Australian Government

Department of Health and Ageing

Ms Lisa Fenn
A/g Committee Secretary
Australian Senate Community Affairs Committee
PO Box 6100
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Ms Fenn

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

Thank you for the opportunity to provide the Committee with supplementary factual information in relation to the Aged Care Amendment (2008 Measures No. 2) Bill 2008 (the Bill), at a level of detail unlikely to be covered in the Department's attendance at the hearing.

I note the Committee received 13 submissions from a range of aged care stakeholders, including the submission provided by the Department of Health and Ageing (the Department).

The aged care regulatory framework, including the *Aged Care Act 1997* (the Act), the *Aged Care (Bond Security) Act 2006* (Bond Security Act) and the Aged Care Principles, needs to cater effectively for the level of vulnerability of the client group, the changing nature of the industry and the large amount of funding it attracts, both through Commonwealth subsidies and consumer contributions. Consumer contributions include substantial amounts of accommodation bonds. As at 30 June 2007, approved providers held a total value of $6.3 billion in accommodation bonds.

Consistently acknowledged throughout the submissions to the Committee was the changing nature of the aged care industry and the increasing complexity of the care needs of the population residing in aged care facilities. Many agreed that the legislative framework needs to adapt to the changing structure and business practices of the aged care industry and that comprehensive and effective safeguards for consumers were crucial for all stakeholders in promoting confidence in the aged care industry.

However, the submissions put forward differing views on how this could be best achieved — with some arguing that the Bill did not go far enough in its efforts to increase confidence in the aged care industry and improve protection for aged care recipients, while others argued it had gone too far.

Some submissions called for a complete overhaul of the regulatory framework. As this is a broader policy matter, outside the scope of the Amendment Bill, the information provided in this letter is limited to the issues raised regarding the proposed amendments.

A number of the issues raised in the submissions were the result of misunderstanding about how the new arrangements would work in practice, particularly in relation to the intention behind and the legislative reach of the new measures. Clarification and comment of the matters raised in the submissions is provided at **Attachment A** to this letter.

The Department is preparing a comprehensive Guide to the new arrangements, which, subject to the Bill's passage through Parliament, will be sent to all approved providers.

The Department is also working with consumer representative groups to identify the best means for distributing information to consumers. National Seniors Australia has offered to work with the Department to ensure that consumer communication is appropriately worded and distributed.

Thank you again for the opportunity to provide this additional information to the Committee. Representatives of the Department will be available on Friday 14 November 2008 to further discuss, the proposals outlined in the Bill at the scheduled hearing regarding this Inquiry.

Yours sincerely

A Stuart

Andrew Stuart
First Assistant Secretary
Ageing and Aged Care Division

14 November 2008

Attachment A

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

There are several problems with the aged care legislation, as currently written, which the Bill endeavours to address. Unintended outcomes have been identified through experience with the operation of the *Aged Care Act 1997* (the Act) and *Aged Care (Bond Security) Act 2006* (the Bond Security Act), including some which may be seen as inequitable or unfair to aged care recipients or aged care providers.

Further information about the specific problems the Bill seeks to address, against the key areas of concern raised in the submissions follows:

Linking approved provider status to the allocation of places

The intent of the Act is to regulate those providers of aged care receiving Australian Government funding. Currently, however, an entity can be an 'approved provider' despite not yet having been allocated any Australian Government funded aged care places. This can give rise to uncertainty regarding the protections provided to care recipients and the rights and responsibilities of the approved provider. It also allows an entity to hold itself out as being 'approved' despite not having been allocated places and not being subject to the same level of ongoing scrutiny under the Act as those providers with allocated places.
Some of the specific issues of concern are:

- care recipients and their families do not have all the protections under the Act, as many are linked to the allocation of places, and protections provided under State-based legislation for private services may be reduced or removed where an entity is an 'approved provider;' and
- difficulties for the Department to act on non-compliance as its powers rely heavily on reducing or withholding subsidy, which is not payable in any event to an approved provider that does not have an allocation of places.

