

Submission
No 87

**INQUIRY INTO SERVICES PROVIDED OR FUNDED BY
THE DEPARTMENT OF AGEING, DISABILITY AND
HOME CARE**

Organisation: Williams & Co; Solicitors and Barristers
Name: Mr Ian Williams
Date received: 6/08/2010

Partially Confidential

Thursday, 5 August 2010

RECEIVED

- 5 AUG 2010

LEGISLATIVE
COUNCIL

Our Ref: IW10067
Your Ref:

The Director
Standing Committee on Social Issues
Parliament House
Macquarie St
SYDNEY NSW 2000

FAXED

By fax: 9230 2981 (10 pages) Original by Post

Dear Director,

**RE: Submission to the Inquiry into services provided or funded by the
NSW Department of Ageing, Disability and Home Care (ADHC)**

We act for :

On behalf of our clients we recently made submissions to the Regulatory Impact Statement (RIS) in relation to the proposed Youth and Community Service Amendment (Obligations of Licensees) Regulation 2010 (Amended Regulation) a copy of which are enclosed.

We are instructed that our clients request that the enclosed submissions be considered, where applicable, as submissions on behalf of our clients to the Inquiry.

In addition to the enclosed submissions our clients wish to make a following further submissions.

Submission regarding the Boarding House Expert Advisory Group

Private service providers such as our clients have little or no representation on the Boarding House Expert Advisory Group (BHEAG) which advises ADHC. BHEAG is primarily composed of representatives from the non government sector which results in advice to the ADHC which is biased against private sector providers.

Our clients submit that as ADHC receives advice from BHEAG, private sector providers should have adequate representation within the group.

Submission regarding People With Disability

People with Disability (PWD) is a non government organisation which receives funding from ADHC. Private service providers such as our clients have little or no representation on PWD and our clients' view of the PWD is that it is a 'kangaroo committee', with a bias against private sector providers such as our clients.

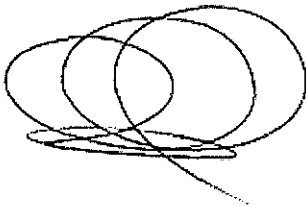
This bias is evidenced by the high proportion of former employees of ADHC on the PWD. The bias can also be seen in the media releases of the DWP which

For example, by media release dated 21 May 2010 a copy of which is enclosed, the DWP implies that there have been no minimum standards for licensed residential centres until the Youth and Community Service Amendment (Obligations of Licensees) Regulation 2010, whereas minimum standard have been imposed by licence conditions, which have been enforced by the Department.

Further, the funding to the DWP is wasteful as the DWP duplicates the functions of other service providers. For example, the DWP purports to have the power to inspect licensed premises. The Official Community Visitors from the Ombudsman regularly inspect licensed premises and these are the proper persons to carry out this function as they are independent, whereas the DWP is not.

Our clients submit that ADHC funding to the DWP should cease.

Yours faithfully,
WILLIAMS & CO

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

IAN WILLIAMS

SUBMISSIONS

On behalf of

and

LICENSED MANAGERS OF LICENSED RESIDENTIAL CENTRES

BACKGROUND

- A. These submissions concern the Regulatory Impact Statement (RIS) in relation to the proposed Youth and Community Service Amendment (Obligations of Licensees) Regulation 2010 (Amended Regulation).
- B. Mr [redacted] is the Licensed Manager of the [redacted] a Licensed Residential Centre (LRC).
- C. [redacted] is the Licensed Manager of [redacted] a LRC.
- D. Part 3 of the Youth and Community Service Act 1973 (YACS Act) provides for the licensing of residential centres for handicapped persons.
- E. LRCs and their managers are licensed under the YACS Act and certain licence conditions (Licence Conditions) attach to the licence.
- F. LRC's are private businesses providing accommodation services to their handicapped clients for which the clients pay an agreed fee. LRCs receive no financial subsidies or assistance from the government.
- G. Non Government Organizations (NGOs) also provide accommodation services of the same or similar nature to handicapped clients.
- H. NGOs are not subject to the Licence Conditions nor the Amended Regulations. NGOs receive financial assistance or subsidies from the government.
- I. The Department of Ageing Disability and Home Care (Department) administers the YACS Act.

