the act and which ones do not. I think it is appropriate to make that clearer. I see restricting the operation of the Aged Care (Bond Security) Act to services that operate under the act as a useful tightening up.

We do have some concern—and I know that some of the other witnesses appearing before you today have made a more explicit point of this—about the extent to which the secretary will exercise the power for the government to set the amount of an accommodation bond. Currently the setting of an accommodation bond is a negotiation between an aged-care provider and an individual. There has always been a provision that people could be exempted from that requirement. Introducing the power for the secretary to determine the amount of an accommodation bond, if it is regarded as an exceptional power to be used in exceptional circumstances, is not remarkable. But it is actually quite a big step if it is a qualitative change in the powers of the secretary in that regard, because it means that the government is saying what the amount that should be paid is rather than it being a transaction between the provider and the individual consumer. So we saw that as potentially a qualitative change, particularly if it is not regarded as an absolutely exceptional circumstances provision.

There are two things that are of most concern to us in the bill, and I will speak about them briefly. One is the freedom of movement issue. I do not recall many of the other stakeholders agreeing with the view put by the department that it was necessary, appropriate and useful for every instance of a resident wandering from an aged-care facility to be reported to the department. There are two reasons why we think that is a dangerous thing to do. One is that it is actually people's right to come and go as they please. If there is a concern about people's safety, the relevant agency to deal with that is actually the police rather than the Department of Health and Ageing. From experience, we know that what happens is that there will be an incident of someone wandering, the department will come in and have a look at the circumstances that allowed that person to wander and they will write another rule that says, 'You cannot do that because so-and-so wandered.'

We fear it as the beginning of a slippery slope. If we allow the department to have a power in controlling the movement of residents in and out of aged-care facilities, it might be okay on day one but we fear where it would end up. That is not just a view that comes from the providers; it is a view that was echoed quite strongly by some of the consumer groups. I do not believe any of them have made submissions but they did feel there was a limit to the extent to which the power of the state should protect people by restricting their freedom. We are concerned about that. There is no problem with an expectation that we report missing persons to the police and no problem with being held account for those decisions through the accreditation process that we are already subject to, but in the medium to long term we could not see good coming out of an automatic requirement to report such incidents to the department.

The second thing I want to highlight is a similar issue, and it relates to the changes that are proposed to the sanctions for noncompliance. I understand the arguments why people would want to weight some criteria ahead of others, but I think there are dangers in the department seeking to act for existing residents without actually asking them what their views are, because there have been instances where, if the media reports are even partially accurate, what the government has argued and what the residents have said they want have been quite different in recent history. I think it is a tall order for the department to have the responsibility of interpreting the interests of future residents. I am not sure that that puts them in a comfortable position or a position that we would be comfortable with either.

The second aspect of the proposed changes to the sanctions is that we do not think it is a positive step to introduce explicitly the notion of deterrence as a reason for introducing sanctions. We would see that as a backward step, certainly not something that improves the character of the relationship between the government and aged-care providers. If they feel that they have to punish people in order to set an example to others, we think that is taking a step down a wrong path, particularly when there are other things that we do not do that I think we should do to improve the safety and quality of aged-care services.

We have had a number of incidences over the last two or three years where organisations have been fully compliant at point of time A, and, within two or three years, have gone from complying with 44 outcomes down to complying with some much lower number. We have never done the systematic research to ask: 'How does that occur? What is the first step on that slippery path? What is it that people do wrong? What is it that the CEOs of our member organisations should look out for in order to recognise the early steps on that path and do something about that?'

We think there is room for a much more constructive approach to safety and quality that asks the questions: 'Why? How did this happen? What went wrong? What could we have done to stop it?' We think that that would be a much more productive investment in the safety and quality of care of vulnerable older people than increasing the weight and severity of sanctions. We have had a sanctions system in place for 11 years. It is doing its work. What we would argue for is possibly beyond the scope of this bill to construct, but we think that the deterrence criteria is a step in the wrong direction and that it would be better to have a more

constructive, more informed and more research and knowledge based approach to achieving safety and quality—something along the lines of the approach taken in hospitals. That is all I wanted to say by way of introduction.

CHAIR—Thanks, Mr Mundy. Mr Young.

Mr Young—Thank you. I would just like to raise three issues. We have made a number of comments upon the legislation, and where we have commented we have recommended some additional provisions or, in some cases, repeal of a provision. The first two items I would like to raise, however, are pieces that are not in the legislation as it stands. The first of those relates to an extension of the aged care assessment team process that we, following on from Mr Mundy, had included in the documentation we actually commented on, earlier in time, and which miraculously disappeared in the final version—which was very disappointing, because we were very enthusiastic about that change. I will just briefly outline how it affects the industry.

Aged care assessment teams are obviously the gatekeepers, on behalf of the Commonwealth, on allowing anyone into community, residential low or residential high care. When an ACAT determines that somebody is assessed as entitled to enter residential low care, some months might pass before the person actually moves into care, and, when the facility actually applies the aged care funding instruments—the new instrument started from March this year—they may determine that the person is eligible for high care. The outcome of that is that, from the point of admission onwards, even though the facility may have determined that the subsidy rate is, say, at the maximum level of $135 per day, they default to what is called the default rate, which is actually $44.14 per day, which is a significant difference. The default rate actually attaches to it, as our assessment has been for a high care resident, all of the care costs that would apply to any high care resident.

So we have to provide all the services—the nursing care, the complex wound management or anything else that might be required—for the high care resident, but on $44.14 per day. And that remains in place until the ACAT comes along and does a reassessment. In many instances, the ACAT simply says, 'That person is in care; we have higher priorities; we will come and do that when we can get around to it.' And that often runs out to three months. So, three months later, the ACAT comes in, does a reassessment and says, 'Yes, that is fine; this person is high care.' The facilities assessment now comes into play, and the department starts paying the higher subsidy rate—from that day. There are no backdating provisions.

What had originally been planned was this. With the new funding instrument, there is a much greater level of objectivity and transparency, and we were more than confident that the department would be able to oversight us to ensure there was not any gaming by anyone in the system and that we could move to an additional reduction in ACAT reassessments that we considered to be unnecessary. So we considered it to be very, very unfortunate that that particular provision did not get into the final version of this bill, as we had given it our strong support up to that point in time. We made our best endeavours to actually make the recommendations in our submission regarding the number of changes that would need to be made—because there are a number of connections about how you would then adjust for that—and what we determined that we should be asking you to do was to go back and look at those provisions and make the amendments to them that would actually achieve that outcome.

The second issue is also not in the bill but relates to the fact that four years ago we were the initiating organisation to convince the former government that we needed to make provision for greater protection of bonds being received by the industry. In doing that, we ended up in 2006 with the bond protection bill. One of the things that has happened recently is that a provider in Victoria called Bridgewater went into administration and then into receivership. There is some $8 million in bonds outstanding at the moment. Those bond outcomes may be recovered but if they are not ultimately it is the aged-care industry that will reimburse the Commonwealth for any shortfall.

What happened to Bridgewater, as far as we understand it—and a lot of the information is still highly confidential because it is still going through the receivership process—is that the owners and operators of that facility actually sold a number of the aged-care units within the nursing home complex. That has lead to considerable complexity surrounding the administrator initially in the process of trying to divest the property and move it to a new owner, because we have the complexity of a corporation actually owning the overall facility and we have a number of individual investors actually owning the individual aged-care units. We have not had the time or the resources to actually go into detail as to how that might be rectified. But it is certainly something that we believe needs to be looked at, because, again, ultimately any shortfall in the future from anybody else who structured their aged-care ownership arrangements will leave any shortfalls that may eventuate as the responsibility for the aged-care industry to meet.

Finally, I would like to add to Mr Mundy's comments regarding the provision for extension of powers of the secretary in making decisions regarding sanctions. I can assure all senators that there is not one single provider in this country who does not consider the possibility of having sanctions applied. Already that is a major deterrent. It just does not make sense to us that the secretary actually seeks to bring to himself an additional provision within this part of the bill that would actually oblige him to consider the deterrent effect of applying a sanction. If you apply a sanction it is a very onerous task on a provider. Usually you do not impose sanctions because the sanction will mean that there is no subsidy for any new residents for six months. That is a significant cost to the provider because if you lose 10 residents in a facility for that six-month period you actually get no income for those 10 places. That is a fairly punitive financial outcome that already applies if the sanction is actually instigated against a provider. So we see no logical benefit in making that additional power available to the secretary. We think that the current provisions where the secretary is considering the health and welfare of current residents has as much application to the present as to the as future. Therefore, why would we want to extend the future provision and expand those considerations to the future. Again, it does not make sense to us as to why the secretary is seeking to extend the powers and the things he must consider in that regard. Thank you.

CHAIR—Thank you very much. Senator Humphries.

Senator HUMPHRIES—Thank you for those opening statements and for the submissions. I have to confess that at this particular point in the year Senate committees become a bit of a sausage factory, so I am not very familiar with these bills and am very much dependent on witnesses like yourselves to sort of guide us to what the salient issues are here. To ask a threshold question, the department has said in its submission that in net terms the changes decrease rather than increase the regulation of providers of aged care. Would you both agree with that statement?

Mr Mundy—I cannot think how you could possibly come to that conclusion, to be honest.

Senator HUMPHRIES—Okay. Mr Young?

Mr Young—No. I cannot see how it achieves that objective.

Mr Mundy—Nothing is being repealed. It is just new things being added.

Mr Young—I would like to comment that one of the real difficulties for us as an industry is that this piece of legislation is now 1,000 pages long. There are 12 or 14 subsets of regulations that are administrative instruments. It is now an extraordinarily complex regulatory environment that our guys in the field, to put it politely, as directors of nursing and managers and CEOs are expected to understand. It is just beyond the average person's capability to understand it.

Mr Mundy—Can I just modify my answer slightly? There is one significant area in the bill where there is a reduction of regulation, and that is in the provisions to do with the aged care assessment teams, where some of the requirements for a decision have been removed. That is the only area where there is a reduction.

Senator HUMPHRIES—Okay. Putting aside the exaggeration which may be inherent in the department's statement, would you agree that, if you stopped someone in the street and asked them 'What should governments be doing about regulation of the aged care industry?' it would be fair to say they would reply 'Tighten it up and make sure it is heavily controlled so that nasty things don't to people in aged care facilities.' Is that your feeling about what direction government should be heading in?

Mr Mundy—No it is not. We have actually just done a significant piece of research that investigated exactly that question in March and April this year. We had interviews with 1,200 members of the general public, 1,000 aged care employees, 600 aged care managers and 800-and-something aged care clients of various sorts. The clients we dealt with were not only through our own organisations but also through the consumer bodies. The people who had the most negative feelings about the aged care industry—by a very measurable margin—were the people that worked within it because they were the only people that believed the stories in the newspapers.

When we asked the general public where they got their information about aged care from the first 87 per cent of their sources were family and friends, neighbours, direct experience and so on. People's direct experience was quite positive. Nine out of 10 of our consumers said they were very happy with the services that they were getting. They could identify things that they were not getting that they would like to have, so they were not happy across the board, but what they were getting was quite positive.

Our measured assessment of the general public is they actually think aged care does a pretty good job. They are very supportive of the people that provide the care and when they see stories of bad things happening they see them as exceptions that do not accord with their own experience of the industry. If you ask people the question in principle 'Do you think that there is a need to set standards and to enforce them in aged care?' everyone would answer 'Yes, I certainly would.' But our research evidence on what the general public thinks is that we actually do a pretty good job.

Senator HUMPHRIES—Could we see that evidence?

Mr Mundy—Absolutely—I am very happy to send you a copy of the summary report.

Senator HUMPHRIES—That would be great; thank you for that.

Mr Young—We would endorse the findings of that study. Mr Mundy's organisation made a copy available to us and it certainly concurs with our view as well.

Senator HUMPHRIES—Okay. I now turn to some of the specifics that you have raised. With the issue of reporting missing residents, as I understand it the department is proposing that, where a resident is missing to the degree that the facility is concerned enough to want to call the police, that is the trigger for notification to the department that this has happened. Mr Mundy, in your submission you characterised it as restricting people's liberty to move around. I wonder whether that is a fair description. Shouldn't the government, on behalf of the Australian community, know whether there is a facility which is losing two people every second day or whether others are not having that kind of experience with their residents going missing?

Mr Mundy—In part, our reaction to the measure was coloured by the context of the discussion we had about it, which also included things like having electronic locks on doors and having people wear bracelets that identify where they come from. It had a very strong flavour of infantilising older people, saying they actually have fewer rights to movement than anyone else in the community and drawing too close a parallel between the care of older people and the care of children. I do not think that is the right frame of reference to bring to bear on this problem. Yes, you could include adequate provision to monitor movement, and it is included in the accreditation standards about building fabric. But having to report every particular instance where someone leaves the facility—maybe of their own free will—to the department—

Senator HUMPHRIES—And you report it to the police.

Mr Mundy—We report it to the police if we are worried, but the police are the appropriate agency to deal with them. We fear that there would be an incremental ratcheting up of perimeter security every time something went wrong. You can imagine how it might happen. Someone might ask the minister a question in the House: 'What happened in this facility?' The minister would want to have a substantive answer: 'That happened here, but we have now done something to make sure that it never happens again.' There is never any going back down that path. It is always more and more measures. I made a comment that might appear gratuitous about protecting political and bureaucratic reputations, but that is what the dynamic privileges. That is what is actually driving things. We think that the requirement to act responsibly and report missing persons to the police is sufficient and that good would not come from reporting it to the department. I know they will have a contrary view, but our view, informed by 10 years of experience under the Aged Care Act, is that rules always increase; they never get reduced.

Senator HUMPHRIES—That is a fair statement. Mr Young, I have just a couple of points to make on your submission. That issue about ACAT assessment is a good one. I think we should put that to the department. Can I be clear about what you are saying about the Bridgewater facility in Victoria? Is the regulation that might address that a feature of this legislation?

Mr Young—No, it is not.

Senator HUMPHRIES—Are you saying it should be considered in this sort of framework?

Mr Young—Our contention was that, although we have not been able to put a solution to this committee, nonetheless, part of this reform to the regulatory framework is dealing with the issues surrounding the protection of bonds. In that context, as the industry is finally liable for any shortfalls, we have a particular interest in how the department approves providers and approves the ownership structure within particular operations. In this instance, which is the only one I am aware of at the moment with any evidence surrounding it, the particular operators moved to this structure with the strata titling and allowing individual investors to own individual units. I understand that—I do not have any direct evidence for this—some of those investors eventually became residents, so they are both an investor and a bond payer. That simply starts to create an

enormously muddied environment. If I am wrong and that is not the case then that certainly could have become the case, where an investor was to become a resident at a future date at which point they would become both an investor and a bond payer.

We have the investors being dealt with by the administrator, now receiver. We have the bond payer being dealt with by the minister and the department, as being recipients of the bond protection scheme. Ultimately, the industry is looked to for any shortfall in those bond payments. We need to have another discussion that actually looks at how we can protect the industry in the broad, residents in the future and any investors so that it is quite clear what the structure should be.

Senator HUMPHRIES—I understand. Thank you.

Senator FURNER—Forgive me for not being familiar with your representation of your clients. In relation to section 8-3A, 'Meaning of key personnel', who would be affected by those sanctions if that new definition of 'key personnel' were in place? How many of your clients?

Mr Young—Potentially, the bulk of the industry could be affected, depending upon the ownership structure in the future. Would you agree with that, Greg?

Mr Mundy—Yes. It is not so much that particular types of key personnel positions are being changed. They would be significant positions like the Chief Executive Officer, the Director of Nursing or Deputy Directors of Nursing. Those are the sorts of people that are defined as key personnel. The changes in this bill try to deal with more complex organisational structures. There has been the practice for some providers to set up a separate company for each particular aged-care home that they operate. That is the principal case that the bill is trying to deal with. There are some extremely complex structures in the church and charitable sector, which I represent, and there always have been.

Senator FURNER—I guess that is what I am looking at. One of the submitters indicated that the religious sector that they look after has a further reaching net than your upper executive areas.

Mr Mundy—And that was certainly raised in the consultations on the bill that I referred to before.

CHAIR—Was there agreement on that?

Mr Mundy—There was, actually. The measure that was proposed was to use the definition that comes from the accounting standards—people had a 'significant and measurable' impact on the organisation. That was put forward as a way of meaning that, say, the Bishop of Sydney is not going to be considered approved personnel, which under other definitions he could be.

Mr Young—That was about the second iteration stage, however, because at one stage we were pretty sure the Bishop of Sydney was going to get captured by the definition.

Mr Mundy—That was the solution to the problem and I am probably not professionally competent to evaluate how good a solution that is. I think you would have to be a very specialised accountant to know exactly how that operates in practice. But that technical definition was put in to try to not make the Bishop of Sydney responsible for their aged care facilities. I have seen a submission that argues that they are not sure that is completely covered. Clearly, the intent is that it is the management of the aged care service that should be in scope; not some other body that happens to own it. It is one of those areas where the structure in the church and charitable sector and the structure in the commercial sector is actually different and it makes for complex law making when you are trying to write a set of rules that gives the same effect in both.