In order to address this situation, amendments are proposed to ensure that approved provider status does not take effect until such time as the successful applicant has an allocation of places. The approved provider status then only takes effect in respect of services in relation to which an allocation has been granted.

These proposed amendments reduce the regulatory reach of the Commonwealth, as only providers that have aged care places that will be funded by the Commonwealth will be regulated under the *Aged Care Act 1997.*

In addition, under the new arrangements, successful applicants will have two years to receive an allocation of places (currently if an approved provider does not provide any aged care during a continuous period of six months, the approval lapses).

It should be noted that the decision to reject an application for approval as an approved provider remains a reviewable decision under 85-1 of the *Aged Care Act 1997.*

If a provider loses or transfers or surrenders the places at a service they would, by force of law, cease to be an approved provider in respect to that service. Given the processes involved, this would not be a sudden loss, as suggested in one of the submissions, but rather a

controlled process that would be carefully managed by the Department. The Department's first concern is always for the ongoing care of aged care residents.

Clarifying the range of people who are key personnel
Currently approved providers are required to identify key personnel as part of establishing their suitability, and to notify the Department about changes in key personnel. Key personnel are defined in the legislation according to the organisational role performed.

As business structures have changed, it has become more likely that control may be exercised over an approved provider by a variety of individuals and organisations that may be outside the immediate entity that constitutes the approved provider. For example, an approved provider entity may form part of a group of companies managed by another company.

When this occurs such people may not be notified to the Department as key personnel despite their having a significant impact on the operations of the approved provider, including the quality of care and the financial viability of the provider (and therefore directly impacting on the security of accommodation bonds and security of tenure). This presents risks to care recipients and the Commonwealth as well as meaning that certain business structures potentially escape the scrutiny that is applied to key personnel in other business structures.

Currently the Act provides that an applicant's/approved provider's key personnel includes any person who is concerned in, or takes part in, the management of the applicant.

The Bill extends to include an explicit specification that key personnel include any person having authority or responsibility for (or significant influence over) planning, directing or controlling the activities of the applicant/approved provider directly or indirectly. This general wording is based on the accounting standard, AASB124 'Related Party Disclosures'.

A new provision has been included to put it beyond doubt that key personnel include directors (in the case of bodies corporate) and members of the governing body as well both natural persons and corporations.

While consumer representative groups welcomed the proposals in relation to key personnel, a number of submissions from providers raised concerns about the reach and practicality of this new measure. The new requirements are not onerous in practice, under the new arrangements existing approved providers would need to:

- identify the people within or outside their direct approved provider organisation that have influence over the day to day management or financial arrangements of the service;
- undertake relevant checks on those people to make sure they are not disqualified individuals and that they understand their responsibilities as key personnel;
- notify the Department within 28 days from the date the provisions come into effect (1 July 2009) of these persons if they are in addition to those already notified; and
- keep undertaking regular checks (as required by section 63-1A and related Principles) to make sure persons continue to be suitable as key personnel.

This measure is not designed to include those sporadically involved in decision making or all leaders within the organisation, unless they are actively involved in making financial or managerial decisions which affect the aged care service (eg: Church leaders who do not

involve themselves in the executive decisions of the aged care service are not captured by the intent of the Bill). Rather than 'setting the industry up for failure', as suggested in one submission, those persons 'pulling the strings' within the industry would be held accountable through this new measure. The approved provider is in the best position to identify those persons.

Changes relating to ongoing suitability of approved providers (especially where a management company is relied upon)

It has become the business practice of a small number of approved providers, for example new entrants to the industry, to engage a management company to manage the delivery of care services. If an applicant for approved provider status is wholly reliant on a management company to demonstrate that it has skills and experience in aged care, the use of the management company should be required, unless a change is approved by the Secretary. Dispensing with the services of a management company could have a significant impact on an organisation's capacity to provide aged care and in some instances could pose risks for care recipients and also for the Commonwealth.

The proposed change would address this issue by creating a regulatory mechanism to ensure that the appropriate expertise is maintained.

