Monday, 7 June 2021

By Email only: community.affairs.sen@aph.gov.au

Dear Committee,

Inquiry into the provisions of the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021*

The Health Services Union (**the HSU**) thanks the Committee for the invitation to provide a submission on the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021* (**the Bill**). We make this brief submission on behalf of our members working in aged care, who have a vested interest in the effective implementation of the recommendations of the Royal Commission into Aged Care Quality and Safety (**the Royal Commission**).

Schedule 1—Amendments relating to restrictive practices

The HSU notes that the Bill intends to further[1] strengthen the relevant legislation, the *Aged Care Act 1997* (**the Act**), including its delegated legislation the *Quality of Care Principles 2014* (**the Principles**), and the Aged Care Quality and Safety Commission Act 2018 (**the Quality and Safety Act**) regarding the use of restrictive practices in aged care (residential). The provisions of the Bill should also have the effect of empowering the regulator, the Aged Care Quality and Safety Commission, to better respond to restrictive practice breaches by approved providers. The Bill also seeks to align definitions with those under the National Disability Insurance Scheme (**NDIS**) and its relevant legislation, to achieve cross-sector harmonisation.

The HSU supports the intentions of the Bill, particularly where the result is protection of human rights, and enforcement and compliance leading to better quality care. However, the HSU is concerned that Schedule 1 as currently drafted will *not* achieve the intentions set out in the explanatory memorandum.

The NDIS stipulates two categories of restrictive practices, regulated and unauthorised, and clearly sets out what constitutes a regulated restrictive practice. A regulated practice is that which has been pre-approved by the NDIS Commission to keep a participant and/or others safe. Providers who implement *regulated* restrictive practices are subject to a more rigorous registration process; they need to submit monthly reports to the regulator; and they obligated to ensure their staff are trained properly to implement the restrictive practice in accordance with an approved behaviour support plan (BSP) submitted to the NDIS Commission.

[1] Noting legislative and regulatory changes already made in response to the Royal Commission interim report and Independent Review of Legislation Provisions Governing the use of Restraint in Residential Aged Care.

HSU National
Suite 46, Level 1, 255 Drummond Street, Carlton VIC 3053
(03) 8579 6328| hsu@hsu.net.au | www.hsu.net.au | ABN 68 243 768 561

Where a restrictive practice is used *without* the authorisation, it is deemed unauthorised and therefore reportable by the provider to the Commission within 5 days of the incident occurring. The Commission can then take a range of regulatory actions or further investigate.

The HSU is concerned that the Bill does not stipulate regulated versus unauthorised restrictive practice. It also does not introduce stringent formal breach reporting requirements to the regulator, nor does it appear to introduce consistent enforcement processes or sufficient penalties. These oversights undermine the intent of the Bill.

We acknowledge the existing provisions of the Principles[2] regarding use of physical and chemical restraints and *documentation requirements* for use before and after, including approved practices documented in a person's care and services plan. These provisions are to be repealed on 1 July 2021. The Bill does not adequately replace these provisions and requires documentation *after the fact*, rather than clearly defining practices, capturing them in a care or BSP plan, and linking them with clear compliance and enforcement requirements – including reporting.

The Bill provides no requirement for staff to be adequately trained in the use of restrictive practices, nor does it detail how approved providers will ensure staff receive adequate training. Additionally, the Bill makes no mention or connection to the number of staff or skills mix of staff. Adequate training and staffing are directly linked to the delivery of high-quality care and therefore can minimise use of restrictive practices.

HSU members predominantly work in direct care roles such as personal care worker and therapy assistant and as was thoroughly documented by the Royal Commission, these workers are rarely provided training or enabled access to training beyond the bare minimum. Similarly, aged care providers often operate with minimal staffing across direct care roles. These structural issues, through no fault of the individual worker, can lead to substandard and neglectful care including inappropriate use of restrictive practices. Legislative changes are urgently required to ensure high standards of training and high levels of staffing. This Bill does not empower the regulator to assess the impact of such structural issues e.g., staff training or lack thereof, where restrictive practices have been used.

The Bill does not appropriately align with the NDIS legislation and related processes. It is difficult to see how, besides its good intent, it positively regulates restrictive practices and ensures care is of a high quality and compatible with a care recipient's human rights. It will not operate with the effect of raising the standards of training, staffing and other structural workforce issues which, if addressed, would improve the quality and nature of care.

The Bill should not be passed without being amended to capture these issues.

[2] s 15G and s 15F

Schedule 2—Amendments relating to home care assurance reviews

The HSU supports the introduction of measures to improve home care provider accountability to both care recipient and the taxpayer. The Bill's assurance review provisions should provide, in-principle, much needed transparency as to how public funds are used and relate to the provision of high-quality care in line with an individual's specific needs and requests. The HSU also supports the intention of the Bill to improve data collection on the activity and efficacy of home care providers and the use of such data to drive inform 'development of home care policy and education of approved providers'.[3]

Disappointingly, the Bill as drafted does not go far enough to achieve these objectives in practice. Several amendments to the Bill would address the deficiencies and ensure it operates as intended and in alignment with the Royal Commission recommendation.

Firstly, the Bill does not require the Secretary (or delegate) to carry out assurance reviews on any regular basis. This will erode the reliability of data collected by minimising the ability to track and recognise patterns in any given home care provider or broader providers behaviour, or inversely genuine outliers. Similarly, the publication of reports is at the discretion of the Secretary. These oversights reduce the deterrent effect of the measures.

Without regular, stipulated reporting requirements from the Secretary on assurance reviews, how will visibility and public trust be achieved? The Bill should be amended to require the Secretary or delegate to carry out assurance reviews regularly, at quarterly intervals at least in the first 12 months after any legislative change, and publication should be required under legislation shortly thereafter.

Secondly, the Bill does not require the person conducting the review to seek information under all Terms of Reference.[4] The Terms applicable in any notice to produce can be set at the discretion of the Secretary or delegate. This will reduce the effectiveness of the review in terms of data collection, deterrence and public accountability. The full scope should apply to all reviews undertaken.

Thirdly, any person with information relevant to an assurance review should be required to provide this information. Recognising that these individuals are unlikely to be receiving significant or in some instances even direct public funds, they can be exempt from civil penalty. However, where the Secretary or delegate believes an individual operating a service is not doing so effectively or in line with user agreements, they should be subject to the same requirements as corporations.

Fourth, the provision of the Bill allowing providers to seek compensation for compliance with an assurance review is contradictory to the intent of the Bill.[5] The Bill is seeking to improve public and consumer accountability. It is therefore not appropriate for the Commonwealth to compensate providers for compliance, particularly by doing so with additional public funds. The HSU believes individuals may seek compensation, but this should capped and requisite documentation should be provided to the Commonwealth first and subject to rigorous checks.

[3] Line 18, s 95BA-1, *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021*
[4] Lines 7-22, s 95BA-2, *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021*
[5] Lines 5-8, s 95BA-5, *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021*

Finally, the Bill must introduce a requirement for the care recipient to be updated on the outcome of the review in a timely manner. An amendment to proposed 95BA-3(4) to extend this provision for providers to also capture applicable care recipients/service users would suffice.

Schedule 3—Amendments relating to the Aged Care Financing Authority

No comment.

If you have any questions regarding this submission, please contact HSU national research and policy officer Lauren Palmer

Yours sincerely,

Lloyd Williams
National Secretary
Health Services Union