Further Submission of the Health Services Union to the Senate Community Affairs Legislation Committee on the *Aged Care Legislation Amendment (Financial Transparency) Bill 2020*

30 April 2021

Introduction

Thank you for the opportunity to provide a further submission to the Senate Inquiry into the *Aged Care Legislation Amendment (Financial Transparency) Bill 2020* (**the Bill**).

The Health Services Union (**HSU**) has now reviewed the final report and recommendations of the Royal Commission into Aged Care Quality and Safety (**the Royal Commission**). We have considered the Bill against the final report and relevant recommendations. This brief submission will address pertinent discussions within the Royal Commission final report.

We note that the Royal Commission is the most comprehensive inquiry into the Australian aged care system that has taken place and follows myriad other inquiries and reviews. Just as the many current system issues do not occur in isolation from one another, nor should the solutions. It is critical however that the scope of the problem does not prevent action being taken urgently, where it can be. Improving financial transparency is a necessary reform that can be achieved swiftly through adoption of the Bill. Implementing improved financial transparency practices now will provide invaluable data on the practices of providers and expenditure of taxpayer money. Such data can then underpin the future of reform across the sector, from effective regulation to high-quality care delivery, sustainable funding, and accountability from the industry and Government to the taxpayer.

We reiterate our strong support for the Bill and urge the Committee to recommend its passage in the Senate, with amendments as outlined in our initial submission and below.

Noting the multiple delays to this Inquiry,[1] and the scheduling of the current reporting date to the final sitting day before the extended winter break, we recommend that the Bill be bought on for a vote in the Senate in the following sitting week (commencing 3 August 2021).

At the outset, we acknowledge there was some division between Royal Commissioners Lynelle Briggs AO and the Honourable Tony Pagone QC in their recommendations relating to funding and financing of the aged care sector.

However, their unfavourable assessments of the current funding and financing arrangements, including financial practices and reporting, are largely shared. Similarly, the Commissioners share views on the capacity of the Regulator, the Aged Care Quality and Safety Commission (ACQSC), and the role of the Department of Health in system governance and regulation. In all instances, the Commissioners express serious concerns, noting 'ineffective regulation has been one of the causes of the high levels of substandard care that exist in the system'.[2] These latter points are important to note.

The HSU believes there is discord between the evidence set out by the Royal Commission inquiry, the assessments of this evidence by Commissioners Briggs and Pagone, and the final recommendations made that are relevant to system regulation, accountability and financial transparency.

[1] Senate Standing Committee on Community Affairs, Inquiry home page, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/FinancialTransparency
[2] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3B, Chapter 14, p. 487.

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Commissioner Assessments of Regulation

It is the HSUs view that the current regulatory system for aged care is complex, with various legislation and instruments setting out the expected functions of approved providers and the ACQSC. Rather than create a robust and comprehensive system, this complexity drives a vacuum and prevents meaningful data collection and oversight. The two overarching pieces of legislation, *the Aged Care Act 1997* and the *Aged Care Quality and Safety Commission Act 2018* (Cth) do not enshrine the high-quality, holistic and person-centred care that older Australians deserve and which we all expect. Instead, these Acts codify an administrative approach to the regulation and outcomes of the system.

The Commissioners support this view, describing aged care regulation as 'lack[ing] the transparency, accountability and responsiveness that would be expected of a contemporary regulatory regime.'[3] Additionally, they summarise the response of the ACQSC to known problems as follows, 'the regulator has lacked curiosity about underlying patterns of performance and has been too ready to accept the assurances of providers in relation to their own performance.'[4]

Understanding the financial performance and practices of providers should be cause for curiosity of the Regulator, as it is for many sector stakeholders including older Australians themselves. Specifically, obtaining regular and detailed information on how providers invest in the provision of care (or inversely where funding does not allow for them to adequately invest in or promote best practice models of care) should be a priority for the ACQSC and the Department of Health.