To ensure that the applicant continues to be suitable to provide aged care, it is proposed that, as part of approval of a qualified applicant, the Secretary could provide that where an approved provider is reliant on a management company and this materially affects their suitability to provide aged care they must, where practicable, notify the Secretary and obtain agreement before there is any change to that circumstance.

The approved provider would not be locked in to maintaining their contractual arrangement with a specific management company. They could seek approval to change the management company, or to dispense with a management company altogether if they are able to demonstrate that they have acquired sufficient in-house expertise.

Protection of Accommodation Bonds

Since the introduction of the Accommodation Bond Guarantee Scheme (Guarantee Scheme) in 2006 (which guarantees the refund of accommodation bonds in the event that an approved provider becomes insolvent) experience has highlighted some areas in which the protections for residents could be strengthened. In particular, the proposed amendments will ensure that: the Guarantee Scheme continues to protect accommodation bonds taken by an approved provider that subsequently loses its approval; and unregulated lump sum payments (very similar to accommodation bonds) are fully protected under the Guarantee Scheme so that residents in similar circumstances are accorded similar protections.

The issues that these proposed amendments address are not expected to arise frequently and should not have a material impact on approved providers or the cost of the Guarantee Scheme over time.

The Department has identified that some approved providers could have charged some of their residents lump sums very similar to accommodation bonds prior to receiving approved provider status (unregulated lump sums). To ensure that residents in this situation receive similar protection to those that paid accommodation bonds, the proposed amendments will ensure that the Guarantee Scheme covers unregulated lump sums held by existing approved

providers and that new approved providers are required to refund these payments (pre-allocation lump sums) as a condition of the allocation of aged care places. The new approved provider would have the option to charge accommodation bonds or charges subject to conditions of allocation requiring that the accommodation bond not disadvantage the existing resident compared to the arrangements for the pre-allocation lump sum, including that the accommodation bond not exceed the amount of the lump sum. The requirement to refund pre-allocation lump sums rather than defining them as accommodation bonds will ensure that residents receive all protections under the Act including means-based limits on the value of accommodation bonds, rules for retention amounts and refund requirements.

The proposed amendments do not alter arrangements for accommodation bonds associated with the transfer of allocated places. Where an approved provider transfers all allocated places of a service to another approved provider, the accommodation bond liabilities will continue to transfer in accordance with section 16-11 of the Act. Therefore there would not be a need to refund the accommodation bonds. The transferor service would become a former approved provider after all places and accommodation bond liabilities have transferred to the second approved provider.

The proposed amendments do not change arrangements for, or introduce any obligations on approved providers in relation to, the transfer of existing unregulated lump sums.

Missing Residents

Under proposed new arrangements, the Department would be notified that a resident had been notified to the police as missing. This would allow the Department to determine whether appropriate action has been taken by the service, in respect of the missing resident and whether there are adequate systems and processes in place to ensure other residents' safety. This measure further protects and enhances safety for residents, particularly those with a diagnosis of dementia.

This is a complex matter about ensuring providers are fulfilling their duty of care to residents, while supporting residents' rights to come and go — which is part of maintaining their quality of life.

In the examples provided in one submission, where two residents were reported to the Queensland Police Service as missing, the Department would not, as suggested, seek to withdraw civil rights or take away a residents right to go out into the community and enjoy themselves.

Approved providers would be required to notify the Department when they decide that the person is missing without explanation and they have notified the police. This should be as soon as reasonably practicable, and in any case within 24 hours after they alert family/carers and police. This timeframe is consistent with the way that the timeframe is expressed in relation to reporting of assaults under the Act.

An increase in residents missing – even temporarily – from a facility without explanation may give the Department an indication about the standard of care and adequacy of staffing at the service. To reduce the number of such incidents, the Department recommends providers have adequate management practices in place.