Mr Young—One of the earlier variations was an attempt to cover the CDC ownership as an equity investor of the Amity group and their involvement across the broad ownership structure. Of course, since then things have moved on and Amity is now owned by Bupa, which is a wholly-owned subsidiary of a UK not-for-profit organisation. The other component that I am aware of that the section amendment was endeavouring to cover was where somebody says they have no day-to-day administrative control over the operations of the facility and therefore should not be considered key personnel and yet they might be found to have either direct or indirect influence on day-to-day activities. It is a difficult and complex issue trying to cover the field. No matter what you do you will almost certainly find that somebody structures an organisation in a different form at some point in the future and it may not be covered by these provisions. But trying to second-guess all of those situations is almost impossible.

Mr Mundy—What it may imply, Senator, is that you might have to pay attention to the management and governance structures of some organisations and review them in the light of this change to make sure that they have not given rise to unintended exposure; that is, if they do have a committee or a board structure that looks

after age care then its role is very clearly defined and the role of other bodies in, say, a church hierarchy are very clearly defined as not being part of that command structure. It may well be that some people will have to make some adjustments to their structure if they want to make sure that they are not inadvertently swept up by the provisions of this bill.

Senator CAROL BROWN—I have a quick question about the changes to the police check requirements. What staff are currently not required to get police checks and what types of work do they currently carry out that you would see would come into this new arrangement?

Mr Mundy—There are two principal classes of people who would be swept up. One would be administrative staff who are not involved in the care of residents; staff that work onsite as opposed to at some remote head office.

Senator CAROL BROWN—But they have access?

Mr Mundy—Currently if they do have access they would have to have police checks. What the new clause is proposing is that even if they do not have access they should also have a police check. Police checks are not free; our estimate of the cost is $100 in round figures. And you think: why? The other class of people that we are concerned about, and the bill does not really get absolute clarity on this, would be tradespeople. If you call a plumber in an emergency, do you have to ask to see their police certificate before they come in? All of the discussion of this and the changes use the words 'employees' and 'workers', which I would take to mean not contractors like electricians and plumbers, particularly ones you call in an emergency. But it is a level of detail that gets filled in later. Once the bill is passed then the particular guidelines or rules are written. I do not see a need to require police checks of the plumber you call in an emergency. You might want to keep an eye on what they are doing—you would anyway. I do not see that anything in particular is gained by requiring clerical and accounts staff to undergo a police check because they do not work with residents. I do not object to it in principle—that they should not do it. It makes for equity as between employees. But none of these things are free.

Senator ADAMS—Who pays now?

Mr Mundy—It is a mixture. I would say that the majority of the cost is borne by providers, given the nature of our workforce, the difficulty in attracting staff and so on. I know that some employers do say it is a matter of private employment so you pay for your police check. I think a lot of our members have discovered or have assumed that is unsustainable and the employer pays. The fee for a police check, if you just go into the state police department, is between $50 and $60. That is just to get the printout from CrimTrac of what you have done.

There are of course more costs associated with them in terms of record keeping and record management—they have to be updated every three years so you cannot just put them all in a filing cabinet and forget about them. A reasonable cost for a straightforward one is about $100. If you have come across someone who has committed an offence and whose status is unclear—and what counts as a crime is different in every jurisdiction in Australia—then if you want to deal with that person justly and fairly and say, 'Can they work in my facility or can they not?' then you might have to get legal advice. I have certainly heard lots of stories of people who have spent $500 on a police check before they could be satisfied that they were not acting arbitrarily against an employee that they either could or could not employ. It is not a trivial cost. I do not see that it adds a great deal of protection to residents to make it a universal requirement for people who actually do not have anything to do with the residents or whose only access to them is supervised by someone who has had a police check. Most of the police check provisions that I am familiar with, such as, for example, at my own children's school, the definition is that the people who need the checks are the people who have unsupervised access to the children. People who do not have that exposure are not required to have the police check. That strikes me as a sensible boundary to draw around where we require police checks. If they were free I would probably take a different view. I do not see that anything is added and there will be a cost. I do not think it would pass a cost benefit analysis, so why are we doing it?

Mr Young—The estimate of the overall cost per annum to the industry since its implementation is around $30 million.

Senator ADAMS—$30 million per annum?

Mr Young—Yes, for the whole industry. That has been totally borne by operating income. There is no additional funding from government at all to meet that cost; it is coming from internal resources.

Senator BOYCE—Have your organisations had a look at how much more it will add to your operating bottom line?

Mr Young—In truth I think it would be relatively minor compared with the $30 million. We might be talking about $2 million or $3 million. But it is: why are we doing it? I cannot see how it materially adds to the safety of people in aged care facilities to have the accounts staff having to undergo police checks. We had always said that since the implementation plan of the former government it would make administrative sense for most providers to cover all of their staff so you are not worried about unsupervised access. Where we have agency staff entering facilities then most aged care providers will insist upon their contracts specifying that any staff coming from a nursing agency, because it is a regular arrangement, have the same. And of course, those people do have unfettered access. They might be on night duty or whatever.

However, as Mr Mundy said, we really get into some grey areas. We need to be very cautious that this does not become a further obligation on industry. There are other contractors—quite a range—and you simply cannot require police checks of all of them. You will get a range of staff. Some of them are infrequent contractors but nonetheless there are a multitude of them who may come into a facility. A lot of them do not have unfettered access to residents but nonetheless they might come to a facility and they might be in an area described as unsupervised access. You can have plumbers, electricians, fire inspectors and all sorts of other service providers. It is almost impossible to impose a police check requirement on those groups. More often than not there will be a staff member with them. I think our concern is that, before we know it, this provision may extend to those contractors, and that would be very difficult to enforce but it will leave us with an obligation at some future time. We would like, I think, the extension to staff to be quite clear—we are talking about employed staff and specified agencies like nursing but not other contracted entities.

CHAIR—Senator Furner, Senator Adams and Senator Humphries have indicated that they have questions on this point, so we will go through them in that order. But, Senator Brown, you may certainly finish your question first.

Senator CAROL BROWN—What I was going to ask was: according to the department's submission, the new requirements would apply to employees of aged care facilities with access to care recipients, supervised or unsupervised. So, if your accounts staff had access to the care recipients, would they be required to have a police check?

Mr Mundy—That is better, Senator. If it is restricted to employees, it does remove the risk of, say, your emergency plumber and so on. I could not find that specification in the bill. But, if that is a clear statement of intent, maybe that is something that we could hold the department to.

Senator CAROL BROWN—I will ask the department.

Mr Mundy—But I would have thought that supervised access was a reasonably safe boundary to have drawn in the first place. I cannot actually see the need to widen it any further than the original legislation set it in 2007. Requiring people who have unsupervised access to residents to have a police check struck me as being what you would expect. Extending that to people who do not have unsupervised access to residents would seem to me to be an unnecessary step.

Senator CAROL BROWN—If that is the case—if it is only the floor staff or people who have access to care recipients—would that exclude your accounts staff?

Mr Young—No, the accounts staff would still have to have their police checks, but the plumber or the electrician who was not an employee would not. If that is the very clear intent, that would certainly remove one whole class of our concerns about the extension to those staff. Our only remaining concern, I guess, would be that we do not think it adds a lot of value and it comes at a cost—but then, if that is really what the government wants, they should pay the cost.

Mr Young—I know that covers the issues we have. From the way the department has framed both the bill and that advice, it is quite clear, in my opinion, that it would be all staff, supervised and unsupervised. Our concern is with those extra-curricular contracts that we mentioned earlier; we need to be quite specific it will not just flow on to those.

Mr Mundy—There are some people it does not apply to—just to put the whole thing in context. For example, the police check provision does not apply to general practitioners or to clergy visiting an aged care facility—

Senator CAROL BROWN—Or politicians?

Mr Mundy—It may not apply to politicians either, because the reason for the exclusion is that such people are deemed to have been invited in by the residents rather than by the management, and that would apply to politicians. And, because of that, the onus of responsibility is on the resident rather than on the facility, but that is a fairly fine point. I do not know that anyone has asked the minister to produce a police check when she has come to open something, but it would not surprise me if someone had tried!

CHAIR—So, on police checks: Senator Furner.

Senator FURNER—My understanding is that police checks currently only apply to directors of nursing and nursing staff—is that correct?

Mr Mundy—No, it is anyone who has unsupervised contact with residents, which would include care staff, care workers, food service assistants, and, most likely, cleaners—just about anyone who works in the resident-occupied area of an aged care facility currently has to have a police check. That it is how we got to our estimate of $30 million, because our view is that the unit cost of a police check from start to finish would be $100 and there are about 300,000 people employed in—

Senator FURNER—Sorry; my question related to the current situation.

Mr Mundy—Currently everyone who is in the care part of an organisation, including the food services staff, the cleaners and probably most of the gardeners, has to have a police check.

Senator FURNER—So your issue, which I take on board, is quite relevant. There could be many contractors—food contractors, cleaning contractors and electrical maintenance contractors. It could be far reaching. What you are submitting—basically, your limitations in having control over that—is quite relevant.

Mr Mundy—Currently, if our members have an ongoing cleaning contract, we would recommend—as Rod indicated—that they include a requirement in the contract that any staff sent to them have had a police check. The difficulty would arise where there was some short-term, urgent piece of maintenance to be done. We would like to retain the provision that we can supervise that person rather than require them to go away again and come back with a police check. If you have an emergency plumber come in who is not the person you normally deal with—whose police check you have sighted—we should retain the option to have someone supervise that person's work rather than having to send them away because they do not have a police check.

Senator FURNER—How do you manage that, though, given the skill shortage in this industry?

Mr Mundy—With difficulty. When you send a plumber away to get a police check, that might be the last time you see that person.

Senator FURNER—No—I am talking about the supervisor of that person.

Mr Mundy—That is a challenge for us too, and that is why we would recommend as a management practice that, where people have ongoing maintenance contracts, they set it up once and for all to remove that requirement. But things do go wrong at short notice, and tying it all up and specifying it all in legislation does not seem like a particularly useful, necessary or economical way to proceed.

Senator ADAMS—I refer to a letter from Ms Halton, secretary of the department, clarifying a number of things. She says the proposed changes will make police checks mandatory for all staff regardless of whether they have supervised or unsupervised access to residents. In your organisation overall, are you aware, Mr Mundy or Mr Young, of any studies that have been done that show that it is imperative that every staff member is police checked?

Mr Mundy—Do you mean a study that demonstrates the efficacy or value of doing it?

Senator ADAMS—Are you aware of any study that has been done to come up with the result that—

Mr Mundy—In this industry?

Senator ADAMS—Yes, in your industry.

Mr Mundy—No, I am not.

Senator ADAMS—So you have not been asked to provide any information regarding this.

Mr Mundy—No.

Senator ADAMS—I am just trying to get some evidence as to why this has happened—that is really what the question was about.

Mr Young—We would perhaps need to go to other industries like, say, child care in Queensland. They have had a police check requirement for workers in that industry for some time. There may be some data in that

state—I am not sure. Some other jurisdiction in another state may have undertaken some work. I am not able to advise of anything that I am aware of at the moment in that regard.

Senator ADAMS—I am specifically asking about the aged-care industry.

Mr Young—No.

Senator ADAMS—As part of your accreditation or anything in that respect are you asked any questions like this?

Mr Young—As part of your accreditation you are now asked, 'Are you compliant with the regulations required under the act?' and police checks for staff are part of that HR function.

Mr Mundy—Anything that gets legislated then becomes a requirement that the accreditation people check on when they come in. In fact, there was an instance recently of an aged-care service who had some people with expired police checks—they were more than three years old—and that was included in the report.

Senator ADAMS—So there has not been a study? That is really the question I want answered.

Mr Mundy—No, I do not believe so.

Senator HUMPHRIES—This is just a small point. Surely everybody who works on site in an aged-care facility necessarily has access to residents, even account staff. Would anybody in the facility think it strange if an account staff member walked into a ward or a resident's room at some point? The answer, surely, is no—that is the sort of thing you would expect to happen. So, really, everybody gets access. Isn't the department saying that that is a reasonable basis for the requirement for everybody based on that site to have a police check? Isn't that reasonable?

Mr Young—That has been our advice right from the start—that it is simpler for management to just have all staff. Our only contention at the moment is that separation between contractors entering a facility for ad hoc purposes and staff.

Senator HUMPHRIES—But you would not argue with the extension to staff who do not ordinarily have access but who are based on the site? As I understand it, that is what the department are saying. You would not argue with that as an extension?

Mr Young—A laundry person, a seamstress, an accounts person—any of those staff may at some stage deliver something going to an area unsupervised by another, police-checked staff member. Administratively we have taken the view that it is simpler just to have all staff police-checked, and then you are not worried about the issue in the future.

Mr Mundy—If it is very clear that the extension applies to staff, then a large part of our concern about it would be dealt with. If it does not apply to contractors doing maintenance and so on, then I think that contains it in a way that we would have much less trouble with.

Senator CAROL BROWN—Aged-care facilities now quite often have hairdressers and other services like that who regularly come in. Do they currently have police checks?

Mr Mundy—Yes, because they do have unsupervised access to residents currently and they are provided by the facility—or that is the way most people would look at it. They are not treated like the priests and the GPs, who are ostensibly invited in by the resident. It is a fine distinction between a hairdresser and a GP on that point, I think.

CHAIR—I have been advised that the actual detail around the police checks is in the regulations, not in the core bill, so the concerns you have raised—this is how I read your submission—are about what you think may be in the regulations. Is that accurate?

Mr Mundy—Indeed. That is a very good way put of putting it.

CHAIR—In terms of process. That raises a whole other issue, about not having the regulations in front of you, which I am sure we will get into. But in terms of process it was mentioned in your submissions. So just to make it clear: we do not have the detail?

Mr Mundy—No, so we do not really know what the clauses will do.

CHAIR—Which is an issue that is real.

Senator BOYCE—I want to ask one follow-up question with regard to the requirement to report missing people to the department. Is there any requirement at the moment, in the way you go about reporting your performances to the department, that would capture that figure? I do not think it is unreasonable for the

department to want to know that one particular home had 20 people a week who required the police to look for them, compared to another that might have had one or two. I very much support your view that we should keep institutions as uninstitutional as possible, but there is also, I think, a performance measurement here.

Mr Mundy—I think there are some challenges in terms of certainty of terms about what 'being missing' means.

Senator BOYCE—The number of reports to the police of someone being missing.

Mr Mundy—Certainly it would not be an unusual thing for the department to ask how many instances had been reported to the police in a period of time. If we had a different sort of relationship between the regulators and our members, I would be much less concerned. If I thought that people would sit down and think, 'What went wrong here and how can we do something to stop it happening again?' I would be much less concerned, but I know in fact what would happen is that they would apply sanctions and everyone would walk away feeling bad about it.

Senator BOYCE—Get out the dogs and the electric fences.

Mr Mundy—And, at the end of the day, the residents are not better off and the future residents are not better off. We need a more constructive culture to approach these sorts of things if we are going to advance the cause. Hospitals discovered that the hard way. They found that when they had a punitive regime in place it just encouraged people to hide incidents. It was only when they moved to the concept of no-fault incident reporting and looked at what they called root cause analysis—'What actually went on here?'—and tried to make it a more constructive, 'How can we fix this?' type of culture that they really started to get to grips with those sorts of things. I think that sort of shift is long overdue in aged care. As I said, our concern about bringing in concepts like deterrence is that it is actually another step in the wrong direction rather than a step towards 'Can we do this qualitatively better?' I certainly think we can, and the experience of the hospital sector is that they had to if they were going to get to grips with significant safety and quality problems.

Mr Young—Can I add to that. Most aged-care facilities would certainly be retaining records of the number of occasions on which the police have been called to find a resident that has gone missing. The second leg of this at the moment is that most providers, if the police have been called in, would as a matter of course notify the department, but it is not obligatory at the moment. There are no central records maintained of how many events have occurred, but you would certainly be able to go to most aged-care facilities and ask them for part of their record-keeping and performance measurement material and be able to find out how many events the police had been involved in over the last six or 12 months or two years. But there is no data at the moment that actually puts that into a—

Senator BOYCE—I take on board Mr Mundy's comments about the current type of relationship, but what would be the problem with providing that on a six-monthly or annual basis to the department?

Mr Young—That would probably be easier than the obligation being imposed here, that you must report to the department. Our secondary concern with that is that this data will then become part of the Aged Care Complaints Investigation Scheme, when in fact it is not a complaint; it is an incident. It is an event for which the police have been called in. The facility has done the right thing, yet it will become part of the data that says 'This event has occurred. The department has handled it'. In fact, it is the facility and the police that have handled it. There has simply been a notification to the department. A simpler process would certainly be some sort of reporting that says each year that this is the number of events that have occurred.

Senator BOYCE—I presume you report to the department in depth on the overall performance and other criteria.

Mr Young—No, we do not.

Mr Mundy—No, not really.

Mr Young—There is no reporting on key performance indicators to the department. Certainly, there is an annual audit of financial accounts. They are analysed by an external accounting firm, but there are no other performance indicators of that nature other than what the agency does when they carry out their support context spot visits or full accreditation audits and their analysis of how the industry is performing against the 44 outcomes.

Mr Mundy—We would actually support the development of a minimum dataset that did report routinely on the overall performance of the industry and the variations within it if it was done within the right sort of framework, such as I described before. I think that would be another component of a qualitative step forward

in actually doing a better job in safety and quality, but it requires a different character of relationship in order to make that work. Again, something like that happens with hospitals. It is not that they are without problems, but you have to encourage people to report things that go wrong rather than cover them up before you are really going to get to the root cause of problems and be able to do something about them.

