



26 February 2007

Mr Elton Humphery
Committee Secretary
Community Affairs Committee
Parliament House
Canberra ACT 2600

Dear Sir

AGED CARE AMENDMENT (SECURITY AND PROTECTION) BILL 2007

The Health Services Union appreciates the opportunity to provide a submission to the Community Affairs Committee regarding the *Aged Care Amendment (Security and Protection) Bill 2007*, however is concerned that the time frames for the inquiry enabled only a rapid response rather than the more comprehensive examination of the legislation that the issues warrant.

The union would welcome the opportunity to address the Committee at a Senate Inquiry Hearing regarding the issues outlined in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Craig Thomson'.

Craig Thomson
National Secretary

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SUBMISSION TO;
SENATE COMMUNITY AFFAIRS COMMITTEE
INQUIRY INTO AGED CARE AMENDMENT
(SECURITY AND PROTECTION) BILL 2007

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1. Introduction

The Health Services Union supports many of the proposed changes to the legislation, but has concerns regarding the limitations of the protection for disclosure and matters contained in the Principles.

The measures contained within the legislation are limited. The union calls on the government to also enact further preventative measures in order to combat abuse of older persons.

This legislation, and recent announcements by the current federal government, fail to provide adequate response to issues facing staff and residents of residential aged care which is of great disappointment given the Inquiry and fifty one recommendations of this Committee twenty months ago, many of which have not been actioned.

2. Health Services Union

The Health Services Union (HSU) is a registered trade union with over 75,000 members nationally. The HSU, as one of the largest unions in the sector, represents members employed in a wide range of occupations in residential aged care.

3. Complaints Resolution Scheme

The union is supportive of changes to the Complaints Resolution Scheme that provide for a fair and responsive complaints process which ensures that complainants' issues are responded to and provide natural justice for all involved.

The Investigation Principles referred to in *Aged Care Amendment (Security and Protection) Bill 2007* are currently not publicly available and the union is concerned that this has meant that it is not able to comment to this Inquiry about the important issues of which matters are to be investigated, how investigations are conducted, considerations in making decisions, procedures for reconsideration and actions that may be taken if providers are found to have not complied with their responsibilities under the Act. This detail will go to determining whether the complaints resolution scheme is effective and fair to all parties.

The union is concerned that addressing the issues of investigation in the principles, rather than the Act itself has meant that the Investigation Principles have not been open to scrutiny by this Inquiry and can be amended by the relevant Minister at any time.

4. Compulsory Reporting

In order for compulsory reporting to be effective it is essential that staff are provided with training in identifying reportable assault and the process used to report it, including both their obligations and rights.

Though the Bill before the parliament does require the provider to take “reasonable measures” to ensure staff report reportable assault, it is not specific in its obligations on providers.

Providers should be obliged to train all staff prior to the introduction of compulsory reporting. Given the high turnover in staff in the industry and the lack of minimum qualification requirements it will be essential for providers to ensure that new staff are sufficiently trained and aware of their rights and obligations in this area prior to working with residents. It is important that this is monitored to ensure that it occurs.

The HSU is concerned about the exceptions to compulsory reporting. Whilst the union is very aware of the complexities in dealing with residents that may have a diagnosed mental impairment and the potential distress of contacting the police, it is important that the process instituted identifies where there are ineffective behavioural management systems. The union has had members that have been regularly exposed and witnessed what may be constituted as reportable assault by residents suffering from a diagnosed mental impairment because a provider is not adequately responding to, and providing resources for strategies to deal with those behaviours effectively. Though it is understood that the Principles are to have alternative behavioural management arrangements for these circumstances, the union has not had the opportunity to sight or comment on these arrangements to know whether they are sufficient.

In order for compulsory reporting to be effective, the Office of Aged Care Quality and Compliance will need to be sufficiently resourced to investigate and respond to assault reported appropriately within reasonable time frames.