Personal information
It has been suggested in one submission that the proposed amendment in Item 112 would 'give the Department the power to access whatever records that (it) had an inkling to look at including personnel records'. This is not the case. The amendment is proposed in order to put it beyond doubt that an approved provider that complies with its responsibility to report a reportable assault or to notify the police and the Department of a missing resident will not be in breach of its responsibility to protect personal information about care recipients. The amendment protects approved providers. It does not give the Department any greater powers to obtain personal information about care recipients than it already has. It does not give the Department the power to access other personal information in the possession of the approved provider such as employee records.

Aged Care Assessment Team (ACAT) Assessments
A range of proposals were originally put forward in relation reducing unnecessary ACAT reassessment, including the interface between Aged Care Assessments and the Aged Care Funding Instrument.

However, there was a lack of agreement and some confusion in relation to some of the proposals. As a result of feedback received, the Department decided not to progress all of the proposals, but to continue with those that were not contentious. Further work is currently being done by the Department, to find further improvements in aged care assessments.

The Department will also review the implementation of the Aged Care Funding Instrument after 18 months, and this review will include its interface with Aged Care Assessments. This review will be conducted in a considered way to ensure sound outcomes for providers and aged care recipients.

Sanctions
If passed, the legislation would require the Secretary of the Department of Health and Ageing to consider the desirability of deterring future non-compliance when imposing sanctions on an aged care service. Concern has been raised that this amounts to a punishment and is inappropriate in the context of the aged care legislation.

The amendments clarify that the Department can take action in response to non-compliance even where there may be no immediate impact on the health, safety or well-being of care recipients. For example, the Department may decide that it is appropriate to impose sanctions on an approved provider who fails to refund accommodation bonds, where the refund amounts have already been paid to former care recipients through the Government's Accommodation Bond Guarantee Scheme. The well-being of these former care recipients is no longer at risk, as they have received a remedy through the Commonwealth. However, in such a circumstance, the Government is keen to ensure that the aged care industry is aware that the non-repayment of bonds is unacceptable and the imposition of sanctions in these circumstances is considered an appropriate way of achieving this end.

The amendments to the Act put beyond doubt the appropriateness of imposing a sanction in such cases in order to deter future non-compliance, either by the sanctioned provider or other providers. The amendments confirm that the word 'sanction' is used in the Act in its ordinary sense, which includes a disincentive or deterrence to acting in breach of legislated responsibilities.

The objects of the Act as specified in section 2-1 are concerned primarily with the protection of the interests of care recipients and mention approved providers only in terms of their accountability for the funding provided by the Commonwealth and for the outcomes for care recipients to whom they provide care. Nevertheless, approved providers continue to challenge compliance action taken by the Department on the grounds that the Secretary did not give sufficient weight to the impact of that action on their financial interests.

Amendments in the Bill would underline the intent of the Parliament as expressed in the objects of the Act and eliminate potential confusion arising from comments made by the Administrative Appeals Tribunal in its reasons for decision in *Marnotta Pty Ltd (Receivers and Managers Appointed) v Secretary, Health and Ageing* [2005] AATA 426. The Tribunal's decision was overturned on appeal by the Federal Court (see *Secretary, Department of Health an Ageing v Marnotta Pty Ltd (Receivers and Managers Appointed)* [2005] FCA 1395), but continues to be cited by approved providers in challenging compliance action taken by the Department. The Bill addresses this issue squarely in order to put an end to the confusion.

Police checks

The proposed amendments to the Accountability Principles expand the current requirement that each staff member and volunteer has the required national police check, and persons with certain criminal convictions do not provide aged care to all staff.

The Department wrote to all approved providers and key stakeholders, including peak bodies, unions and other Government departments, inviting comment in respect of the proposed new measure.

While some providers expressed a view that there may be a financial impact on the sector, a significant number of approved providers already have systems in place to ensure that all staff and volunteers undertake a police check, irrespective of whether their access to care recipients is supervised or unsupervised.

An appeals mechanism is not being proposed. This would introduce a bureaucratic process to revisit and possibly override a decision of the Courts and state/territory parliaments about people with the most serious criminal convictions, and whether these convictions should be considered 'spent' (ie: not recorded).