Mr Young—There is a form of that happening already, but it is happening in the private space. There are two quality clinical indicator organisations providing a service to the country. The two organisations cover, roughly, about a thousand sites around the country between them.

Senator BOYCE—What are those two organisations?

Mr Young—One is called QPS Benchmarking and one is called Moving ON Audits. There are significant differences in the data they are collecting and how they are analysing it—

Senator BOYCE—But they are providing benchmarking for the private sector.

Mr Young—Yes, they are—quite comprehensively.

Senator BOYCE—Mr Mundy, I think you have also partly answered one of my next questions in your comments about the relationship. I was somewhat concerned to hear you mention in your first two points that there had been consultation but not agreement. I understood you to say that, on one point, no one had agreed. Was that correct?

Mr Mundy—I do not recall anyone thinking that the reporting of wandering residents to the police was a good idea. That is my memory of a meeting. I have read the minutes, and they do not say anything about it at all.

Mr Young—I would endorse your memory about that.

Mr Mundy—I do not recall anyone speaking favourably about it. I do recall the consumer groups saying: 'You cannot take all risk out of life without taking something out of life.'

Senator BOYCE—Exactly. Going on, you mentioned the comments from the department around the composition of the aged-care industry being incorrect. Was it just the composition that you were talking about there, regarding the proportion of the industry in the not-for-profit sector?

Mr Mundy—Yes, it was. It was just a surprising thing to find that an explanatory memorandum does not actually paint an accurate picture of what the aged-care industry is like.

Senator BOYCE—But that is only in relation to the composition—

Mr Mundy—Yes, indeed.

Senator BOYCE—or is there a wrong characterisation of the industry as well?

Mr Mundy—No. It creates a misleading impression of organisations that require to be regulated. In my view it really was just a correction of a surprising inaccuracy.

Senator BOYCE—Senator Moore has already mentioned that a number of other submissions had raised concerns that there will be changes to the aged care principles that will underpin this but we do not know what they are now. Do either of you have comments on that?

Mr Young—It is extremely frustrating. We have on not infrequent occasions in the past come to this committee and others to give evidence; you are dealing with a bill but you do not know the details of the principles that are going to sit behind that. Then you have a secondary issue with the department, which is an administrative instrument that sometimes you can reach agreement on but many times you cannot.

CHAIR—For the record, Mr Young and Mr Mundy, this is not a new situation.

Mr Young—No.

Mr Mundy—No. They are—what is the correct technical term there?

Mr Young—Disallowable instruments.

Mr Mundy—Disallowable instruments, generally speaking. But then you are in the hands of the composition of the parliament and the extent to which they actually get exposed to—

Senator BOYCE—You talked before about the potential for the secretary of the department to set accommodation bonds. In the current climate there is something like equality between the person who is choosing to enter a facility and the facility management in that people do have some choice to go elsewhere. It is an equal negotiating position. It is quite likely, is it not, that as we move on with the ageing of the

population that choice is going to be more and more restricted? People are going to be in a take it or leave it situation. Do you have any other suggestions about how one might go about keeping the balance in that relationship between the person who wants to go into the facility and the owner to ensure that people are not being gouged for accommodation bonds, for instance—when the situation is if you do not go there, there is nowhere?

Mr Mundy—I think there is a big problem currently with the whole of our aged care industry in terms of the restriction on supply and the impact that has on the differential power of residents versus the government versus providers. It is for that reason some of the commentators on the aged-care industry, particularly the economists, have argued for a qualitative change. In the last six weeks economists such as Henry Ergas from CRA and Saul Eslake, the chief economist of the ANZ, and the Productivity Commission, in the form of Commissioner Woods, all argued that we need to open up aged-care service provision to market forces a little bit more to increase the level of supply by not regulating quite so tightly so that consumers do have more choice and are therefore relatively more empowered. There is, of course, a price that they would pay for that. If you move from being 99 per cent occupied to 89 per cent occupied it means the price of every unit has to go up to cover the cost of the vacant ones. But there would be a gain for consumers through such an increase because they would gain choice of facilities in ways that may not be available in all parts of Australia right now.

It is our view that it may be time to change the paradigm in aged care and open it up a little bit more to market forces and choice. That is, to not necessarily completely deregulate it—I think that would be an unlikely scenario to succeed in the current environment—but it could not be much tighter than it is currently. The argument would be that the government already regulates who is eligible for residential aged care through the ACAT system. Does it really also have to regulate by issuing licenses for the absolute level of provision of services? It is not like child care because there is no equivalent of an ACAT for child care—either you are a child or you are not, and you are entitled to a subsidy according to your parents' income. It goes up quite high—I used to get it. But do you need to be able to hang the braces? If you say you do then you run the risk that you identified accurately, Senator, of constraining the choice of consumers. Consumers essentially get what the government says they should have, rather than what they would choose to purchase themselves. That is a big question, but it is a very good question, and one that we will not be able to evade as the population gets older.

Mr Young—A secondary issue that we need to factor into the current structure is that on our estimates there are for about 12,000 vacant places throughout the aged-care system.

Senator BOYCE—Is that nationally?

Mr Young—That is nationally, and is hugely variable.

Senator BOYCE—Is that generally across the board? Are there spots—

Mr Young—There are spots in, say, Queensland. For instance, in Mackay there is an excess of demand over supply. There are places in inner West Sydney where the supply is way ahead of demand. That raises the whole issue of the planning formula and how effective it is. Leading up to last year's election, the government committed to undertake a significant review of the planning formula and how it might better meet the demand in the future. That is currently leading us to an average 93 per cent occupancy rate as at June this year, on our estimate. That means that you do have a number of facilities now that are down in the high eighties, and that is putting considerable pressure on those facilities.

Senator BOYCE—What would you consider to be full occupancy? I presume that it is less than 100 per cent.

Mr Young—It is less than 100 per cent but above 98 per cent. That would be the usual. As an industry, when you look at how historically prices were struck for this industry, they were usually predicated on about a 98 per cent occupancy rate. So there is a fairly heavy discount within the pricing the government sets for the industry that is based upon that sort of occupancy rate. When we look at the planned future projections, then certainly over the next five years that vacancy factor is probably going to grow rather than diminish. We may then see an equilibrium starting to occur again because you will start to get a significant increase in the future projected population. But in the meantime, from a provider's perspective, if you have a vacant place you carry the full cost of that. There is no cost to the public purse at all. That is where we get into real tensions between what you can expect someone to pay and what is going to make it a reasonable investment proposition for anybody to outlay the $200,000 per unit, which is what it is currently costing us to build places.

My other issue regarding the question you raised is that our interpretation of those particular sections in the proposed bill were for hardship only, and we have certainly said that we need more clarification and involvement in how the criteria would be set in those cases to inform the secretary as to how the criteria would be applied. So we need to clarify what 'hardship' is going to mean and in what instances the secretary would try to put a cap on the accommodation bond amount.

Senator ADAMS—I would like to come back to the ACAT assistance. Firstly, is there a shortage of ACAT teams throughout Australia?

Mr Young—I can give you one example of a New South Wales based ACAT region that we wrote to the minister about recently, and she has certainly been endeavouring to find some solutions with New South Wales health. But in this particular region there was a fulltime staff of three. The ACAT team was down to 0.8 staff. One of that 0.8 was a 0.4, and that 0.4 was on leave. So we had 0.4 out of three fulltime equivalent staff actually functioning for many weeks. We had 40 places vacant in aged-care facilities across that region, and I know of one hospital in the region that had 10 patients waiting for assessment for transfer to an aged-care facility. Again, this is hugely variable. It varies between states and it varies between regions. Our view is that we are getting to the point where ACATs probably need to seriously consider moving out of state and territory jurisdictions and becoming the responsibility of the Commonwealth so we can get a greater level of control over both the performance and the criteria than what we are getting at the moment with the variable ACATs across the country.

Mr Mundy—The problems tend to vary over time as well as between regions because, with the general tightness of the health workforce, if you lose a key person in an ACAT it might take three months to replace them, during which time the workload for everyone else increases. It tends to be quite a long cycle to get them back to a stable functioning state.

The ACATs also tend to prioritise their work differently from the way the Commonwealth aged care program would anticipate. Their job is to place people in appropriate settings and it is a second order issue for most of them to comply with the administrative requirements of the aged care program. So there is a little bit of a tension between what their state masters ask them to do and what their Commonwealth masters ask them to do. But it is for that reason that there was a major review of the ACAT program, and it is out of that that some streamlining of the work they do has come into this bill; so that is a step forward. There probably will need to be further steps, though, if it is to be a way of facilitating access rather than becoming inadvertently a bottleneck. That was never the intention, but once they get below a certain resourcing level they do act as bottlenecks rather than as access points.

Senator ADAMS—I am just trying to do a few sums on how much the providers are losing through the ACAT not being able to come back and reassess someone who has come in on a certain ACFI level—and it happens quite often that when someone is taken out of their own comfort zone and put into an aged care facility they deteriorate very rapidly. I can see that, with that default figure, if you are waiting all those weeks for an ACAT person to come in and actually do the reassessment, then that provider is certainly going to lose quite a lot of money in that respect.

Mr Young—In addition, lots of people who have an ACAT assessment will wait weeks and sometimes months before they will activate the assessment and gain entry. Sometimes it is because they want to go to a particular facility, or they might be moving—an ACAT assessment is simply a voucher to take up residence in an aged-care facility.

Senator ADAMS—That is correct. But then when they arrive on the doorstep it may be that they need far more nursing care than was originally thought. So the provider who has taken them may then find that they are not even able to deal with them—or, if they are able to, the person may be right at the high end of the scale, so that it will obviously cost a lot more money to keep them within that facility, but, since they cannot get the ACAT assessment done, they are on that default fee.

Mr Young—This is an opportunity to, again, take some of the excess burden away from ACATs, if that particular requirement could be removed.

CHAIR—That is not in the bill, though, Mr Young, is it?

Mr Young—It is not in the bill at the moment, no. It was in our discussion documentation earlier on but not in the bill.

CHAIR—That is right. It is not in the bill.

Mr Young—So (a) that opportunity presents to take some of the load off ACATs; (b) if the department were to instigate a re-instatement of the appropriate funding from the day of admission it would fix the providers' problem; and (c) if the department were to do that, then probably the logical extension—to ensure they achieve their objective of protecting the public purse—would be to concentrate, in their validation processes, when they look at our assessments to ensure that they are accurate, on that group of people as being accurately assessed by us when there is a variation between our assessment and the ACAT assessment at entry at low care as opposed to high care.

Senator ADAMS—The reason I ask that question is this. These changes are to streamline the assessments, but if you have not got the actual personnel—as in, the ACAT—there to do it, how are we going to streamline it and make it better?

Mr Young—This would streamline that process by virtue of taking one of the additional reassessment functions away from ACAT so that at least what resources there were on the ground could concentrate on new entrants, not on people who were already in care.

Mr Mundy—The measures in the bill will help. They will reduce or eliminate a whole class of administrative assessments that have had to be done and no longer do need to be done. So it is a step in the right direction. I guess what we are both saying really is that there is more that could be done in that regard to eliminate the ones that are essentially only done for administrative purposes rather than to ensure that the appropriate care gets provided to the resident. The ACATs will always tend to give priority to ensuring the appropriate care is provided; that is their central mission. And the priority they give to the administrative things that help us is understandably but annoyingly lower. Once someone is placed they have come off the urgent list; the fact that there is an anomaly about their subsidy level is an issue for an ACAT, but it is a much less important issue than ensuring that a particular person is in an appropriate care facility.

CHAIR—I am going to have to wrap it up there because we have got to have a small private meeting. Thank you, Mr Mundy and Mr Young, as always, for your contribution. If there is anything you think you need to add that we have not covered efficiently, please be in contact with the committee. We received this morning a supplementary submission from the department which I am sure you will be interested in as well. So as soon as we make it a public submission you can see it. Thank you very much again, and if you would like to wait a moment you could get a copy of it. I know you will be interested in it. This formal hearing is now suspended until we reconvene at 1.15 pm with the next witnesses.

Proceedings suspended from 12.50 pm to 1.16 pm

LINDSAY, Mr Peter Leonard, Alliance Member, The Aged Care Alliance

JEFFERY, Ms Jillian, Manager, Strategic Development, TriCare Ltd

TOOHEY, Mr James Patrick (Jim), Chief Executive Officer, TriCare Ltd

CHAIR—Good afternoon. I welcome representatives of the Aged Care Alliance from Queensland. Thank you very much for coming to see us today. I am sure you are all experienced at doing this. You know the rules; you know about the protection of privilege; and all those things. We have your submission. Thank you very much. Would any or all of you like to make a short opening statement?

Mr Toohey—I would, thank you, although there has been a change in the game plan.

CHAIR—That is fine.

Ms Jeffery—We have just been advised that the department has lodged a supplementary submission to the inquiry, which we have had a very brief look at. It is quite long, so we are seeking the opportunity to provide a supplementary submission in writing in response to the contents of that.

CHAIR—That would be fine as long it is very quick. As you know, we have a very tight time frame on this one. If you could get it to us as early as possible next week, that would be good.

Ms Jeffery—Close of business Tuesday?

CHAIR—Could you do it by Monday? We do apologise. It is just the nature of this time of year with the legislative calendar.

Ms Jeffery—We obliged with the timeframe. We understood that all the other parties would, too. We now have no choice but to do that.

CHAIR—Thank you very much.

Mr Toohey—Other than part 6, amendment (118), which relates to the proposal that approved providers can be sanctioned based on a determination that residents not currently receiving care may find themselves at risk sometime in the future, none of the provisions of this proposed amendment in isolation represent more than further incremental regulatory impost on aged-care providers. However, as far as TriCare is concerned, that is precisely the point. Aged-care providers are the most highly regulated, reviewed, scrutinised, audited and validated commercial organisations operating in Australia today. The regulation of the aged-care sector is exhaustive and without parallel. The Aged Care Act and the aged care principles, in the words of a well-known academic who conducted a review into the sector, provides the Department of Health and Ageing with unprecedented delegations and powers in respect of actions it can take against aged-care providers. It is surely time that the quantum, scope and intent of this regulation was properly and independently overhauled with a view to retaining vital, robust protection for elderly residents and their families whilst, in the spirit of the policy platforms of both major political parties, cutting red tape and regulation of business.

Apart from the increasingly sclerotic effect of further legislation, the second point I would like to make concerns the cost impact. The Department of Finance and Deregulation website lists a number of considerations and requirements in respect of regulation. This includes the completion of a regulatory impact statement. According to the department's website a regulatory impact statement is a document prepared by the department, agency, statutory authority or board responsible for a regulatory proposal following consultation with affected parties. It formalises and provides evidence of the key steps taken as part of a good policy development process. It includes an assessment of the costs and benefits of each option followed by a recommendation supporting the most effective and efficient option.

It further states that if you have to undertake any regulatory analysis and there are likely to be any compliance costs, you are required to prepare a full compliance cost assessment using the business cost calculator or an approved equivalent. The OBPR will advise you if this is the case when you contact them after completing the preliminary assessment. Where there are likely to be significant compliance costs, the quantification of these will form part of the regulatory impact statement.

I recall that when the last layer of regulation was introduced to this sector by the previous government in the form of staff police checks and a mandatory reporting regime—ironically in response to an assault by a staff member without a criminal record whose activities were reported promptly—the industry was told there would be no impact in terms of costs on the sector. I presume this is the case this time around as well. I do not know how such an assessment can be arrived at without substantial input from the sector into the modelling,

assumptions and costing which underpin these determinations. To the best of my knowledge, if they exist in any substantial form they have never been made available to the sector so they could be tested. Surely, they are integral to the considerations legislators need to make.

My final point is that I believe we need to move to an evidence based regime in respect of regulation. I do not believe it is acceptable that regulation which impacts on providers and staff should be introduced simply because it makes the department's job easier, provides them with additional measures of protection for their actions or simplifies what are always complex considerations in the interests of expediency. Though undoubtedly popular, legislation which purports to protect vulnerable residents and punish greedy, exploitative providers by exposing, for example, who is pulling the financial strings behind an aged care organisation should be subject to the same rigorous tests as any other piece of legislation. In short, all stakeholders are entitled to expect that the need for further regulation is underpinned by evidence—clear, unambiguous evidence demonstrating its necessity. Further regulation should be considered only where its absence has clearly resulted, or would clearly result, in serious, widespread systemic failure to protect vulnerable elderly residents.

CHAIR—Thank you. Mr Lindsay, do you have anything to add at this stage?

Mr Lindsay—I support what Jim Toohey has presented in his introduction. I also affirm that in our view, while there will be additional costs of implementing the regulations, we do not see any direct benefit to our residents. Given the level of regulation with regard to funding and what we might charge our residents, every time there is an additional cost it has got to come from somewhere. I know in my organisation—a church charity—our prime goal is to provide a community benefit return within a financially viable framework. We do not make a lot of money out of aged care so every time there is an additional impost upon us there is only one place where it can be reflected, and I would have to say that is within the area of resident care.