Commissioner Assessments of Government Oversight and Provider Accountability

The Australian Government is the primary funder of the aged care sector, contributing approximately $20 billion each year in taxpayer subsidies. The figure is likely to rise substantially as the Commonwealth embarks on serious reform in response to the Royal Commission. In addition to the direct taxpayer subsidies providers can also raise capital by other means, including via Refundable Accommodation Deposits (**RADs**).[5]

Both Commissioners express concerns with the RAD system, including the risk it poses to the Government, and therefore taxpayer, as the guarantor of the loan. Commissioner Briggs characterises this financial agreement, while having some benefits to the expansion of the industry, as 'represent[ing] a welfare transfer from people receiving aged care and distorting the financing of aged care in ways that are not fully transparent to the people who pay the deposits or to taxpayers.'[6] Commissioner Pagone cites evidence that as the bearer of any financial risk associated with RADs, the Government can pass on the cost of this guarantee to other providers. These providers have 'no way of mitigating against the [financial] management practices of the rest of the industry.'[7]

[3] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 2, Chapter 4, p. 226.
[4] Ibid.
[5] RADs act as an interest-free loan from the person accessing residential aged care to the service provider. At the end of a person's time in a residential facility, the RAD is refunded, less any applicable costs deducted under the Aged Care Act. The Government bears any associated financial risk should a provider be unable to repay the RAD. RADs are financing mechanism unique to Australian aged care.
[6] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3B, Chapter 17, p. 888.
[7] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3B, Chapter 17, p. 729.

It is important to examine the final report's commentary on RADs as it provides context and insight to an industry marked by inadequate financial oversight, prudential regulation, provider and Government accountability, and the impact of these on quality care provision. These arrangements drive inequity of access to services for older Australians and quality of services able to be provided by smaller or geographically isolated providers.

An uneven playing field and the 'administrative burden'

It is noted by Commissioner Pagone that there are significant variations between providers and provider types (public, private and not for profit) as to financial viability, capital raising, distribution of profits, and reliance on RADs. Financial uncertainty is worse for providers in regional, rural and remote areas[8] passing on market disadvantage to older Australians accessing services in these areas. The HSU attributes the varying levels of financial performance and stability to policy measures that have allowed the aged care sector to be opened to the private market. In conjunction with a lack of government oversight and ineffective regulation, the result is a system that can prioritise profits over the provision of high-quality and dignified care, delivered in line with transparency and accountability to the taxpayer.

The HSU recognises that some providers and their representative bodies have expressed concerns about the administrative burden that would arise from increased reporting requirements. We understand that this this may be true for some smaller providers however, the Bill can have safeguards against disproportionate reporting costs. The HSU supports the provision of the Bill set out at Item 4, 11 and 12 which would provide an exemption from Tier 1 reporting under the *Corporations Act 2011* to providers receiving less than $10 million in taxpayer subsidies, *to take effect after the first reporting period*.[9] We recommend an additional provision stipulating that providers receiving over $10 million in taxpayer subsidies are not eligible for exemption from Tier 1 reporting.

The Medicare Levy

There has been much discussion on how the aged care system can be adequately and sustainably funded. There is agreement across stakeholders that current funding levels are both inadequate and unstable, with no link between care needs, service quality and costs. The HSU is of the strong view that the inadequacy and instability of aged care funding is exacerbated by a lack of financial transparency and accountability.

To reform the sector positively and comprehensively, it is inevitable that the Government will have to increase funding. The Commissioners are not entirely conclusive on how this should be done however, both focus their assessments and Recommendations on an increased and hypothecated Medicare Levy. Estimates for the quantum of funding to undertake such reform include an additional $7 billion per annum,[10] $10 billion per annum,[11] and $20 billion over four years for wage and staffing reform.[12] Such significant public funding demands improved accountability and transparency from the industry. The Government should be leading these calls and supporting this Bill as a measure to ensure leadership and public trust, particularly ahead of substantially increased taxpayer contributions.

[8] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3A, Chapter 8, p. 279 and Volume 3B, Chapter 21, p 856.
[9] See initial submission of the HSU, p. 7.
[10] Duckett S, Stobart A & Swerrissen H, 'Reforming aged care: A practical plan for a rights-based system', Grattan Institute, 2020, p. 4, 65.
[11] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3A, Chapter 8, p. 279 and Volume 3A, Chapter 2, p. 62.
[12] 'Delivering Decent Residential Aged Care: Funding the Care Elderly Australians Deserve', Equity Economics, p. 24.