5. Whistleblower Protection/Protection for Disclosures

Victimisation and reprisal are significant issues that need to be addressed for both compulsory reporting of reportable assaults and for those that access the complaints resolution scheme. A study of whistleblowers in Queensland in 1997 found that 71 per cent suffered official reprisals and 94 per cent unofficial reprisals.¹

The same protections afforded to those who report reportable assaults should also be available to those who utilise the complaints resolution scheme and therefore the *Aged Care Amendment (Security and Protection) Bill 2007* should be amended. The Commissioner for Complaints Annual Report in 2002-03 documented that by conducting a word search on records between 1999 to 2003, each year there were approximately 1200 records in which the at least one of the words fear, intimidation, retribution, reprisal, harassment or victimisation appeared.²

Though it may provide some protections in some circumstances, unfair and unlawful dismissal remedies under the *Workplace Relations Act 1996* are not comprehensive, and especially so since *Workchoices*. The Bill should be amended to ensure that those whose employment is terminated because they have made a complaint through the complaints resolution scheme, have access to the same remedies as those who report a reportable assault. It is important for employees to be able to utilise the complaints resolution scheme without fear of termination of their employment.

The union is also concerned that there is very little detail in Section 96-8 (5) regarding how the clause would operate and apply and no assurance that employees would be sufficiently compensated including all financial and other costs involved in the victimisation such as legal costs and compensation for pain and suffering where applicable. The clause currently provides for reinstatement **or** “an amount instead of reinstating the employee”. This should be amended so that employees who are reinstated also have access to compensation.

It is in the interests of residents of aged care facilities and the broader Australian community for employees to have the opportunity to be able to report not only reportable assaults but also to be able to use the complaints resolution scheme to raise quality of care issues without fear of victimisation, reprisal and termination of employment. This Bill does not provide sufficient protection for employees on these matters and it is too limited.

After conducting an extensive Inquiry into Quality and Equity in Aged Care, the Community Affairs References Committee, in June 2005, recommended that “the

¹ De Maria and Jan (1997) cited in John, T., (2005) *Research Note: Whistleblowing in Australia – transparency, accountability.... but above all truth*. Parliamentary Library, Commonwealth of Australia

² Commissioner for Complaints (2003) *Annual Report 1 July 2002 to 30 June 2003* Commonwealth of Australia, p29.

Commonwealth examine the feasibility of introducing whistleblower legislation to provide protection for people, especially staff of aged care facilities, disclosing allegations of inadequate standards of care or other deficiencies in aged care facilities.”³ There has been no public consultation regarding broader whistleblower protection and the union is concerned that this bipartisan recommendation of the Committee has been ignored.

6. Review

Should the *Aged Care Amendment (Security and Protection) Bill 2007* be passed in its current, or amended form, the union would seek that a comprehensive review of the changes occur in two years time to evaluate their effectiveness.

7. Police Checks/Certificates

Principles which are legislative instruments under the *Aged Care Act 1997* were recently changed to incorporate police checks/certificates for staff and many volunteers of residential aged care facilities. As a change in Principles these changes did not form part of the Bill being considered in this inquiry, however the union wishes to make the Committee aware of some concerns over some of the details of the change.

The HSU is supportive of the introduction of police checks for staff and volunteers within the sector, however is concerned that the government did not prevent employers from forcing employees to pay this cost.

Anecdotal evidence would suggest that most employers in the industry are paying for the police checks for existing staff, however a few rogue employers are undermining the efforts of the industry and attempting to enforce employees to pay for the police checks.

Unfortunately, despite skills shortages in the industry, and difficulties recruiting new staff anecdotal evidence would also suggest that many employers are forcing new employees to bear the cost of the required police checks, creating a further barrier to ensuring that the industry is able to attract employees.

Whilst the guidance to the providers states that the police certificates may be tax deductible the union would urge the Department to seek a Class Ruling for the industry from the Australian Tax Office. Taxation Ruling TR98/6 states in regards to commencing employees in Real Estate:

177. In nearly all States and Territories, employers require real estate employees to obtain a police clearance certificate when entering the industry.

³ Community Affairs References Committee (2005) *Quality and Equity in Aged Care* The Senate, Commonwealth of Australia

178. A deduction is not allowable for the cost of obtaining police clearance certificates.

179. Although the police clearance certificate may be necessary for employment into the industry, the expense is an outgoing that precedes the earning of assessable income. It is not an expense incurred in the course of gaining assessable income.⁴

This Tax Ruling is cited in at least two Class Rulings and raises some uncertainty over the tax status of police checks for employees that are new to the industry and therefore clarification is needed.