On page 13 of our submission, where we spoke about section 8(3), is an example of the corporate structure of Queensland Baptist Care. If you like, I can provide you with a copy of our organisational chart in summary. It might make my point even clearer. This is about the need for broadening the identification of people as key personnel. If I look at my organisational chart, as the chief executive officer I am answerable to a board of Queensland Baptist Care that has a delegated authority from the board of the Baptist Church in Queensland, who itself has a delegated authority from what we call our Assembly—delegates from 180 churches. As we read the amendment, it could well suggest that every one of those people who are not just members of the board above those that have day-to-day responsibility for the delivery of services to people but who are part of the church governance structure may well need to be deemed as key personnel.

We would suggest to you that that becomes fairly unworkable and does not really enhance the opportunity of care for our residents. The people that we are talking do not have any direct input to the day-to-day operations. They might make a large, big-picture-type decision—'Will we stay in this area of the enterprise or get out of it?'—but with regard to the impact on our day-to-day operations they have a fairly marginal involvement. Thank you for the opportunity to make those points.

CHAIR—Thank you. I am sure we will raise that point with the department. There is a heading in their supplementary submission which may address that. I just have not had a chance to read it yet. Ms Jeffery, do you want to make a statement at this stage?

Ms Jeffery—I have nothing further to add.

CHAIR—We will go to questions.

Senator HUMPHRIES—I thank the three of you for appearing today. Can I start by clarifying who the Aged Care Alliance represents. Is it purely Queensland providers?

Mr Toohey—The so-called Queensland Aged Care Alliance came about as a result of discussions amongst key provider organisations in Queensland about the best way to advance discussions on policy change in aged care. The members of it are simply prominent Queensland aged-care organisations from both the private sector and the church and charitable sector.

Mr Lindsay—It would be true to say that we are an informal network rather than a peak body. I guess we are here representing the view of providers as opposed to, but not different from, that of a peak body.

Senator HUMPHRIES—I ask the question because we understand from the department's submission that there was a substantial degree of consensus about the value of these amendments, but you are the third set of witnesses we have heard today and there does not appear to be a lot of consensus among those that we have

heard. Of the people who are members of the Ageing Consultative Committee the department used to consult about this legislation, which organisations or organisation would have represented the alliance or members of the alliance?

Mr Toohey—Off the top of my head, nearly all members of the alliance are members of Aged Care Queensland, which has also membership of Aged Care Association Australia and Aged and Community Services Australia—with the exception of one of them. I am aware there has been an assertion that there has been extensive consultation on this bill, and I am not in a position to comment, other than to say that I knew nothing about it other than that there had been a proposal to change the requirement to bring ACAT to assess a resident who had been admitted as low and then under ACFI went to high. That was the extent of what I knew the proposal within the legislation to be. It may well be that there has been some deficiency in the communication process, but talking from TriCare I only became aware of this when it started to be floated around as something that the committee was examining.

Senator HUMPHRIES—The department makes this comment in its submission:

In net terms, the changes decrease, rather than increase, the regulation of providers of aged care.

I take it you would not agree with that statement.

Mr Toohey—Certainly not.

Mr Lindsay—The department has made those sorts of comments before, and our experience does not mesh up with what they are suggesting.

Senator HUMPHRIES—What do you consider to be the level of urgency about these changes? Obviously if you disagree with them you would consider them not urgent at all but, if you assume for the moment that there are some necessary changes to be made in this legislation—make that assumption—is there an urgency to have this done before the end of this year, in your opinion, or can this wait until the beginning of next year, for argument's sake?

Mr Toohey—My view, representing TriCare, is that there needs to be a great deal more understanding of what these changes entail and, going to my final point in my opening statement, the evidence for their necessity. I am happy to take you on your word and assume they are necessary.

Senator HUMPHRIES—I am not asserting that. I am just saying—

Mr Toohey—I understand; for the sake of the argument.

Senator HUMPHRIES—If it could be argued that there was something important to do in there in a regulatory sense. I am trying to work out what the urgency of it actually is. The Senate is being asked to pass this, I assume, by the end of this year. That is why we are dealing with it today at the end of a sitting week when we have very limited time and we are frankly pressing our luck to get this done properly, I might say. But I am wondering whether you would consider that there is any urgency in these provisions, even taking the point of view of the department that they think that these are changes are valuable and efficacious for a better aged-care sector. Even if you make that assumption, is it actually urgent?

Mr Toohey—In my view, no.

Senator HUMPHRIES—You only make one recommendation at the end of the submission but the other comments you make seem to suggest that there are other changes that ought to occur in the legislation. I appreciate that you have not had a long time to look at these issues and to be able to comment on them. As I think you mentioned before, Ms Jeffery, there is now a supplementary submission from the government and perhaps it deals with some of the issues in here. We just do not know and neither do you, obviously. But would you make other recommendations to the committee based on the comments you have made in your submission? Are there things that you would like to see actually changed in the legislation or the regulations made under it to pursue the issues that you make in your submission?

Mr Toohey—It is difficult. I would quite frankly like to see this go back to the drawing board, if you like, and start with the evidence for its necessity being clearly presented to the sector along with agreed consultation mechanisms signed off by everyone in place and a proper regulatory and compliance impact assessment take place as to its necessity, because it always comes down to cost-benefit. Anyone coming from the outside looking at these things could say, 'I don't see what is particularly onerous about A to D.' My view is the there has not been sufficient consultation or appreciation by the sector of the necessity for these things and the best way to achieve them.

Senator HUMPHRIES—I realise that you are doing a lot in a short space of time, and I have taken on board your suggestion that perhaps this is not as urgent as we might have been led to believe. But if we are persuaded that it is urgent and needs to be done quickly, any tangible suggestions that you would like to make in your supplementary submission about what needs to change in the letter of the proposed law would be a very useful thing to have on the table.

Mr Toohey—Thank you.

Ms Jeffery—Can I just seek some clarification. Are you asking for restrictions within the proposed amendments rather than the broader regulatory framework as such?

Senator HUMPHRIES—In a sense we have been presented with the request by the Senate to comment on the details of this piece of legislation, and as individual senators we may well share with members of the industry the view that some broader view needs to be taken about the framework of regulation. But our task immediately is to see whether this bill should pass or not. The Senate is asking us to tell it whether this bill should pass and in what form.

Senator SIEWERT—I want to be very clear about this, although I think Senator Humphries has probably covered it. At this stage you do not want these amendments to go ahead. Is that correct?

Mr Toohey—That would be my view, yes.

Senator SIEWERT—And any changes should be done in a broader context of overall reform to the sector. Is that right?

Mr Toohey—I think that is well put, yes.

Mr Lindsay—Including an impact statement so we can be clear on what the outcomes would be.

Senator SIEWERT—In your introduction you talked about the aged-care principles, and we had some discussion about that with our earlier witnesses. You said that you are not at this stage aware of these changes. Have the aged-care principles not been flagged with the sector?

Mr Toohey—My understanding is that the principles give effect to the legislation. I am not aware of what the proposed construct of those principles will be.

Senator SIEWERT—Does that mean that there has been no consultation with the sector, or does it mean that the alliance has not been consulted?

Mr Toohey—I think probably more the second. We are unaware of them. I would not speak for what has happened that we do not know about.

Senator SIEWERT—Right. Thank you. Now I am going to put the acid on you a bit. If some of these changes are going to go ahead, which are the most onerous—the ones of which you would say, 'We think that is harder, is going to cost more and is going to have a negative impact'? Which ones are, for whatever other reason, the ones you think should not be going ahead? Which ones should we focus on when, as Senator Humphries said, we are reporting back to the Senate? Which ones would you say are going to cause the most difficulty?

Mr Toohey—Again, as I think I said in my opening remarks, you could look at these amendments and say, 'There are a few more straws on the poor old camel's back; let's hope she keeps staggering on for a while.' But if I did have to isolate some particularly important ones, they would be twofold.

The first issue is the sanctions proposals. TriCare has been fortunate never to have had a facility which has been sanctioned. We have never failed a standard under the accreditation standards. Notwithstanding that, in principle having something in place which says, 'A provider may be sanctioned for an action which may occur in the future for potential residents who are not yet there,' seems to me to be extraordinary.

The second issue is determining the best way to go forward when there has been an issue in an aged care facility. To simply say, 'All we are going to take into consideration is the wellbeing of residents,' sounds unarguable. However, we have seen many instances—I have certainly seen them on the television; I am sure you have—of where homes have been closed and there has been an enormous reaction from relatives of residents in these homes who were very happy in their facility, who did not want it to close and who suffered enormous distress and anxiety as a result of it being closed. It may be that there are extraordinary circumstances where that is the only course of action. However, I would suggest that a better way, when there is a problem, is for there to be an ordained course set down whereby all stakeholders' considerations—including those of relatives of existing residents, GPs, the provider and, of course, the residents—are taken

into consideration and used in perhaps constructing a plan for moving forward. Now, ultimately, the department would have to—and we would expect as citizens that it would—maintain the right to act decisively if further problems were to eventuate and the plan was not stuck to. But I would prefer to see a more consultative approach to developing that plan. They are the two issues I would nominate. Peter, do you want to add anything?

Mr Lindsay—I would agree with what you have said there. Obviously, while it might not add significantly to our costs, the complexity of the key provider proposals certainly make them very difficult to put into place. On the comment about limiting donations that might be made: within our framework, sometimes people choose to make a donation to our organisation, even if it is just the donation of interest on an amount of money and a fee-offset opportunity is put in place. This would limit our opportunity to provide the range of payment options that we currently have for residents.

Senator SIEWERT—Okay. Thank you.

Senator BOYCE—I just want to talk about a couple of the comments you have made. You have talked about the fact that state government bodies are not covered by this legislation. That has always been the case, hasn't it?

Mr Toohey—No. There are substantial parts of the legislation that do apply to state government nursing homes.

Senator BOYCE—So what would you like to see changed in that area?

Mr Toohey—What I think we are pointing out is that, if these matters go to protection of resident rights, and the accreditation principles and the standards apply equally to state government and non-state-government nursing homes, then surely these provisions should also equally apply.

Senator BOYCE—You have discussed in some depth the potential for conditional provider status. This has obviously come about because of a number of incidents where people have had allocations and done nothing with them, basically. It seems quite reasonable to me that there would be a framework to ensure that people who get allocations for beds intend to provide beds. How would you see that that could be covered in a way that you found satisfactory and that would achieve the government's aims?

Mr Toohey—I think what we have said in here, which is important, is that, if there is to be a conditional approved provider concept, then there should be mechanisms of appeal against the conditions which are put upon the provider. I am not in principle disagreeing with your point, which is that obviously it is not in the community's interest to have allocations of beds sitting there for long periods of time not coming on line—I do not disagree with that—but there should be a mechanism for appeal or review of the conditions which are put in place for a conditional approved provider.

Senator BOYCE—For what purpose? Is that simply where applications may have been somewhat delayed or what? What are the circumstances that you would see—

Mr Toohey—I guess it is a bit open-ended, which is my concern. I probably would prefer to see laid down specifically what it is anticipated those conditions would be. It may well be that in a particular part of the country it takes a bit longer than somewhere else to get a construction underway. I do not know. Having it as open-ended as it is makes me nervous, quite frankly.

Senator BOYCE—So it is putting some criteria around that—

Mr Toohey—Yes.

Senator BOYCE—that would demonstrate that that provider is moving towards actual provision in a timely fashion.

Mr Toohey—I think that is well put.

Senator BOYCE—That is probably easier to say than it is to legislate for. I just have one other query. You have talked about key personnel. I think this is particularly directed to you, Mr Lindsay. You have talked about the QBC, which is the service division of the Baptist Union of Queensland, that administers your aged-care facilities. You say here that QBC has its own board, which is subordinate to the church board. I am not really familiar with the idea of one board being subordinate to another board. Would you like to explain what you mean there.

Mr Lindsay—You will find that a number of churches, not just Baptist, have some interesting governance structures. We are incorporated under an act of parliament called Letters Patent, and that is different to a

company limited by guarantee, clearly, and registration under the Associations Incorporation Act. Within that, under our by-laws and constitution, there is an opportunity for the representatives of the churches, the assembly, as I have said in there, and then there is a delegated authority to a board of the Baptist Union of Queensland. In reality, that board have the corporate responsibility as directors, if you like, of the company. But, under the by-laws, there are bunch of groups called charter groups, of which Queensland's Baptist Care is one. I have the document that outlines the responsibility of the charter group and that delegated authority.

Under this charter document, we, Queensland Baptist Care board and management, take up the responsibility on behalf of the church. If I can put it in this context, the board of the church would see that their prime goal is to set the spiritual direction and the pastoral oversight of the churches. While they do recognise that they have director responsibility, they do not see themselves getting immersed in this aspect of our work. To that degree, they have said to the board of Queensland Baptist Care: 'You take responsibility under the charter document for oversight of the activity and take day-to-day responsibility for the day-to-day outcomes.' We would really only report to them by exception, if something was going wrong.

Senator BOYCE—Perhaps you could table that charter agreement. It would be good if you could provide us with a copy of that.

Mr Lindsay—Yes. I am happy to do that.

Senator BOYCE—We come back to governance questions, don't we? If it is a delegated authority, then the board of the Baptist Union could theoretically tell the QBC board to act in such a way that it would affect the day-to-day operations of the facilities.

Mr Lindsay—I think that, theoretically, you are right. I have worked for Queensland Baptist Care for 16 years. I have been the CEO for just over six years now. I guess what we were trying to say in our submission with our illustration is that, in my experience over that period of time, the board of the church has not played a strong role or any role in the day-to-day operations of the service. We have provided a service that has been financially viable. We, like TriCare, have not had situations where we have had sanctions against us or the like. There have been no exceptions that would call for the board to be engaged at that level. Over the period of time that I have been in the chair—and that my predecessor was in the chair—that was the practical experience.

Senator BOYCE—Nevertheless, it does not seem unreasonable to me for the legislation to be framed in such a way that there is a need to hold someone ultimately responsible.

Mr Lindsay—I agree with that. Someone ultimately needs to be responsible. I have a list here of those who are key personnel within our organisation, and the board of Queensland Baptist Care are all on it. I guess some of our concern would be with the way in which the legislation is currently worded. Does it stop with the board of the church or does it go to that group that we call 'assembly', the delegates of 180 churches? Functionally, if it stopped with the board of the church, with people that had corporate responsibility, that would not be too hard to manage in our sector. But if the legislation was interpreted broadly and the delegates of all the churches needed to be defined as key personnel, it would be a different administrative issue.

Senator BOYCE—Thank you.

CHAIR—Just on that point, have you spoken to the department about this concern?

Mr Lindsay—Not at this point in time.

CHAIR—That seems to be the kind of issue that should be discussed. It is a fear and should be discussed.

Senator FURNER—I have a variety of questions here. Firstly, I want to concentrate on the statement that was made about, I think, moving people out of a Victorian nursing home. What sort of impact would that have had on the residents and their families in that sort of circumstance?

Mr Toohey—I make my comments in terms of the experience of having had to close a home for purposes of rebuilding and having to find alternative accommodation for large numbers of elderly residents. It is extremely traumatic for them. In the case that TriCare was involved with, in managing the Salvation Army nursing homes, there were a number of facilities that had to be closed. The process we engaged in took many months. It involved engaging social workers to case manage each individual resident to find accommodation that was appropriate for them and their family. It was very, very distressing for them. I did make the comment—and I reinforce it—that it may well be that there are extraordinary circumstances where it is necessary to go down that track. I just do not think that we should lose sight of the fact that there is a significant impact on residents.

Senator FURNER—How difficult is it to find suitable accommodation for them if you move them out of their existing residence?

Mr Toohey—In the cases that I have been involved in, it took many months to find places to their satisfaction. As I said, we engaged social workers in each of these cases. We ensured that we had a vehicle which had wheelchair access, and the social worker individually case managed residents and their families to all the different facilities in the area to find one that they liked. We helped them negotiate bond arrangements and that type of thing. To do it very quickly—I do not know. I guess the public hospital system may be expected to take up some of the slack. I do not know.

Senator FURNER—You spoke earlier—and I forget who asked the question—about the information from the Ageing Consultative Committee. There are a range of bodies on that committee, but I note there is a private equity firm, Babcock and Brown. How long have they been on that committee? Are you aware of that?

Mr Toohey—I am not.

Senator FURNER—Do you know why they are on the committee?

Mr Toohey—I can only speak, I guess, from general knowledge. As I understand it, they have sold their aged care portfolio or are currently in the process of selling it. But I was unaware that they were on that committee, and I am unaware of how long they have been there.

Senator FURNER—Are any of the companies that you represent involved in a private equity firm at all?

Mr Toohey—No. We were the only one that was at one stage, but that ceased several years ago.

Senator FURNER—Just looking at the proposed definition of what would be of 'paramount consideration', it indicates that it would be when the noncompliance:

... would threaten the health, welfare or interests of current and future care recipients.

I guess that lends itself to your recommendation of putting in some safeguards about allowing the resident to have some involvement with their GP or their specialist to really identify the risk involved. Is it where you are coming from with regard to your recommendation?

Mr Toohey—Yes, it is. I guess, as I have said, it is reserving the right of the department to act decisively in the most serious circumstances. But I have seen these pictures on television of very distraught residents and relatives, and I have been involved in relocations myself. I wonder if we really should be making sure that that is an absolute last resort. Perhaps laying down a formal plan or steps that can be undertaken in consultation with residents and relatives might be a better opportunity.