The Commissioners share the views of stakeholders in their considerations of raising the Medicare Levy and improving public trust in tax revenue expenditure for aged care

> *'In paying these levies during their working life, Australians would be conscious of their contribution to the entitlement of all to high quality aged care in accordance with need, tending to encourage government accountability to taxpayers for providing that entitlement, and making the cost of that entitlement transparent to the nation.'*[13]

Funding the response to COVID-19

The aged care sector has been disproportionately impacted by the COVID-19 pandemic. Since March 2020, the Government has made a series of funding announcements to support the sector's ongoing management of the crisis. The total of these announcements at August 2020 was more than $1.5 billion.[14] The HSU has welcomed the additional funding during this period. We acknowledge the advice from then-Minister Colbeck that providers may be subject to audit by the ACQSC to ensure that this money is spent as intended (for example, on workforce continuity and the retention bonus).

Notwithstanding, the HSU has voiced concerns that there needs to be greater transparency and detailed advice on how these funds are allocated and spent by providers. Without a requirement to demonstrate the funds have been spent as intended by the Government, there is a risk the funding has/will not translate into additional staffing, training, visitation support and PPE, as indicated that it should in Ministerial Statements.

Separating out the issues of ring fencing and transparency

The Commissioners, as have some submitters to their inquiry, raised concerns about 'ring fencing' funding i.e. allocating funds for expenditure on specified services. Ring fencing can serve to ensure that funding is used for the provision of care and related care expenses. In turn it enshrines high levels of transparency. The (larger, for profit sect) industry has demonstrated there is little incentive to prioritise funding for the provision of high-quality care. Ring fencing could serve as a means to mandate expenditure on care for this group. As such, the HSU sees merit in ring fencing for these reasons. Commissioner Briggs and Pagone make the following observation on funding allocation and transparency,

> '*We also consider that funding arrangements should be transparent—the basis for funding allocations should be clear—and should support accountability for the use of funding, whether from the Government or from service users.'*[15]

Such an observation is one of a *multitude* like it that call out the lack of transparency, accountability, data and oversight on the relationship between (taxpayer) funding and real care outcomes. Yet, neither Commissioner takes the logical next step to recommend a measure, as provided by the Bill, to collect data and understand the financial activity of providers, especially those in the private market or

[13] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3B, Chapter 20, p. 797
[14] Department of Health, Minister Hunt, Additional Funding to Reinforce Australia's Aged Care Sector, media release.
[15] Royal Commission into Aged Care Quality and Safety, Final Report, Volume 3B, Chapter 21, p. 820.

operating in thin markets such as remote locations, as it relates to the delivery of care to older Australians. There appears to be a confusion that by introducing financial transparency legislation, stakeholders are also calling for the ring fencing of funding. This is inaccurate.

The proposed legislation does not seek to stipulate funding allocation by category; it seeks to understand and provide transparency as to the decisions providers make about how funding is spent by care categories. This kind of insight into the sector would help inform key decisions made, including by the Government as the funder, any relevant pricing authority,[16] and for providers who require a degree of financial flexibility.[17] The Government, the ACQSC, the Department of Health, providers, older Australians and the public should all have an active and vested interest in understanding how funding is spent by providers and the relationship this has to care. The Bill promotes such an interest.

Conclusion

The HSU recognises that the Commissioners do make positive Recommendations regarding reporting requirements and financial oversight, such as Recommendation 12: Inspector-General of Aged Care, Recommendation 115: Functions and objects of the Pricing Authority, and Recommendation 122: Reporting of staffing hours. We understand that these measures promote a better culture of oversight and accountability however, without the introduction of the Bill, genuine financial transparency will not be achieved.

It is confounding to the HSU that despite unequivocal acknowledgement that the system is currently incapable of providing assurance to the public as to how monies are spent in aged care, while also acknowledging significantly more taxpayer money will be required to deliver a system that places high-quality care at its centre, the Commissioners do *not* recommend the introduction of stringent financial reporting requirements. This is a greatly missed opportunity to develop a detailed picture of the funding received and how it is allocated (or not) to care provision and needs, as well as reinstating public trust and positive perception of the aged care industry.

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[16] Ibid, pp. 824-830.