It is proposed that the amendments will specify that persons not contracted by, or under the control of, the approved provider will not fall within the definition of a staff member. That is, trades people who perform work otherwise than under the control of the approved provider (as independent contractors) will not be required to obtain a police check.

Changes to the Aged Care Principles

A number of submissions called for more information about the details of specific measures, in instances where the detail sat in the Principles. The Explanatory Memorandum outlined that consequential changes would be necessary in the Aged Care Principles (the Principles). In most instances, the proposed changes are consequential to, and flow on from the Act changes to achieve the policy intention set out in both the Explanatory Memorandum and the Consultation Paper. The more significant Principle changes are detailed below:

Accountability Principles 1998

A new section is proposed to be inserted requiring approved providers to notify the Department when residents have been reported as missing to the police. This provision is likely to have a low impact on aged care providers, as it is unlikely to occur often and is consistent with other reporting requirements. The impact will be positive as it will increase consumer confidence and protections by ensuring adequate systems are in place to ensure other residents safety.

The Accountability Principles will also be amended to broaden the current police check requirements to make it necessary for all employees of aged care facilities, with access to care recipients, whether supervised or unsupervised, to have a police check.

Currently, the police check arrangements permit people with convictions for serious offences to work in aged care with access to care recipients, provided they are under supervision. However, it is difficult for approved providers to monitor compliance by their staff with requirements for supervised access.

Approval of Care Recipient Principles 1997

These Principles will require changes relating to Aged Care Assessment approvals to:

- Ensure that for people eligible for EACH and EACHD (high level flexible) care can also receive a lower level of care; and
- Ensure some ACAT approvals do not lapse, thus removing the requirement for reassessment in some instances.

Amendments to Investigation Principles 2007

A number of technical changes are proposed in relation to the Complaints Investigation Scheme (CIS) and the Aged Care Commissioner. Following experience with the operation of the CIS, unexpected outcomes have been identified including some which may be seen as inequitable or unfair to aged care recipients or aged care providers. The proposed changes are as follows:

- Enabling complaints to be made orally;
- Enabling the Commissioner to consider a request for review, where the Secretary has decided not to investigate the matter;
- Ensuring no further examination following a decision of the Secretary on re-consideration, to ensure there is not an endless cycle of appeal;
- Enabling the Commissioner to consider complaints about process without the complainant needing to first raise the issue with the Department/Agency; and
- Ensuring the Commissioner notifies the Department/Agency about the nature of the complaint made against them.

These proposed changes will make CIS more accessible without imposing additional imposts. As it will also make the scheme more workable from a practical perspective for all concerned, it is likely to have a positive impact on aged care recipients, aged care providers and the Australian Government.

Amendments to User Rights Principles 1997

Changes to these Principles are proposed to align the date of effect of the base interest rate with the maximum permissible interest rate, clarify that there is only one applicable *base interest rate* (section 23.40) and create provisions for accommodation bonds paid by

continuing residents of new approved providers. These proposed changes are likely to have no impact on aged care recipient and will have a positive impact on aged care providers and the Australian Government by streamlining reporting requirements.

Consultation Process

As previously advised, thirteen written submissions were received in response to the Department's Consultation Paper from a mix of State and Territory Governments, providers, peak bodies and consumer representatives. As it should be in a robust consultative process, some excellent suggestions and a range of views were offered in relation to many issues. As in this instance, however, issues raised in response to the Consultation Paper differed widely.

Additional papers were developed and distributed to members of the Ageing Consultative Committee on the proposed amendment and discussions were held with the Committee at two meetings (26 June and 10 October 2008).

The Department certainly considered the feedback in the fine tuning and development of the Bill.

What was consistent and remains consistent throughout both sets of submissions is the recognition that the legislative framework needs to adapt to the changing structure and business practices of the aged care industry. Also agreed across all submissions is that comprehensive and effective safeguards for consumers are crucial for all stakeholders in promoting confidence in the aged care industry, and this is what the Bill seeks to achieve.