Senator FURNER—I appreciate that you are probably in the same position we are, having only just received a supplementary submission from the department. In the sanctions they infer that there is a proposal to impose sanctions on providers who fail to refund accommodation bonds. In your experience, have there been situations where that has occurred?

Mr Toohey—Only anecdotally, that I am aware of. The most prominent one that I recall was not a residential aged-care provider in Queensland receiving government subsidies but, in fact, an unfunded provider in Queensland. I understand that there was some issue there with bonds. However, the bonds as such were not covered by this legislation or this act. They were not a provider receiving government subsidies. That is the most prominent one I am aware of.

Senator FURNER—I have a question with regard to the police checks. We have had some discussions on this already this morning. The department also indicates that providers should have significant numbers of approved arrangements in place where staff and volunteers undertake police checks irrespective of whether they have access to care recipients, supervised or unsupervised. Is that your experience in your industry?

Mr Toohey—I am aware of many providers that, prior to the introduction of this, did have that type of provision in place. Looking at that in isolation, you would not say it was a bad thing. Elderly residents are very vulnerable and very frail and are easily able to be exploited. Firstly, I think we have to corral that to make sure it does not just become a free-for-all. Secondly, the assertions that have been made, that that was a cost-neutral implementation of something, just are not correct. There are significant costs involved in putting a police check regime in place. Providers, of course, have their funding capped by this legislation. There was no recompense for that. As Peter has made the point, it has to come from somewhere.

Senator FURNER—Sure. I note the department indicates that there will be exclusions to independent contractors. What is your position on that?

Mr Toohey—Like you, Senator, I have just had a quick glance through it. This may or may not address one of my original concerns. Let me use a hypothetical. The phone rings at 12 o'clock at night. There is a leak in the toilets at an aged-care facility and water is gushing out. The registered nurse in charge would usually have a protocol as to who she could call to say, 'Come quickly and fix the toilets.' My concern previously was: would we then have to make sure that person had a police check? They would be in the bathroom fixing toilets and the staff would be doing what they need to do. I do not know if this clarifies it or not, but I would argue that it surely has to pass a reasonableness test. For staff that bathe or feed residents or are alone with residents, it makes sense. Again, I think we just have to make sure that it passes that reasonableness test.

Senator FURNER—Thank you.

Senator SIEWERT—I want to revisit the issue of the protection of accommodation bonds. I am reading the department's supplementary submission, so you may need to take this on notice. Do you have a problem with that particular area? Is there something that we have missed? I know you do not like the overall package but I am just wondering if that is one that falls into the basket. It seems pretty reasonable to me. Does it fall into the basket of not having a material cost to the providers?

Mr Toohey—We will address that in our supplementary submission, Senator. Off the top of my head I would say that—taking my aged-care providers hat off and putting an ordinary citizen's hat on—if elderly people are going to be paying substantial sums of money to aged-care provides of whatever ilk, then there have to be protections in place to make sure that those funds are safeguarded. I actually have never met anyone in the sector who has had a different view. The second part of your question was: were there costs associated with that? I cannot recall specifically. I would have to go back and have a look as it was a few years ago.

Senator SIEWERT—Thank you.

Senator ADAMS—On the ACAT teams: do you have problems having your patients reassessed as far as the time goes? Does it take a long time between the time that you feel a patient needs to be reassessed and the ACAT team comes out?

Ms Jeffery—It varies from region to region because the ACAT teams are administered by the state governments, as you know. Within Queensland, the Queensland health department is then broken up into district health services. Some are quicker than others and I make no comment on the reasons.

Senator ADAMS—So you have no complaints—

Ms Jeffery—Not particularly, no.

Senator ADAMS—coming from aged-care providers mainly about the fact of the interim payment? When someone has to be reassessed, the provider is not actually getting their full payment for that process?

Mr Toohey—Senator, if we could clarify that as we have a concern about that. I think that what Jillian is saying, and only in respect of TriCare, is it is not something that we hear a lot from our managers about. It is taking a great deal of time but it does vary.

Senator ADAMS—So as far as the provider is concerned and having to wait for the ACAT assessment, you do have problems with that?

Ms Jeffery—Yes, we do.

CHAIR—Thank you very much. If we could get your comments back as quickly as possible, it would be appreciated. I know that is an impost but we are working on a tight time frame.

[1.58 pm]

GRAY, Mr Richard Nelson Worsley, Director, Aged Care Services, Catholic Health Australia

LAVERTY, Mr Martin John, Chief Executive Officer, Catholic Health Australia

CHAIR—Welcome back. As experienced witnesses, you know how privilege and the elements of seeking in camera evidence, if required, operate. Would either of you like to make a short statement after which we will go to questions?

Mr Laverty—Thank you chair and senators for having us appear before this inquiry. I apologise for my scratchy voice; I have the Canberra flu. We have said in our submission that we broadly support the provisions of this bill and we should clarify that. In questioning previous witnesses it was asked: was there an urgency; was there a need for this bill at this time? It caused me to think that the business case is not well made. There is certainly not an urgency for these provisions. In giving our support to this bill we should perhaps class our position as not being in opposition to it. There are a handful of amendments that we think are vague and could be drafted with more precision—again you should not interpret our comments on those particular amendments—and there are five that I will speak to. We are not raising particular opposition; we are suggesting that they could be better drafted.

I will run through those five relatively briefly. Clause 24 of schedule 1 deals with the revocation of provider status. There does not appear to be an urgency for this particular provision. Clause 96 in schedule 1 deals with the ability of the secretary to determine what is a maximum bond. The current arrangement creates a mechanism whereby a bond is determined on the assessment of a resident's capacity. We at Catholic Health Australia believe that these provisions are adequate at the moment and that there does not need to be an additional requirement imposed. In fact, we would go further and say that the ability of a resident to contribute to a bond should in fact be the mechanism by which the quantum of a bond is determined, rather than an artificial measure that we understand clause 96 would be creating.

Clause 116 in schedule 1 would appear to give the ability to impose sanctions in relation to future care recipients. Again, we think this drafting is uncertain. We are assuming that the scope of this would be determined by guidelines to be developed by the department at some stage. We would prefer that the bill itself actually articulate the scope of this provision rather than wait for the development of guidelines. Clause 117 seeks to deter future noncompliance. The current act does not, to our knowledge, have such a power. So this is a new power being introduced. Again, it appears vague to us. It appears to be creating the opportunity for some type of punitive sanction in an area that is uncertain. Rather than a more positive opportunity of creating incentives, of encouraging approved providers to meet standards, it is a new punitive measure to deter some future event that is yet to occur.

We would raise similar issues as the previous witness did in relation to the definition of 'key personnel' in clause 7. I am cognisant that the department has made a supplementary submission today, and I have had a brief opportunity to review it. As the amendment is currently drafted, it does appear to be expanding the class of people that would be categorised as key personnel. Similar to the situation that representatives of the Baptist Church have just pointed out, within our own Catholic organisations we have boards of directors that are responsible for our services that have direct Corporations Law or associations law responsibility, but there is wording in the proposed amendment that also captures those with 'significant influence' over a service. Some of you will appreciate that a bishop in the Catholic Church, who perhaps does not have immediate day-to-day operational authority over a service, nonetheless has significant influence. We question whether or not that was the intent of the bill as currently drafted—to actually incorporate such people as bishops of the Catholic Church. If it is not the intent, ideally that set of words would not be in the bill.

We make these provisions and give our unenthusiastic support to the entire bill after consultation with our members. Catholic Health Australia is a peak body. We represent 550 different aged-care services operated on behalf of the Catholic Church. Within those 550 services there are some 19,000 residential aged-care beds. So you can appreciate it is a substantial component of the provision of residential aged care in Australia that the Catholic Church is involved in. All of our services not for profit. The main criticism that our members have, after consultation with them in relation to this bill, is that it simply does not go far enough. We have made some observations in our submission to this inquiry knowing they were beyond the scope of the matters that you were looking into. They are based on a research report that we released publicly this week, an aged-care

policy blueprint into the future of residential aged care in Australia. For the benefit of the inquiry, I will table that so that it might be incorporated into the evidence of these hearings.

Recognising that the matters we are raising are principally out of scope, I will speak to them only briefly. We are arguing that this bill could be improved if it were to go further to consider such things as providing for a single, national, consolidated Commonwealth funding program that was based on matching the actual cost of providing care. In Australia at the moment we have an operational subsidy from the Commonwealth that does not relate to the provision of care within Australia. Our funding system deserves and requires significant reform.

We are also recognising that it is not the role of government to meet all costs of residential aged care, and we do not in fact seek the Commonwealth to do so. The position that we have put it that those with capacity to pay should be able to contribute to the provision of their aged care; those that do not have that capacity must be protected by safety nets. We need to recognise that the strong safety nets that already exist are in fact doing that today for people without capacity to pay, but they in fact need to be strengthened. The example I will give is that at the moment an accommodation charge that can be levied for a consumer is capped at $26.88 per day, and the Commonwealth will contribute to that in a circumstance where an individual does not themselves have a capacity to pay. So there is an example of the safety net in operation. However, our own research indicates that, whereas the cap is at $26 88 per day, it can cost upwards of $55 on average per day to provide that accommodation. You can see that the subsidy is not meeting the actual cost of care. Also, the operation of the cap is prohibiting the ability of consumers with capacity to pay to contribute to their own accommodation such that the provider is under pressure, knowing that there is a $55 actual per day cost against a capped revenue of $26.88 per day.

We are further arguing that the distinction between low and high care that is now operating in Australia be abolished. There are two reasons for this. The first is that the nature of individuals entering residential aged care is now changing. They are entering later in their life. They are entering with greater prevalence of dementia. In practice, the distinction between low and high care is starting to no longer have merit. It also means that there is a technical distinction as to whether or not you can charge a bond in low care and high care. We have said that there should be bonds able to be levied in all care, based on the capacity of an individual to pay. At present, residents in low care are able to be levied bonds. I understand that around Australia at the moment there is $6.5 billion being held in bonds contributed by those in low care. I understand in this financial year, despite the global financial crisis, that amount will increase to $6.75 billion. I cannot confirm to the inquiry exactly how many residents that relates to, but with that size of resource being contributed in bonds we can assume that there are many, many people contributing bonds.

Catholic Health Australia in 1997, when the current framework was endorsed, expressed some opposition to the ability to levy bonds in high care. We cited at that time a series of arguments as to why it was inappropriate. A few things have changed since then. The pressures on residential aged care have increased dramatically. We have also seen that some of the arguments raised in 1997 have not impacted as we may have thought. Having had the experience of 11 years of bonds being taken in low care, and with $6.5 billion now being held in bonds of residents in low care, some of the arguments mounted against bonds are no longer valid.

There are broader and more far-reaching recommendations that we have made in our policy blueprint for change. We have contributed those without criticism of the current government. If anything, we make a criticism of the previous government because the need for change has been around for some time. With the changing of the government we see an opportunity for these reform issues to be tackled with some urgency. There is not today a crisis in residential aged care. There will be in some years to come, and that crisis I think has been evidenced in recent days. With the release of the Commonwealth's 37,000 residential aged-care places and community packages over the next three years, some providers have said they will not with confidence be able to take them up because of uncertainty within residential aged care at the moment.

We have proposed a blueprint to try and address some of those requirements. Of government, it asks that there is a review and an increase of operational funding. But perhaps the cost-neutral option that we put to government and that we suggest this inquiry has the capacity to consider, even within its limited terms of reference, is that we move to deregulate those areas that prohibit residential aged care from passing on some of the actual costs of care to those consumers that have capacity to pay, remembering that we must always have a safety net for those unable to pay. I will ask my friend and colleague Richard Gray if he might have something to add to that.

Mr Gray—I will make just a quick opening comment. The department has identified in its original submission and supplementary submission that it did consult on these proposed changes through the Ageing Consultative Committee. I represent Catholic Health Australia on that consultative committee and, yes, we did get briefing papers that broadly outlined the government's intention with respect to the regulatory changes. But, of course, we never saw a draft version of the bill, so until we saw the actual wording in the bill we could not really know how the legislation would impact. The other thing, too, is that we are sworn to confidentiality within the consultative committee and therefore we are not in a position to share the departmental briefing papers with our members.

Another issue is to do with the compulsory reporting of missing residents. Overwhelmingly, just about everybody on the Ageing Consultative Committee expressed real concern and dissatisfaction with the government's intention in that regard. The concern is not so much about a provider having to compulsorily report to the department that a resident has gone missing after they have searched for the resident and reported that matter to the police, but about how the department will take that information and deal with it and what action they might then take. The concern within the consultative committee is that that will increasingly lead to providers having no option but to continually restrict the movement of residents, to the disadvantage of their freedom and of their right to take risk and be able to go out of the facility as they see fit without having to be under some reporting or confining process.

CHAIR—Mr Gray, have you had a chance to talk to the department about that concern?

Mr Gray—Yes.

CHAIR—What was the department's response?

Mr Gray—Their argument was that it was not intended that the reporting of missing residents would therefore necessarily be used. All they said they were concerned about was wanting to be sure that the provider has in place appropriate security for remaining residents and has taken precautions to ensure that residents are safe and secure. The question is how you would interpret that they might go about doing that. Invariably what happens is that, as soon as a report is made to the complaints investigations scheme, the department will send out investigators to physically investigate, on the spot, for themselves what the provider has in place. If that takes place when this comes in, how will the complaints investigation inspectors then determine whether the provider has appropriate security in place? And will they weigh up the right of residents to have the freedom to be able to come and go as they please, even when the residents are not in a secure dementia facility but do have dementia, and also to still have the dignity and freedom to take a risk if they want to when they go out of the facility?

CHAIR—That worry stays with you despite the interaction you have had?

Mr Gray—It does.

Senator HUMPHRIES—In describing the consultation process, the departments submission makes reference to a meeting with the ageing consultative committee in June this year, but I take it from what you have just told us, Mr Gray, that that was the only time when the committee was actually given a chance around the table of that committee to discuss these proposals. Is that correct?

Mr Gray—There were two occasion—in June and again in August—where there were some revisions made to the government's intent, based on a number of members of the committee putting in submissions. Originally it was intended that broadening the definition of key personnel by the department was going to include people who were indirectly involved or in some way had some degree of influence. Now they have removed the 'indirectly', but of course have still left having 'significant influence over', which is still a concern, as Mr Laverty has pointed out, in terms of how that might be interpreted by the department. It is unclear from the bill what that actually means. It is very unclear how the department would determine that.

The other thing, which we did not put it in our submission, but which I have raised with the department, is that the department does not distinguish between key personnel when the key personnel are individuals who are directly involved in the day-to-day care and management, as opposed to those individuals who are appointed to the board of directors of the approved provider. Consequently, the department goes about requiring of those persons sitting on a board, or potentially going to be accepted as board members, to complete a questionnaire about their financial capability. One of our member appointed to their national board a CEO of a major utility company that turns over hundreds of millions of dollars a year, and that was how he completed the question about financial capability. The department wrote back and said: 'That is insufficient information. We need further information as to your financial ability.' Now, I have to question that. The reason

boards of directors sit on boards is because they have different skill sets, many of which may not be related directly to the provision of aged care. They may bring legal skills, specific financial skills, human relation skills, social worker skills or a whole range of perhaps different skills. Therefore, the way the key personnel definition is currently framed is unsatisfactory. We would recommend that the bill be amended so that it identifies key personnel of different types as specified in the approved provider principles.

Mrs HULL—The department's submission says 'These changes decrease rather than increase the regulation of providers of aged care.' Do you agree with that statement or not?

Mr Gray—No. Certainly some of them do, but quite a number of them enhance the regulation. The compulsory reporting of residents is one, the key personnel is another. The key personnel is an onerous responsibility for providers because every time there is a change of key personnel, providers have to go through exactly the same procedures with respect to the change in key personnel, and it is an administrative cost to providers. To the best of my knowledge no government requires that of hospitals, so one would need to question why we need to go to that extent in the aged-care system.

Senator HUMPHRIES—Is there a power now for the secretary to determine the maximum accommodation bond—

Mr Gray—No

Senator HUMPHRIES—There is no power for the department to do that at the moment?

Mr Gray—Well, the power does reside within the fact that the maximum level of bond is determined by an asset test that is set out in the act. That should be sufficient.

Senator HUMPHRIES—But the power that is proposed in clause 96 is to set some different level based on—

Mr Gray—Based on the secretary's determination as to the person's financial hardship, not on the reality of whether or not they are financially under hardship. We do know that there are times when people present as if they are under financial hardship and the provider discovers they have assets all over the place that they have chosen not to declare.

Senator HUMPHRIES—What is wrong in principle with a departmental official being able to determine this—against the views of the provider who you might argue has a conflict of interest because they want the bond? What is wrong with the official saying, 'No, this is a situation where this person genuinely is hard up and should not have to pay the bond at the level asked for'?

Mr Laverty—The problem with this provision is a problem that relates to many of the proposed amendments. It seems to be relying on guidelines to be established by the department at some later stage. You are referring to clause 96, and we would be seeking to have a mechanism identified before the bill becomes an act so that we know on what grounds the secretary would be exercising that power. In such circumstances, we may have no objection to it. What we are suggesting is that the current act does actually provide the mechanism for establishing the levying of a bond. We are not aware of the urgency to change that current mechanism. We have not been presented with the rationale as to why this amendment is required, and in the absence of a set of principles as to how it is going to work we obviously have to raise our concerns with it. I think I can say that is common to all of our concerns, that the bill is quite uncertain. I have great respect for the individuals who will then work out these principles but it would be worthwhile to see them in advance of becoming law.