RESPONSE TO THE GUIDE TO BETTER LEGISLATION PRINCIPLES

Principle 1: The need for government action should be established

- 1. At point 7 of the RIS, the need for government action is sated as:
 - 1.1. to remove "*uncertainty as to the scope of the Minister for Ageing and Disability's power to impose conditions on a licence where the conditions did not directly relate to the licensed premises*" and
 - 1.2. "*to create greater certainty regarding the licensees' obligations, providing greater clarity regarding their responsibilities.*"

2. The “uncertainty” referred to in 1.1 above arises from the fact that the Licence Conditions impose upon the licensee of an LRC what amounts to the role of carer.
3. At paragraph 23 of the RIS the Department acknowledges the imposition of an obligation of care when referring the Licence Conditions it states “...that is, conditions relating to the care...of residents and the provision of services from the premises.”
4. Further the Department also acknowledges at paragraph 23 of the RIS that the only apparent intention of Parliament was “that accommodation provided for handicapped persons is at least of a certain minimum standard.”
5. Only in the case of an LRC, whose sole source of revenue are the fees paid by its residents, is the care of its residents purportedly made an obligation, over and above the common law duty of care. If one compares LRCs with the other providers of commercial accommodation services such as those provided by hotels and hostels one will appreciate that this additional obligation of care is not within the power of the Minister.
6. IT IS SUBMITTED that the Licence Conditions are *ultra vires*, in that the YACS Act does not grant the Minister power to make licence conditions concerning the care of residents. This inherent defect cannot be remedied by the Amended Regulation.

Principle 2: The objective of government action should be clear

7. The government objective should be to ensure that the needs of all handicapped persons are met in a fair and equitable manner while being fair and equitable to all stakeholders, including LRCs and NGOs.
8. The objective is unclear and appears to be a stop gap measure in an attempt to overcome the Minister's lack of power to impose an obligation of care on LRCs. This is, to a limited extent, acknowledged by the Department at paragraph 82 of the RIS at the third last bullet point, where the Department sought the advice of the Boarding House Expert Advisory Group (BHEAG) concerning the Amended Regulation, and “...BHEAG indicated that they were satisfied the proposal to amend the 2005 Regulation would go **some way** to addressing the current issues with Licence Conditions...” (Emphasis added).
9. IT IS SUBMITTED that the Amended Regulation does not meet this principle for the foregoing reasons.

Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of option including non regulatory options.

10. The RIS fails to meet this principle in that it does not show the costs or costs savings to the government of the suite of options available. For example:
 - 10.1. The RIS does not include the option of the government paying for the costs of carer services delivered.
 - 10.2. The RIS conflates services that are properly part of regulation in terms of minimum standards for facilities and how and by whom residents are to be cared for within LRCs.
11. The Licence Conditions and the Amended Regulation significantly impact on the ability of LRCs to sell their businesses. This was acknowledged in the Report of Allen Consulting Group referred to in paragraph 82 of the RIS where the authors noted that licensing regimes create entry barriers to new applicants for a licence under the YACS Act and therefore create exit barriers for existing licensees. The costs of these barriers are not considered in any of the proposed options.
12. IT IS SUBMITTED that the Amended Regulation does not meet this principle.

Principle 4: Government Action should be effective and proportional

13. The Amended Regulations seek to impose upon LRCs an obligation of care (over and above the common law duty of care).
14. While the need for carer services of handicapped persons is not doubted, this should be the responsibility of government and not imposed by the government upon the LRCs by Licence Conditions or the Amended Regulations.
15. The Amended Regulation is not proportional for the following reasons:
 - 15.1. All NGOs providing accommodation services to handicapped persons are subsidized by the government.
 - 15.2. No other private business is obliged to have a carer relationship with its clients.
16. It is difficult, if not impossible for the business of an LRC to be sold or transferred and we refer to the comments at paragraph 11. above.
17. IT IS SUBMITTED that the Amended Regulation does not meet this principle in that the government action is discriminatory against LRCs and disproportionate.