In an industry with skills shortages, lack of wage parity with the acute care sector and a substantial number of very low paid workers it is abominable that this government has refused to ensure that employees do not bear the cost of these important checks.

Though the union is supportive of the introduction of police checks it is concerned about the potential for employers to discriminate against employees who may have past convictions recorded which may be not relevant to their employment, could be minor, and may be several years old but which the employer now has access to information on. The union is therefore seeking that there be ongoing monitoring, review and consultation with the industry (including the unions) on this issue within the first twelve months of the implementation of the use of police checks/certificates.

8. Limitations of the Bill

The legislative amendments before Parliament, though largely positive, are limited and do not address many aspects of abuse of older persons, particularly in regards to prevention.

The Health Committee in the House of Commons in the United Kingdom conducted an inquiry into elder abuse which reported in 2004. The report of that inquiry noted that a commonly used definition of elder abuse is:

“a single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.”⁵

A guidance list on elder abuse issued by the Department of Health in the UK in 2000 identified six main forms of abuse: physical abuse, sexual abuse, psychological abuse, financial or material abuse, neglect and acts of omission and discriminatory abuse.⁶ Thus, abuse of older people has many different dimensions.

⁴ *Taxation Ruling TR98/6*

⁵ House of Commons Health Committee (2004) *Elder Abuse: Second Report of Session 2003-04 Volume 1*, UK

⁶ Cited in House of Commons Health Committee (2004) *Elder Abuse: Second Report of Session 2003-04 Volume 1*, UK

In Australia there is not comprehensive reliable data on the extent of abuse of older people and the union advocates the government undertake and fund research into this area.

Regular training and education for staff that care for and provide services to older people on prevention, identification and management of abuse of older people is vital. This training should extend to all types of abuse.

Community awareness raising and education are important activities which should be undertaken with support from the federal government. Integrated and resourced services regarding the abuse of older people and a specific telephone information service are all important measures the federal government should support.

The proposed changes to the legislation fail to address significant issues facing residential aged care which impact on quality of care for residents and job satisfaction for staff. There have been recent announcements of extra funding in aged care but there have been no guarantees that additional funds will be used to address the issues in the industry and ensure quality of care for residents.

International research has consistently shown that staffing levels have an impact on quality of care for residents in aged care facilities. Studies, using correlation data, have found a relationship between staffing levels and lower death rates, higher rates of discharges to home, improved functional outcomes, fewer pressure ulcers, fewer urinary tract infections, lower urinary catheter use and less antibiotic use.⁷ Australia, however, does not have mandated minimum staffing levels. There has not been any indication of a requirement that the additional funds recently announced will be used to ensure adequate staffing levels or other quality of care measures. Minimum staffing levels should be mandated at a level required to provide for quality of care for residents. Specific information on staffing levels at each residential aged care facility should be publicly available.

Specific information regarding staffing levels is not routinely available to residents, their families and carers through accreditation reports even when a facility is deemed to be non compliant on this quality outcome. The staffing, and other outcomes in the accreditation system, are not subject to transparent, specific measures. An effective system to measure and ensure quality of care of for residents is vital and the system requires a complete review.

⁷ Schnelle, J., Simmons, S., Harrington, C., Cadogan, M., Garcia, E. and Bates-Jensen, B., (2004) "Relationship of Nursing Home Staffing to Quality of Care" *Health Services Research* 39:2, April 2004

A further issue yet to be addressed is the lack of pay parity with the acute sector and low wages generally, exacerbating skills shortages. There is no requirement of providers that the recently announced additional funding go to addressing these issues. Aged care workers are dedicated and committed to providing quality care for residents but they are under paid and under staffed. As staff play such an important role in residential aged care it essential that these issues are addressed immediately.

9. Conclusion

The Bill before the inquiry is limited and on its own does not sufficiently address the issue of abuse of older people, or issues facing residential aged care more broadly. There are some positive changes included in this Bill but the union has some concerns about the limitations of the protection for disclosure and matters that are contained in the Principles.