Senator HUMPHRIES—Especially, as I expect is the case, being regulations, the Senate cannot disallow those rules made subsequent. We can disallow regulations but not guidelines, as I understand it.

Mr Gray—That is correct.

Senator SIEWERT—I cannot recall whether you said you had seen the departmental supplementary submission; I presume you are aware of it but have not had a chance to read it. In terms of the police checks issue, contractors not under their direct control—in other words, independent contractors—will not be subject to the police checks requirements. Does that allay any fears that you have?

Mr Gray—Not entirely, simply because of the point that was made by Mr Toohey, a previous witness, and that is that in certain circumstances you do need a contractor urgently to come in and do something and, because you necessarily would not require every emergency contractor to have a police check, you would not necessarily be in a position to provide supervised access to that contractor. You may not be able to provide a staff member to be with that contractor every moment of the time that person is in the facility, particularly

after hours, and therefore potentially in an unsupervised position with residents. Whilst in principle we do not have a problem with the mandatory police checks for all staff—in fact, most of our people do that now—the issue is really with respect to contractors and what additional conditions and interpretations will be imposed by the amendments to the bill.

Senator SIEWERT—If I understand both your comments and your submission, you have unenthusiastic support for the four key areas that you specifically talk about—revoking service provider status and the maximum bond et cetera. Could you take on notice—and while I was out of the room somebody may have asked this already—to look at the department's supplementary submission to see if that actually allays some of your fears?

Mr Laverty—I can deal with one of those immediately, having had the opportunity to read the department's comments on clause 7, which we have suggest would expand key personnel. The department in their supplementary submission is saying that it is not intended to catch religious leaders, that that was not the intent of the bill.

I spent a few years at law school. I am a constitutional lawyer. I have had the opportunity to understand the words 'those of significant influence'. While ever the words 'significant influence' remain within clause 7 of schedule 1, we will have concerns. I have to say that the department's supplementary submission does not satisfy our concerns. It is changing significantly the number of people that, on a lawyer's reading, would be captured to have to comply with the 'key personnel' requirements.

To some extent, that is not an onerous undertaking. I can table for the benefit of the committee the application form that key personnel need to provide in the event of there being a change in key personnel. It is not an onerous form by any means, but it just raises the question 'Why is it required?' Why is someone who has significant influence over an approved provider needing to provide a key personnel form? There does not seem to be a business case for it. There does not seem to be a reason for it to be there. If there is a reason and we have missed it, I would appreciate the opportunity to learn what it is so that we might respond. But, while ever those words 'significant influence' appear in clause 7, I would have to say that I do not share the view of the department that a bishop may not be captured.

Senator SIEWERT—You were here when we had the alliance here earlier. They had a number of concerns, but one of their key concerns was that the increase to regulation would increase the financial impact. Do you share the same concerns around potential for financial impact?

Mr Laverty—We do. The committee senators would be aware that there is a much greater concern within residential aged-care providers at the moment about the continuing focus on compliance, on standards and on the external pressure that comes from communities by reading constantly about these types of policy issues in newspapers. We do not walk away from the importance of standards compliance and the importance of ensuring the continuing quality of our care. But you are about to impose another layer of regulation on the sector without good reasons as to why. I think our support would be a bit more than unenthusiastic if there were an urgency about pursuing any of this. There is not. There is an urgency about broader reform of residential aged care, about freeing up the regulation that prohibits aged-care providers from being able to obtain the revenue that they require to deliver the services that they exist for. That is where the focus of policy reform should be.

This bill, if you like, is just adding another layer of the magnifying glass as to how we operate our organisations. That is not what we need. We need wholesale reform. That is why Catholic Health Australia has taken the time to develop those proposals for debate. We do not expect this inquiry to deal with all of our recommendations—that would be naive. Nor do we expect government to accept all of the recommendations that we have made. But we do want to trigger a serious debate about the future reform of our sector. This bill ain't it.

Senator SIEWERT—I have another question about the impost of sanctions for future care. That seems to be a consistent concern that all the groups have. Could you support it if there were amendments to that clause?

Mr Laverty—This is clause 117?

Senator SIEWERT—Yes.

Mr Laverty—Yes, we could. At the moment, our criticism is that it is vague and we do not actually have an understanding as to what it would look like in practice. If amendment were to articulate what a future incident might be, if it were to indicate what type of punitive power this is creating—we have assumed at the moment

that clause 117 is creating a punitive power; we do not know that for sure because the clause in and of itself is not exactly clear.

Senator SIEWERT—There are clause 116 and clause 117. Clause 116 is about the future care of residents and clause 117 is about deterring future noncompliance. To me, they both seem to have some issues around them.

Mr Laverty—Agreed.

Senator SIEWERT—So you would be willing to support it if there were amendments to them that put a bit more parameter around what they were intended to do and how they should be interpreted?

Mr Laverty—Indeed and that is consistent with each of the clauses we have raised. We do not oppose them in the event that they are clear in their intent, with, perhaps, the exception of clause 7 on key personnel. While the words 'of significant influence' remain within that, our interpretation would be that that captures more people than is required.

Senator SIEWERT—Thank you.

CHAIR—Could you get us a definition of what that is?

Mr Laverty—Certainly.

Senator ADAMS—Thank you for your submission. I note in your blueprint that, under the aged-care assessment team program, you are asking that it be fully funded and managed by the Australian government. You go on to say:

This service would ensure consistency of eligibility is applied, and there is no conflict of interest when undertaking assessments.

Would you like to expand on those comments please?

Mr Laverty—One of the previous witnesses to give evidence before us indicated that in different geographical areas ACATs move with different speed. That is certainly the experience of our members as well that there is not a national consistency as to how fast ACATs work or indeed what their outcomes are. We have had information from one of our members—and I want to stress that this is an isolated example and it is the first and, in fact, only time that I have become aware of it—of one person assessed under the ACAT for entry into their facility and then being assessed entirely differently under the ACFI. It was the same individual with two different assessments and two different outcomes. Ideally we would have, in Australia, a single and seamless assessment process whereby you received the same classification on arrival into a facility as you then do for access to the operation funding. There are some circumstances as to why that particular example should not be relied on as occurring regularly, but it illustrates, I think, that there is not a consistent mechanism at the moment of people entering the care services that they need and that it is very much a subjective process.

Unfortunately, we have regular anecdotal reports—and I stress they are only anecdotal—of assessments being made and a person being put into high care when, in fact, they are probably a person who should be classified in low care. We understand the reason the ACATs have made those assessments is for the simple avoidance of the question of a bond. We do not think that a system that allows that type of subjectivity is one that is serving the Australian community well. Given that residential aged care is principally regulated and funded by the Commonwealth we think the entry system to it should also be regulated, funded and operated by the Commonwealth.

Senator ADAMS—Thank you. Mr Gray, have you got anything to add?

Mr Gray—Just on that, the bill certainly does have some positive amendments with respect to ACATs but does not go far enough. One of the things during the Ageing Consultative Committee discussions on the proposals by the department with respect to ACATs was that, if the ACAT determined a person as low care but the ACFI determined the person as high care, then it would be decided that the ACAT need not come back into the facility to reassess the resident to determine whether the facility's assessment was accurate. That has been removed.

We have had examples where the ACAT has assessed as low care, the facility has assessed as high care legitimately under the ACFI and, when they have asked the ACAT to come in reassess the resident, the ACAT has said, 'This person doesn't need any assistance with activities of daily living,' therefore they have to be low care. Under the current way that the ACFI determines what is high care and low care, the ACFI determines that that person is high care. If the ACAT is not prepared to change their assessment, then the provider only

receives funding at the low care level even though the ACFI has accurately assessed that person as high care. That system is inappropriate.

Another case was the ACAT assessed the resident as high care. When the ACFI was applied the resident scored nil funding under activities of daily living, nil funding under the behaviour supplement and nil funding under complex health care. So the facility is not going to get one cent of care subsidy. The ACAT still assessed that person as high care. I do not know the reasons as to why, except that sometimes residents and families will make out to an ACAT team that the person is a lot more dependent than subsequently turns out to be the case when they enter residential aged care and are assessed under the ACFI. That can be because the family is desperate to get the person assessed and into a residential aged-care facility, therefore they want the ACAT to assess them positively that way. The other reason is that they might want to make sure they are avoiding having to pay a bond as well.

Senator HUMPHRIES—To clarify, does that mean that there are different ways of interpreting ACFI?

Mr Gray—No, not ACFI. The ACAT do not use the ACFI to assess the resident. They have their own assessment process. The ACFI is the assessment tool used to determine the level of funding and also whether the resident is high care or low care under the ACFI and therefore classified as high care or low care under the act. The requirement as to whether a resident is eligible to pay a bond or accommodation charge is determined by the ACAT and their assessment, which is not an ACFI assessment.

Senator HUMPHRIES—But can't you align ACFI and the ACAT process so that they have the same criteria?

Mr Gray—We have argued for that. That is what we want. We want the ACAT to use the ACFI instrument to assess the high- or low-care level of the resident.

Senator ADAMS—We have had several other witnesses give us that evidence, so thank you for that. On the bonds, you made a comment that perhaps we should have bonds for high care, especially now with the community aged care packages and people entering the residential care in a much frailer condition. The fact that you just explained about the classification of where the bonds come in and where the bonds do not come in seems to be coming up quite a lot. I have found that not so much here but with people coming in and talking to me about this issue. How can we rectify this?

Mr Laverty—We already have bonds in high care by stealth. You can be admitted into low care and contribute a bond, and that bond stays there so that effectively you have a bond in high care. What we have said in our *Aged care policy blueprint* is that the arguments against bonds in high care that were made in 1997 have proven themselves to not be current in 2008. The principal concern in 1997, as expressed by my own organisation, was that it would require the selling of the family home in order to fund the bond into high care.

Senator ADAMS—I certainly remember that.

Mr Laverty—It was a significant community debate, but we have now had 11 years of experience. Those 11 years have indicated a community is able to contribute a bond to fund the provision of their low care. They have indicated that substantial components of bonds are in fact refunded at the other end of a person's journey through high care. The demographic shift into residential care has changed: we are entering later and with higher needs. There is less need for the artificial distinction between low and high care in a practical sense within a facility today. Most importantly, there are arrangements in place to protect those without capacity to pay. Those arrangements, again, have had 11 years of experience and they are proving themselves to work quite successfully. So we should be very clear about the Catholic Health Australia position: bonds should not be compulsory in low or high care but must always be based on the ability of a person to contribute.

Mr Gray—And their choice.

Mr Laverty—There must always be a strong safety net in place for those who are not able to make that contribution. As the increasing cost of residential high care is only going to continue, we think the role that the Commonwealth plays should be to focus its subsidy on those without capacity to pay. Those with ability to contribute to their care should be enabled to do so. At the moment regulation prevents that. The daily accommodation charge is capped at $26.88 per day. That cap should be removed. For those with capacity to pay, we would foresee the residential aged care facilities publishing the equivalent of a daily bed rental, if you like. For some it would be $26.88 per day, in line with the maximum available government subsidy; for others it would be closer to what we estimate to be the actual cost, which is $55 per day. If we do not do this, if we do not move on this—and this is part of several proposals on freeing up the ability of residential aged care to secure revenue—in five or 10 years time, or 15 years time, when the baby boom generation requires

residential aged care, we will not have enough beds, to put it simply. We are not trying to create the expectation of a crisis today; there is a shortage and there are pressures on aged care today, but that crisis has not yet hit. That crisis will come if we do not incentivise residential aged care providers to keep building beds and expanding services, recognising that the Commonwealth cannot fund all of that. The only alternative is freeing up user charges for those with the capacity to pay.

Senator ADAMS—Do you see that there would be cherry picking by providers if that were the case?

Mr Laverty—That cherry picking already occurs. We have in Australia a system of for-profit and not-for-profit care provision. You will appreciate we represent the not-for-profits—those that have a strong interest in providing that safety net through the concessional arrangements. Our church services are very proud of that. We would see that as our continuing role so that, in advocating the position that we are, which is that those who are able to pay should be able to and those who are not must be given a safety net, we have a fair degree of skin in the game, if I can use that expression. We will continue our focus on those without capacity to pay but we will also be looking to those who can to contribute to the cost of their care. That is both a reasonable proposal within a free market and also one that is cost neutral to government.

Senator BOYCE—You have commented on the capacity for this legislation to impose sanctions in regard to future care recipients and pointed out that you are concerned about that because you do not know what the outcomes of it would be. Having read all of the material that we have been provided with so far, I am not sure of its purpose either. Do you have any knowledge or views on what might have been trying to be achieved with this?

Mr Laverty—We would be guessing, with respect.

Senator BOYCE—Yes, but it would be an informed guess, I think.

Mr Laverty—It is an informed guess. There are providers that the department would, quite reasonably, be aware have track records. I assume that this is a provision to make some punitive sanction against those with track records. We take the position that the best way to ensure compliance with standards is to have a system of enforcement, which exists, and is quite significant and harsh at the moment. What we do not have is a great focus on incentivisation—on encouraging, on educating and on better enabling compliance with standards.

Senator BOYCE—On benchmarking.

Mr Laverty—We do not encourage innovation within this sector. We have said in our policy blueprint that there should be a modest, small fund made available to innovate within aged care, to give the opportunity for providers to try new things to improve their care. This provision is creating another big stick, and it is a big stick that already exists. It is not a big stick that we need.

Mr Gray—And it is not clear to us how a delegate of the secretary of the department could make a judgement, as this bill would allow.

Senator BOYCE—Indeed.

CHAIR—Thank you very much. Is there anything you would like to add, just to give you that last opportunity?

Mr Laverty—Madam Chair, I heard you utter, perhaps privately, to your colleagues that there might be a future inquiry, a review of regulation of aged care. I very much look forward to appearing before the inquiry that you have now announced!

CHAIR—I was going to draw you attention to the finance and public admin inquiry that is occurring, which I think, looking at the terms of reference for that, would be an appropriate place for you to refer to, as I know you will.

[2.46 pm]

HALL, Ms Marlene, Principal Legal Adviser, Department of Health and Ageing

ROSEVEAR, Ms Allison, Assistant Secretary, Residential Program Management Branch, Department of Health and Ageing

SCOTT, Mr Iain, Assistant Secretary, Prudential Regulation Branch, Department of Health and Ageing

SMITH, Ms Carolyn, First Assistant Secretary, Office of Aged Care Quality and Compliance, Department of Health and Ageing

STUART, Mr Andrew, First Assistant Secretary, Ageing and Aged Care Division, Department of Health and Ageing

CHAIR—Thank you for coming. I note that the Senate has resolved that an officer of the department of the Commonwealth or of the state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for that claim. The committee received your original submission, and this afternoon we also received your supplementary one. Thank you very much. Are there any amendments or alterations to those submissions?

Mr Stuart—No. Thank you.

CHAIR—I see most of you are very experienced people at this process, so you understand all the rules. You heard some of the evidence, and I know that you have looked at the submissions. I expect that there will be an opening statement or statements and then we will go to questions. A number of points have been raised by witnesses, which you may like to address or which senators will ask you about.

Mr Stuart—Thank you for the opportunity to provide the committee with further information on the Aged Care Amendment Bill. I would like to start by providing some brief context for the proposed changes. In the first six months, the Minister for Ageing, Justine Elliot, was in office. She noted a number of issues with the current regulatory framework, including some gaps in protections for care recipients. The first time the Accommodation Bond Guarantee Scheme was triggered, a few issues with the regulatory framework were identified from experience, as was the need for the framework to be more in tune with the changing nature of the aged-care sector. This includes some gaps in regulation, some gaps in protection for some residents and also opportunities to reduce some red tape. These issues have been addressed through the Aged Care Amendment Bill.

It has been a number of years since the Aged Care Act has been reviewed, and it needs to be updated to reflect the evolving nature of the aged-care sector and the needs of the nation's 170,000 aged-care residents. While detailed information about specific measures was included in the memorandum, I am pleased to have this opportunity to provide you with further information about the proposed legislative changes, along with information about the consultation process that gave rise to the bill.

We do believe that the proposed changes in net terms decrease rather than increase the regulation of providers and provide greater certainty for care recipients and providers about their respective rights, obligations and protections. The reform package, which also includes some amendments to the aged-care principles, will improve protection for residents and promote public confidence in the aged-care industry. I note the committee received 13 submissions from a range of aged-care stakeholders including the original submission provided by the department. The department has also prepared a supplementary submission, which has been tabled today, and which I hope addresses some of the issues raised by stakeholders in their submissions.

On consultation, the proposed amendments have been the subject of consultation with the aged-care sector through the Ageing Consultative Committee, with whom the department discussed the proposed amendments at two meetings. The department provided a discussion paper to members of that committee as well for use with their members. Membership and terms of reference for the committee was provided in our original submission. The department received 13 submissions from a mix of state and territory governments, providers, peak bodies and consumer representatives. I note that, as it should be in a robust consultation process, some

excellent suggestions and a range of views were offered. On some matters issues raised in the paper differed widely as they did in submissions to this inquiry.