LRCs and NGOs

18. NGOs and LRCs provide similar if not the same supported accommodations service.
19. However, as stated above at point F. and G. of the Background, NGOs have never been required to comply with the Licence Conditions and will not be subject to the Amended Regulations.
20. Under the present regime, the residents of NGOs and those of LRCs receive different standards of care because NGOs are not subject to the same obligations of care as is sought to be imposed on LRCs by the Amended Regulations.
21. IT IS SUBMITTED that NGOs and LRCs should be the subject of the same obligations of care to ensure that all handicapped persons will receive a similar standard of care.
22. IT IS SUBMITTED that LRCs ought to receive a financial subsidy for the additional obligation of care sought to be imposed by the Amended Regulations.

THE COMMUNITY WELFARE LEGISLATION and THE YACS ACT

23. The RIS acknowledges that the YACS Act forms part of the Community Welfare Legislation.
24. Section 4 of the Community Welfare Act 1987 sets out the objects of the legislation.
25. The RIS attempts to link the imposition of care obligations on LRCs under the Amended Regulation to the objects of the Community Welfare Legislation and hence the YACS Act.
26. It is relevant to quote the Long Title of the YACS Act:

"An Act to state the objects to which the powers, authorities, duties and functions of the Minister shall be exercised or performed; to provide for the licensing of certain premises at which handicapped persons reside; to amend the *Child Welfare Act 1939* and certain other Acts; and for purposes connected therewith"
27. Part 3 of the YACS Act deals with the licensing of residential centres.
28. Sections 12 and 13 of the YACS Act provides for the application for a licence and its grant or refusal.
29. Sections 16 and 17 of the YACS Act provide for, respectively, conditions of any licence; and revocation, variation or addition to such conditions. The current Licence Conditions, which the Amended Regulation seeks to effectively update were made under these sections of the YACS Act.

30. Significantly, section 12 provides that the Minister only has the power to grant - 12(1) or refuse - 12(2) an application. There is no power to grant a licence subject to the imposition of conditions.
31. Having regard to the long title of the YACS Act and a reading of Part 3 there is no power on the Minister to impose care obligations on LRCs.
32. IT IS SUBMITTED that the YACS Act was never intended to operate to impose care obligations on LRCs and that the inherent *ultra vires* nature of care obligations imposed by the Licence Conditions is not overcome by the Amended Regulation.

LICENCE CONDITIONS AND THE AMENDED REGULATIONS

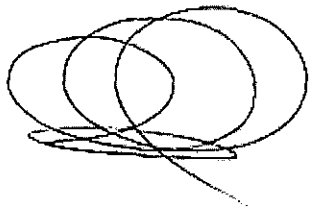
33. It is conceivable that in addition to the obligations of compliance with the Amended Regulation, LRCs will still be subject to conditions imposed on any licence under Sections 16 of the YACS Act.
34. In other words, rather than creating certainty or removing uncertainty (see paragraphs 1.1 and 1.2 above) the Amended Regulation may in fact have the opposite effect.
35. IT IS SUBMITTED that consideration ought to be given to the amendment of the YACS Act.

SUMMARY OF SUBMISSIONS

36. The Amended Regulation does not meet Principles 1 to 4 inclusive of the Guide to Better Legislation.
37. The YACS Act was never intended to operate to impose care obligations on LRCs and the inherent *ultra vires* nature of care obligations imposed by the Licence Conditions is not overcome by the Amended Regulation.
38. Consideration ought to be given to the repeal of the YACS Act and the creation of legislation specifically for LRCs.
39. If the proposition in paragraph 33 is rejected then:
 - 39.1. NGOs and LRCs should be the subject of the same obligations of care to their residents to ensure that all handicapped persons will receive a similar standard of care.
 - 39.2. LRCs ought to receive a financial subsidy for the additional obligation of care sought to be imposed by the Amended Regulations.

For the foregoing reasons and in light of the pending recommendations of the government's Interdepartmental Committee (IRC) on the Reform of the Shared Private Residential Services Sector, the most appropriate course of action is Option 1, that is, do nothing. While the system of Licence Conditions is not wholly satisfactory, to take any action while the IRC is considering the matter is inappropriate.

DATED 13th July 2010

A handwritten signature consisting of several overlapping loops and a trailing line, appearing to be the name 'Ian Williams'.

Ian Williams, Solicitor for