The department considered the feedback in the finetuning and development of the bill. As a result some of the original proposal were not pursued or were amended to better achieve the policy intent. However, of course, not all views are able to be accommodated while still either achieving the intent of the measure or complying with technical drafting requirements of legislation.

A detailed information package is currently being developed and, subject to passage of the bill, we will be making that available to providers of aged care prior to commencement of the legislation. Providers will receive information by direct mail and will also be able to access information on the department's website and through our 1800 information line. The department is also working with National Seniors Australia to identify the best means for distributing information to consumers about what are sometimes rather technical subjects and they have offered to work with the department to ensure any communication is pitched appropriately and distributed through appropriate channels. Thank you very much for the opportunity to make an opening statement.

CHAIR—Thank you, Mr Stuart.

Senator SIEWERT—On the issue around decreasing the amount of red tape and reducing regulations, we have heard, I think, every one of our witnesses say that it is going to increase our regulation and our cost of compliance. Can you tell me how it is actually going to reduce the red tape? I must admit, in my reading of it, it does seem to be more compliance and is going to be more onerous for the sector.

Mr Stuart—There are some additional requirements. There are some that are net impact zero because they are a change of requirement rather than an additional requirement. There are at least three or four measures, some of which actually have not been raised very much by stakeholders because, I think, they are probably broadly sympathetic with them, that reduce existing requirements. On those I would point to the reductions in aged-care assessment team assessments of residents under some circumstances. I would point to the clarification of the reach of the Aged Care Act to only those parts of buildings that are actually delivering aged care and only to approved providers that are actually in receipt of places. Both of those requirements reduce the extent, scope and reach of the Aged Care Act. There is another one but it is not coming immediately to mind.

Senator SIEWERT—You have done a cost benefit analysis on the reduction of red tape in some versus the increase in the others?

Mr Stuart—We did do that, yes.

Senator SIEWERT—On balance, you reckon it breaks even?

Mr Stuart—Yes, break even or a bit better. I have thought of the additional matter. We have always had a blanket ban on the transfer between services of partly completed aged-care homes and we have significantly softened that to make it subject to departmental approval but, nevertheless, to allow it to occur where it is in the benefit of the local community to continue with that aged-care development.

CHAIR—If you have done the work of saying where you have removed some complexity and where there could be some changes, could we get that in documentation? It has already been raised this afternoon in questions and answers that the principle of the government was to reduce complexity and regulation. That is one of our principles. It may be useful if that could be clarified in a response from the department.

Mr Stuart—We are happy to whip it into shape and provide it to the committee.

CHAIR—That would be really useful, just to have some kind of immediacy on Senator Siewert's question that people can see straight away.

Senator SIEWERT—We have all been skimming through your supplementary submission, and thank you for that. You heard me ask earlier about police checks in terms of the independent contractors. There are still concerns that that is in fact going to be more onerous, and there is a concern around supervision of contractors when they come in. Could you clarify where you are coming from on the police checks and whether it is a genuine concern or whether the submitters that we have heard from just do not quite understand all the detail of the provision?

Ms Smith—The police checks measures were introduced under the previous government and have been in place for a while now. The purpose of those was to prevent unsuitable people from working in aged care. The requirements imposed a need for providers to do police checks on volunteers and staff who had unsupervised

access to residents. The feedback we had from the industry at the time—and I think Mr Young referred to this in his presentation today—was that most providers actually undertook to get all their staff police-checked to ensure that they complied with the requirements regardless of whether or not they had unsupervised access. So I think in general most providers took a fairly risk averse approach and ensured that all staff had been police-checked. But we have become aware through some cases that have been drawn to the department's attention that it is quite difficult for a provider or for the department to monitor compliance with the requirements for supervision. I am aware of at least one instance where a staff member with a very serious conviction which would have precluded their employment was allowed to keep working on the grounds that they were going to be under supervision, and the provider was not able to demonstrate that that supervision had been in fact provided. In relation to the issue of independent contractors or tradespeople—the real dilemma, I suppose, of a provider who has a blocked drain in the middle of the night—the existing legislation does not define staff as tradespeople. So, if you need to call a plumber in the middle of the night, they are not currently defined as staff. We would not propose that that is being changed by the current requirements. I think there is a misunderstanding about that aspect which we tried to clarify in the supplementary submission.

Senator CAROL BROWN—But will they be required to be supervised?

Ms Smith—The current legislation says that, if they did not have unsupervised access, they would not be regarded as staff. I think everyone adopts a common-sense approach to that provision.

Senator SIEWERT—So what you are saying is this does not change the existing—

Ms Smith—It does not change the current requirement, no.

Senator SIEWERT—Thank you for that. I want to go back to the evidence for these reforms and why you are doing them now, because in some of the evidence we received this morning people were saying: 'We don't believe these changes are urgent. We actually need broader reform, so why are we proceeding with these changes before the broader reforms are undertaken?' As I understood your opening statement, Mr Stuart, you have had consultation with the sector and have proceeded with some of these changes. Have these changes come from what the sector has raised, or is it a combination of what you have noticed through your ongoing interaction with the sector and what the sector has asked for?

Mr Stuart—Some of these changes are learning from experience, striking issues that we have not struck before because of changes in the nature of the sector. I will try to outline a couple of them with help from my colleagues. One very key change in the sector is the very much greater complexity in the financial organisation of the sector. Ten years ago when the Aged Care Act was implemented we had a picture in our heads that an aged-care home would be owned by an entity who would manage it and that the entity who managed it would be the approved provider. It is now increasingly common, within both the profit and the not-for-profit sectors, to have approved providers managing an aged-care home with a higher-level entity sitting across the top that manages a range of aged-care businesses. So the approved provider becomes, say, Oakleaf Home No. 1 and then there is a separate approved provider, Yellow Oakleaf Home No. 2—there are two approved providers—but they share essentially the same management structure and the same financial reporting lines. We know about the key personnel and the approved providers of each of the Oakleaf homes but we do not know who is sitting across the top pulling the financial strings and directing their operations, necessarily.

Also, at the moment when we are allocating new aged-care places, for example, we have the capacity to assess the management of the individual approved provider, Oakleaf Home No. 1, when they apply for new aged-care places. But if Yellow Oakleaf Home No. 2 has had a recent history of sanctions and poor management we are not currently entitled to take that performance into account in assessing the application from approved provider Oakleaf Home No. 1 for an extension or significant new licences. There is an increasing tendency now in the industry, whether for tax purposes or because people understand the nature of the operation of the Aged Care Act, for risk to be segmented in this way by setting up multiple approved providers, one for each aged-care home, and for the overarching management structure to escape scrutiny. We also have people who are disqualified individuals who may turn up as key investors or directors of a group of aged-care homes but never be members of the approved provider entities themselves so, again, they would escape the regulatory scrutiny. That is a key issue of concern.

We also have some really important learnings from the first operation of the bond security scheme relating to Lifestyle Care in Queensland, which we have certainly given evidence about to this committee at estimates hearings. And we had a couple of interesting learnings which Carolyn may like to say more about. One was that it was a shock to us that we were actually responsible for regulating an aged-care home which did not receive any funding from the Australian government, simply because they had applied for and received

approved provider status with the intent of applying for aged-care places. That seemed to us rather bizarre. Subsequently we had some learnings about what happens when an aged-care home starts to close and residents who are in that home have bonds that were pre-existing bonds or even were paid while it was an approved provider. We can get into that space in more detail, if you wish, in response to questions.

Senator SIEWERT—Your supplementary submission covered that one pretty well, I thought. It made sense.

Mr Stuart—So they are the main lines of learning in relation to the regulatory aspects. The aged care assessment team issues come from negotiation between the Australian government and each of the states and territories under a COAG initiative to review the operation of aged care assessment teams and to try to make them more efficient and more timely. That is where those proposals originated.

Senator SIEWERT—One of the issues that I must admit I still cannot get my head around and understand properly is to do with the amendments to clauses 116 and 117, which I was just discussing with Catholic Health Australia. This is about where noncompliance would threaten the health, welfare and interests of future care recipients and, in clause 117, the desirability of deterring future noncompliance. I must admit I am having trouble understanding that. I suppose I can understand where it is coming from but I am just wondering how you can do it without a bit of a crystal ball. Could you tell me how you see that operating.

Ms Smith—We do not see that operating in a large number of situations, but we felt it was important to provide clarification because there have been a couple of situations where, in imposing sanctions, providers have challenged the action and run arguments that we are not allowed to take the needs of future care recipients into account. We felt it was important to clarify the situations in which it might be relevant.

Senator SIEWERT—Can you give us some examples?

Ms Smith—The example we provided in the supplementary submission was the situation where you have a provider who has failed to refund overdue accommodation bonds. We are faced with that situation at the moment in relation to the operators of Bridgewater Aged Care Facility. You could have a situation where the government has to step in and repay those bonds through the operation of the Accommodation Bond Guarantee Scheme. So the current care recipients have now had their interests taken into account. They have received their remedy through the government stepping in, but in terms of taking sanctions action against a provider who has failed to repay the bonds it is actually the interests of future care recipients that would be relevant because the existing care recipients have already been dealt with.

Another situation is where one of the sanctions that is open to the department is to revoke a provider's existing allocation of places. That would clearly impact on current care recipients who were occupying those places, but the other sanction that the department can apply is to revoke the provisionally allocated places. In that situation, there are no existing care recipients in those places. We have had a situation in the past where a provider argues that the department could not revoke the provisionally allocated places because there were no care recipients in those places. In fact, there was an AAT hearing that discussed that issue, which providers often quote in their submissions to the department questioning sanctions action, even though that AAT decision was in fact overturned by the Federal Court. It is an area where there has been some confusion, and we were trying to put beyond doubt that these are matters that the department can take into account.

Senator BOYCE—So there have been some court cases—two?—that have relied on the fact that you cannot legislate—

Ms Smith—There has been at least one. I am not aware of—

Senator BOYCE—around future care recipients? Did you examine other ways of closing that loophole?

Ms Smith—This was felt to be the appropriate way to put that issue beyond doubt. If you refer back to the objects of the act, the objects of the act are all about the protection of care recipients. It does not specify in the objects of the act that they are current or future residents, but the whole purpose of the act is to protect the recipients of aged care. Providers are actually mentioned in the objects of the act only insofar as they receive funding to provide care for residents and only insofar as they are accountable for the outcomes that they deliver for residents. So we feel that the changes in this part of the amendment bill actually are merely putting beyond doubt issues that are completely consistent with the object of the act.

Senator BOYCE—It would seem reasonable to me that legislation is based on the people who are actually using a system.

Senator SIEWERT—I can understand your example. I am concerned with the way it is drafted. I can understand why the sector is concerned about it, because they could say it could be used against them. The other issue—and I am trying to go through some of the issues that were raised this morning—is around missing residents. It seems to be an area that is of great concern to the sector as well. If a missing resident is reported to the police, does that automatically mean they have to be reported to the department as well? Is that how we are supposed to interpret that clause?

Ms Smith—The department is not seeking in any way to impact on the ability of residents to come and go from an aged-care home. People regularly go out on outings, they have regular places that they like to go to and they work that out with the provider and we are not in any way seeking to interfere with that. The provisions will require that where the aged-care service provider is concerned enough that it has called the police—so the person is missing without any reasonable explanation and the provider is quite concerned that they are missing—the service provider will also be required to notify the department.

The point of our involvement is to ensure that the service has systems in place to manage those kinds of risks in the future. Sadly, we have had several incidents in recent times where residents have gone missing without an explanation and have suffered quite serious injuries and death. In those circumstances, I think it is important for the department to satisfy itself that the home has systems in place to ensure that those sorts of incidents do not happen again. We had a very difficult case in the media in the last week or so, the result of a coronial inquiry in South Australia, where a resident who had a history of wandering behaviour was found hung on a fence and died in very gruesome conditions. The coroner has now come down with some very serious recommendations about the need for a review of the home's processes to ensure that they can safely care for residents with that kind of behaviour. It is a tricky area and we understand why people are concerned. The service that they are in is their home and they have a right to come and go, but you have to balance that against the right to ensure that those people are being looked after safely.

Senator SIEWERT—Is it the department's intention to investigate every case that is reported to you?

Ms Smith—We would intend that our action was proportionate to the issue. If it was a relatively short absence and it all ended happily, I think it would probably be a matter of a phone call discussion between the department and the provider.

Senator SIEWERT—In that case, if you intend to take action on every report that is sent in, do you have the staffing requirements that that would necessitate?

Ms Smith—The department has a number of requirements in the act that it enforces and we are resourced to do that. We do not imagine that this will be a significant increase in workload for the department, but it is important that those situations where people are missing are appropriately acted upon and we will take proportionate action.

Senator SIEWERT—With all due respect, Ms Smith, you did not answer my question. If you intend to take appropriate action for each case that is phoned in, there will be a list of people that you will have to investigate. You will have to review the file whether it is a phone call or whether you take more detailed action. This is an additional activity you now have to carry out. Do you have the resources or are each of the providers wasting their time ringing in this information when it is not going to be followed up?

Ms Smith—I do not think it is a significant additional workload, because what we find in this area is that a lot of the responsible providers would voluntarily tell the department. So we already liaise with the provider about what to do in those situations. In fact it is only a marginal increase in the workload for the ones that would not have told us anyway. We are already getting reports of these situations.

Senator SIEWERT—I appreciate that, but how do you what proportion of those reports that you are getting? Have you done an assessment that backs up your assumptions that this is not going to be another large impost on the department?

Ms Smith—We have not done a detailed analysis of that but I am fairly confident, based on my experience over the last few months, that this is something that the department is able to manage. If, with experience, we find that it is proving more onerous than we had expected, we will obviously keep it under review.

Senator CAROL BROWN—Can I just follow up on that. Some of the concern was not necessarily around contacting the department when a resident goes missing but with what happens after that in terms of how the department will deal with it. In your submission you say that you will assess whether there are adequate systems and processes in place to ensure other residence's safety. Now you are saying that that may actually only be done by a phone call.

Ms Smith—What I am saying is that the sort of action the department will take could range from information gathered through a phone call through to a site visit, depending on the seriousness of the issue. We will take follow-up action on all cases in terms of gathering information, but I do not anticipate that a full-blown investigation will be required in all cases.

CHAIR—Do you know how many cases of people going missing went to the police last year?

Ms Smith—I do not have that number.

CHAIR—There does seem to be a change, which is the element that the senators are seeking. It is one of those things where we are looking at the impact not just on the workload but also on the general interaction between the department and the providers with the ongoing staff. It is hard to assess just how much of an impost that is going to be if we do not know how many people in the last 12 months could be subject to this kind of interaction. Is there any way for the department to find that out?

Ms Smith—I can certainly have a look at our systems and whether we can generate that sort of information. I think that it is often difficult with a new requirement that has previously been voluntarily reported to be able to anticipate what the increase would be under a mandatory requirement, but I can certainly see what we can get.

Senator CAROL BROWN—So the processes arising out of a notification and what the department will do has not actually been decided?

Ms Smith—The details of these changes will be in the aged-care principles and they will be backed up by guidelines both for the sector and for our staff in how to implement it. They are still in the process of being developed.

Senator BOYCE—You said earlier that the responsible aged-care providers were already voluntarily giving you information around incidents of people missing without reasonable explanation. How does that gel with the fact that all of our witnesses today, I would have thought, are people who would be considered to be from the responsible part of the industry and yet all of them have said that they find this onerous and unnecessary and have gone on to talk about it how it infantilises the people who are living in aged-care facilities.

Ms Smith—The providers who have given submissions here today are talking in a policy sense, but there is certainly a lot of operational information that is conveyed between individual facilities and our state and territory offices.

Senator BOYCE—Sorry; I do not quite understand. You are saying the responsible ones tell you, but these are responsible witnesses and they are saying it is an unreasonable regulation.

Ms Smith—I am just saying that there is already a lot of information provided to the department by individual facilities, and I think that is to be distinguished from a policy position about the requirement.

Senator ADAMS—Have you incorporated a dollar figure in the department's budget to deal with this?

Ms Smith—No.

Senator ADAMS—You have not costed it?

Ms Smith—No.

Senator ADAMS—Normally, when you are going to make reforms, you need quite a lot of evidence, and it seems, from the comments you have just made under questioning from my colleagues, that it is not really there. There is also, normally, a budget figure to deal with it—if you are going to have a reform, you normally have a budget item to cover it. I would really like to know how much it is going to be. If you could take on notice what you have budgeted to deal with this specific issue, because I can see it growing quite large if a lot of small things happen. I come from a rural community, and we have had cases where a resident has been missing for a certain time, the police have been called and then that resident has been found in the neighbour's yard feeding the chooks. I would wonder whether the department really wants to be dealing with those sorts of issues. I would think that the aged care providers, with all their experience, would be able to cope. If you are going to be doing it, you must have a budget item, and I would like you to give that to the committee when you come up with it.

Senator BOYCE—My question concerns the consultation process. I think you have heard all the witnesses say that they did not think there was full consultation. What is the department doing? How are you reviewing your consultation process in light of that?

Mr Stuart—The minister has an aging consultative committee—which is really very broadly represented—to which we took a discussion paper in June setting out all of the issues and proposals. We followed up again in August with a further discussion of reporting back to that committee about what we had been able to take on board and what we had not been able to take on board. A number of the members of that committee took the opportunity to circulate the papers quite widely in their organisation and seek comments back. As a reflection, I think that that committee is very representative and covers all of the peak representative groups for providers, for consumers, for various professional groups, such as medical groups, and for other kinds of stakeholders in the aged care system.

I think there is always going to be some level of frustration when people make suggestions to the department that the department is not able to follow, either because we have to implement government policy or because there are legal impediments to particular changes or because there are particular ways that things have to be done in drafting government legislation.

Senator BOYCE—However, we are not actually talking about the outcome of those consultations; we are talking about the consultation process itself. There have been comments made today that people were being consulted on principles and not on practical aspects or operational matters that might appear in the follow-up legislation. Certainly you could not say that Catholic Health Australia, TriCare, the Baptist Union and the others were not people who are representative of the industry. Some of them were involved in the consultations and some of them were not, but they all say that they were not happy with the consultative process—not with the consultation results but with the process. What is being done is about the process?

Mr Stuart—I think that the next time we have a consultative process we will again take a paper to the Ageing Consultative Committee that sets out the case in detail and we will again have detailed discussions with the Ageing Consultative Committee. It seems to me that there is not—

Senator BOYCE—So you do not see any room for improvement in the consultative process?

Mr Stuart—I will talk to the people that have made those comments and seek their views on what more can be done, but we did have several hours of discussion about this at an Ageing Consultative Committee. In fact, one of the members was moved to suggest to me that it was time we got out of the weeds and talked about some important policy issues. So you cannot please everybody all the time.

Senator ADAMS—I would like to go back to the aged-care assessment teams. Catholic Health Australia tabled a blueprint. I do not know whether you have seen it yet. This statement was made there:

Aged Care Assessment Team program to be fully funded and managed by the Australian Government. This service would ensure consistency of eligibility is applied, and there is no conflict of interest when undertaking assessments.

Have you got a comment on that statement?

Mr Stuart—I think I am unable to comment on a policy proposal, but I think I am able to tell you that the Australian government is working with all the states and territories on improvements to the aged-care assessment team program in two ways. One was coming out of a previous round of COAG decisions trying to improve the consistency and timeliness of aged-care assessments. In fact, that process has produced a report which we are now seeking to implement through this legislation, identifying areas where workload could be reduced so that we can improve the timeliness of aged-care assessments. The minister is very keen to take that forward so that she can start negotiating in the new year with states and territories on how much improvement in timeliness can be achieved on the basis of the reduced workload.

Senator ADAMS—Just to go on with the ACATs: as far as their assessments go, we have had a number of submissions talking about conflicts with the way that the ACATs assess people. When a person enters a residential facility it may be found they are really are not a low-care resident but are in need of high care, so consequently that resident needs to be reclassified. Submissions have talked about the time it takes from when a person enters a home under the wrong classification and then under ACFI they have come out as a high-care person and the fact that they are on the default rate of payment from when they come in until they are reassessed, and it might take up to 12 weeks to get the ACAT person back to do a reassessment. Is the department looking at those sorts of problems?

Mr Stuart—I would hope that if we can improve the timeliness of ACAT assessments then those assessments will be done more quickly also. We are aware of those sorts of issues. They come up from time to time. We would like to be able to think more about that. I think it is quite complicated because it goes to the whole issue of who pays a charge and who pays a bond.

Senator ADAMS—I was about to go on to the bond.

Mr Stuart—We think that we would like to have a close look at that issue in the context of doing the 18-month review of the Aged Care Funding Instrument which the government has committed to.

Senator ADAMS—That goes into the bond with the ageing in place with the bond going from low care. That person can go through with it but then under the circumstance where the person that has been assessed as low care may have a bond and then go on. As we have heard, really from 1997 the aged-care providers were not happy about the bond situation, especially for high care. But now, because people are much older and frailer when they are entering residential care, is the department going to relook at bonding going through on the high care?

CHAIR—I do not think Mr Stuart can answer that question.

Mr Stuart—Again, I believe that is a policy question—

Senator ADAMS—All right.

Mr Stuart—and not closely related to the bill. There are some things there that really need thinking through by everybody who is calling for bonds in high care. Catholic Health Australia did allude to some of them but, I think, not all. People going into high care are often making transitions at a time of a health crisis, many on coming out of hospital, and they then have to make significant financial arrangements at that difficult time. There is an issue about how you maintain access for everybody when some people are allowed to pay an uncapped amount, so there is an issue about equity. If people are thinking in this policy space they really have to grapple with those issues, I think, and deal with them.

Senator ADAMS—Well, they are coming up rather fast and I think we are probably going to have a flood very soon. As we have got the Community Aged Care Packages, people are able to stay at home a lot longer, and then by the time they get to their residential care place they are much frailer. So it is really a rethink of something that happened 11 years ago.

I have a question on the legal effect of the proposed change to section 10-2. Catholic Health have expressed concern about the effect of the amendment proposed to that section of the act regarding revocation of provider status. They argue that the proposed change would mean that if a provider has approved places revoked under sanctions, for example, their status as an approved provider would immediately lapse and that this would have the legal effect of preventing them having the decision administratively reviewed, which is supposed to be their right under the act. A 2005 Federal Court case appears to confirm their interpretation of what this amendment would do. Can the department indicate whether, if all of a provider's approved places were revoked, the provider could still get a meaningful administrative review, which could potentially result in them getting the places back if the AAT found in the provider's favour?

Ms Rosevear—Yes, it is correct that if an aged-care provider no longer has an allocation of places at all—they have no Commonwealth funded places—then the approved provider status automatically lapses. The fact that they are no longer an approved provider, though, does not take away their right to have the decision to revoke the places in the first place reviewed. Ms Hall might like to add a comment on that.

Ms Hall—Yes. A person has standing to apply for review if they are a person who is aggrieved by the decision. Obviously someone who had lost something as a result of that decision would be a person aggrieved who would have standing. They do not need to be an approved provider to have standing.

Senator ADAMS—I do not know how long reviews take in these circumstances. While their beds have been sanctioned, how long would that review go on for? They would obviously have to close their facility down and find places for their residents to go to. Would the review take years?

Ms Hall—They could potentially go to the Administrative Appeals Tribunal and seek a stay of the operation and implementation of the decision to impose the sanction. If the Administrative Appeals Tribunal decided in their favour, the sanction would be stayed until the tribunal could give the application for review a full hearing, which indeed might take several months or even longer, depending on the workload of the tribunal.

Senator ADAMS—In relation to the reason the sanction had been put on them, would they have to have someone overseeing what was going on in their facility? How would it work?

Ms Hall—There might be a number of sanctions imposed upon them including, for example, the requirement that they appoint an adviser from the department's panel. Or, if a stay of the operation of the original sanction was given by the tribunal, the department could potentially impose a sanction requiring them to appoint an adviser or administrator as an own motion reconsideration of the original sanction's decision. I

do not see that it actually changes the current situation where an approved provider that has had its approval as a provider revoked as a sanction is able to go along to the Administrative Appeals Tribunal and seek a stay of the operation of that sanction.

Senator BOYCE—Why are state aged-care facilities run by the state and local government et cetera outside the approval process?

Mr Stuart—I think this goes back into history to some extent. When we drafted the first Aged Care Act 1997 there was a requirement that all approved providers be corporations and registered, and I think that that is an issue for state and territory governments. I wonder if Allison can shed any more light on that.

Ms Hall—State and territory governments would be a body politic.

Senator BOYCE—So they are out then because of a technicality rather than because we are terribly confident that they are very good at assessing this independently.

Mr Stuart—We certainly do manage a lot of aspects of care quality in relation to state and territory government homes through accreditation and even occasional sanction. But saying to a state government, 'You are no longer fit to be an approved provider of aged care,' might be a rather remarkable thing to do.

Senator BOYCE—It may.

Ms Rosevear—These amendments actually do not change the current status quo when it comes to state and territory governments.

Senator BOYCE—But a number of submitters have made that point that the facilities run by state and local governments are outside the approved provider framework.

Mr Stuart—I have given the historical reason for that, as well as I can remember it.

Senator FURNER—The private equity firm, Babcock and Brown, is on your Ageing Consultative Committee. Can you explain the reasons why they are on that committee?

Mr Stuart—I am just getting the list. On the committee there are a range of consumer groups, provider peak groups and also a small number of individual aged-care providers. The peak groups include, for example, Rod Young from the Aged Care Association of Australia in front of you and you had Greg Mundy from Aged and Community Services Australia.

Senator FURNER—I have seen the list.

Mr Stuart—They presented to you today. We also have Catholic Health Australia. Then we have some individual aged-care providers like ACH Group, which is a secular, not-for-profit aged-care provider from South Australia; Baptist Community Services, which is a religious and charitable provider from New South Wales; and Babcock and Brown, which is a large, private sector firm. There is a balance and a range of different kinds of providers represented.

Senator ADAMS—Are consumers on that?

Mr Stuart—On consumer representation, National Senior Australia, Carers Australia, Alzheimers Australia, the Federation of Ethnic Community Councils, Australian Pensioners' and Superannuants' Federation and COTA Over 50s are represented.

Senator FURNER—Does Babcock and Brown still have any involvement in any aged-care homes at all?

Mr Stuart—Yes. The Babcock and Brown parent company, I believe, has divested its interests to what was called Babcock and Brown Communities Group, which I think is going through a change of business structure and a name change. It would be the organisation which continues to be the aged-care provider that we want around our table.

Senator FURNER—I am not sure whether you answered the question.

Ms Rosevear—Babcock and Brown Communities is essentially the organisation represented on the committee and they are actually still essentially the approved provider so, despite restructuring and renaming, it will still be that organisation that will be the approved provider.

Senator FURNER—How many homes would they have, roughly?

Mr Stuart—It is very substantial.

Mr Scott—We can include that in a package of information. From memory it is a couple of dozen services through a couple of different corporate entities under the Babcock & Brown community's banner. We can include that.

CHAIR—I have only one question and it has already been asked by submitters today. There were questions about the time-urgency of this legislation and whether there was a need to pursue it very quickly. People had different views. I would just like something on record from the department about whether there was a time to report.

Mr Stuart—There are some things that are reasonably urgent in this bill. For example, we are now just starting on our new aged care approvals round process. We advertised last weekend. Without these amendments, when we have applications from some of those providers that have segmented their risk we cannot take their overall performance into account in assessing the applications for new aged care places. So that is one kind of pressure.

Another is the aged care assessment team—reductions in workload. We need to have a new agreement in place with states and territories by the end of June next year and we want to start negotiating that very early next year. Until we can point to what the workload reductions are going to be, we will not be able to negotiate with the states and territories on how much quicker they will be able to do their assessments. There may be other reasons for urgency that Carolyn or—

Mr Scott—I think it would also be very useful to get through the amendment for the guarantee scheme for accommodation to ensure that the guarantee scheme is able to deal with situations where an approved provider may lose their approved provider status, so that we can still pay out bonds owed to their former residents—and also deal with the lump sum issues. As was being alluded to earlier, we had a situation with Lifestyle Care Providers earlier this year where we had to use active grace payments to deal with some of the money that needed to be refunded. That was somewhat more complicated and a bit more onerous, at least at the margin, on residents. Whereas, under the bond security act we have fairly clear and set processes, including the assignment of creditor rights to the Commonwealth so that we can pursue the defaulting entity. Getting those in place as soon as possible would be very beneficial, I think, both from the department's perspective and from the residents' perspective.

CHAIR—The other point that was raised, and it is an ongoing one as you would understand, was about the difficulty of having primary legislation before the Senate committee and then having other legislation such as that dealing with the principles—and I know you made an effort in your supplementary submission to identify some of those principles. The statement was made that it was difficult when you did not have all the information in front of you to consider. That is an ongoing process and we would not be doing our job if we did not put on record the fact that it continues to be a frustration to people trying to see the whole process when we do not have documentation that is important to the way that it is going to actually work. In this case it was not just the principles; it was the guidelines that work with it. A number of our witnesses and senators talked about the fact that some of the detail will be in guidelines, which at this point are not public. I know that is something that the department has no control over; the decision about the release of those things is a government one. But it is an ongoing issue for this committee and I felt I needed to put it on record.

Mr Stuart—I want one point of clarification on that because I think Senator Humphreys raised it. All of the subsidiary principles here will be disallowable principles, not non-disallowable guidelines.

CHAIR—Sure, they will all be disallowable, but they are difficult.

Mr Stuart—The department will certainly consult with the sector further in relation to those principles.

Could I go to one other issue that I thought might be covered in questions but it was not? In fact, there are two really important points of clarification. One was on the meaning of key personnel and the issue about any other person who has 'authority or responsibility for or significant influence over'. It might be some comfort to the industry to know that we have taken those words from a particular place that they should be familiar with and I will ask Allison to point out where that is.

CHAIR—That is in your supplementary submission?

Ms Rosevear—Yes, it is from the Australian Accounting Standards Board requirements and it is the same requirement that they use for the general purpose financial reporting. There is certainly no expectation that the church providing pastoral advice or the church board members in that role would be considered to be key personnel. But certainly if we have somebody who is pulling the financial strings then we would consider

those persons to be key personnel. The provider is in the best place to identify that and they do so for this requirement, anyway.

CHAIR—I think, Mr Stuart, you actually referred to the pulling of financial strings in your previous evidence and that seems to be the layman's way of defining whether someone needs to be covered under the key personnel aspect. These related party disclosures, which you actually have identified in your supplementary submission, is the technical place where the definition is but if it is someone who is pulling financial strings in the organisation they would come under the heading.

Mr Stuart—Yes. Currently as we were pointing out there are sometimes many approved providers under a larger entity. For example, Babcock and Brown was a case in point with a structure like that and with several approved providers under a larger entity. If the larger entity wants to say, 'From now on we are getting larger financial returns from everybody and you need to lay off a few nurses,' we would like to know who are the people that are making those decisions. One other point of clarification was in relation to the issue that has been raised about the department setting maximum bonds. There is a very particular context to that. It is embedded in a very particular space in the act and, as it is really quite technical, I would really like Allison to set that out because it is actually very, very limited in its application.

CHAIR—I hope it is not too technical.

Ms Rosevear—Just to set the context: when we did the 20 March changes to the legislation, we introduced new provisions where people with limited assets but not low assets could pay a small bond or pay a lesser charge and the government would supplement the rest. That is for people in a particular asset range. The hardship provisions were not changed, at that time, to mirror that so we now have people who may have, in theory, assets but they are unrealisable. If we take off their unrealisable assets, they do actually still have some assets in that particular range and could pay a small bond or charge and get a top up from the department, but actually cannot do so. All we can say is, 'No, you cannot pay a bond at all,' and then we can only provide a small supplement, so providers are disadvantaged by that. This allows, when there are unrealisable assets, to treat people the same as if under the 20 March changes. So, if they are under hardship, they get treated the same as they would if they actually had those assets.

An example of unrealisable assets might be when we had a situation where we had an elderly lady with dementia and her daughter had got power of attorney a number of years previously. The daughter actually cleaned out her bank account, spent the money and went into bankruptcy. The elderly lady is on income support payment and has absolutely no capacity at all to pay the sort of bond based on what we say her assets actually are. If we take into account the fact that that money is actually now truly gone, it is an unrealisable asset. She still has a little bit left and she can pay a little bit of a bond and then we can subsidise the rest. Those are the kinds of extreme circumstances where it is out of the person's control.

CHAIR—So, you need this.

Mr Stuart—We need this to enable the provider to charge a small partial bond without detriment to the individual. Just to emphasise, this provision is embedded inside the hardship provisions rather than being a part of the Aged Care Act at large.

CHAIR—I have not seen that explanation you have just given us in your submissions, Ms Rosevear. Can you give that to us?

Ms Rosevear—Certainly.

CHAIR—It seems to me to be another point that is needed. The kinds of things we have heard in the discussion about what is needed to get through or not—that seems to be one.

Mr Stuart—Yes. It disturbed me hearing the discussion and we need to make really clear how limited this is.

CHAIR—I think we need to have that in front of us so we are really clear about it as well. On those two points, which seem to be responses to issues that were raised by some of the people who have given evidence and a little bit of confusion about what it meant, what is the process for the department to ensure that those people, most of whom are your clients, know the information in the explanations you have given us? I know it could come to the consultation point. Particularly the issue around the bond, which is quite specific and technical, and the previous one, which was about the key personnel, were raised in submissions and discussion with us. I am just concerned that those issues could have been clarified very easily at an earlier time.

Mr Stuart—I will undertake to write to the people who raised that issue with the committee or with the department.

CHAIR—That would be very useful because the key stakeholders who gave evidence to us today, which were major groups, all raised a concern about the key personnel. It seems to me that the information in your supplementary submission and that we have just discussed may have been useful to allay their fears earlier.

Mr Stuart—We did make a change to that particular clause quite late in the piece to meet some of the objections that were made by Catholic Health Australia, for example. I think Richard Gray actually acknowledged that in his evidence. These issues are being raised; I will write to them.

CHAIR—We have given the people who came today your supplementary submission, and we are waiting to hear back from them. With any luck, at least those elements, if not all, will be clarified for them. Thank you very much for your time; we deeply appreciate it. As you know, we are on a very tight time frame for our report so, if we could get that information from you as quickly as possible, that would be very deeply appreciated. Thank you very much.

Committee adjourned at 3.51 pm