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Via E-mail (ohc@sympatico.ca)

Ms. Natalie Mehra
Ontario Health Coalition
15 Gervais Drive
Suite 305
Toronto, ON
M3C 1Y8

Dear Ms. Mehra:

Re: Opinion re; Bill 21 - *An Act to Regulate Retirement Homes*

You have requested our legal opinion in respect of three features of Bill 21, *An Act to Regulate Retirement Homes* ("the Bill"), which has received second reading in the Ontario Legislature. The elements of the Bill that you have requested we examine are: (1) the governance and regulatory structure in Part II of the Bill; (2) the scope of the definition of "retirement home" in s. 2 of the Bill; and (3) the provisions relating to the restraints and confinement contained in Part IV of the Bill.

A. Summary of Opinion

As set out in more detail below, it is our opinion that the governance and regulatory structure established by the Bill does not provide adequate safeguards to ensure that the regulation of retirement homes is conducted in the public interest. In this respect, the Bill adopts a private corporate model with limited public controls, which raises significant concerns as to whether effective and accountable regulation of retirement homes will occur in the interest of the public and the residents of these homes.

In our opinion, the Bill's definition of "retirement home" leaves open the possibility that retirement homes may be able to provide a wide array of medical and nursing services, essentially equivalent to those provided in Long Term Care Homes and potentially even public hospitals. However, retirement homes will not be subject to the more stringent regulatory regimes that govern other types of health care facilities. This could mean that retirement home residents would receive equivalent services to these other facilities, but be subject to a lower level of oversight and protection.

Finally, the provisions of the Bill which contemplate that retirement home residents can be subject to restraints and confinement appear to be inconsistent with the notion that retirement

homes are not intended to be medical or nursing facilities. Further, the protections contained in the Bill are simply inadequate to ensure that such restraints or confinement will be imposed in the best interest of the resident.

B. Governance and Regulatory Structure

The Bill establishes a Retirement Homes Regulatory Authority (the "Authority") in the form of a private, not for profit corporation. The fact that the Authority is a private corporation (and is specifically deemed not to be a Crown agency), means that many of the regulatory provisions in place to ensure transparency and fair dealing by governmental agencies may have no application to the Authority.

For example, the provisions of the *Freedom of Information and Protection of Privacy Act*, which provide, among other things, for public access to the records of governmental and quasi-governmental institutions, will not (at least on the face of the legislation) apply to the Authority.

Similarly, the requirements of the *Public Service of Ontario Act,* which regulates conflicts of interest in respect of public servants, will have no application to the Authority, its inspectors or its employees.

While the Authority will be required to establish a code of ethics to govern directors, officers, inspectors and employees of the Authority, there is no legislative requirement that the Code be equivalent in stringency to those governing public authorities, nor are there any legislative guidelines as to what must be included in the Code, beyond the requirement that the code include rules respecting conflicts of interest, political activity and disclosure of wrongdoing.

The composition of the Authority also raises significant concerns. The Authority is established as a private, not for profit corporation composed only of the members of its Board of Directors, a group of nine individuals. The Authority will not therefore be answerable to a larger constituent body comprised, for example, of representatives of consumer groups or health professionals. Rather, it appears the Authority will be independent of direct public control.

Indeed, while the first five directors will be appointed by the government on an interim basis, the Bill provides that future appointments by the government to the board of directors cannot constitute a majority of the number of directors required to be on the board. Rather, the majority of directors will be elected by other members of the Board of Directors (the majority of whom will not be government appointees).

The Bill provides that qualifications for directors may be established by regulation. In addition, amendments to the Bill were recently passed at committee which have given the Minister the power to establish rules regarding, among other things, who can serve as a director, the process for the election of directors and the length of directors' term of office. However, these powers are entirely discretionary; the Minister is not obliged to establish any qualifications or other criteria, and can change qualifications and criteria without obtaining legislative approval.

Given that the Board of Directors will not be determined by the government, there is a significant risk that the Authority may largely be composed of persons related to the retirement home industry. As a result, there may be a built in conflict of interest between the Authority's aim to ensure adherence to the requirements of the legislation and the business interests of those subject to its regulation.

The governance structure of the Authority may be contrasted with that of local health integration networks under the *Local Health System Integration Act, 2006*. Under that statute, a local health integration network is a not-for-profit Crown corporation with a board of directors appointed by the Lieutenant Governor in Council.

The Legislature has sought to maintain some level of control over the Authority's activities by including in the Bill provisions: requiring the Minister and the Authority to enter into a Memorandum of Understanding setting out, among other things, requirements relating to the governance of the Authority; requiring that the Authority's board of directors appoint a Risk Officer to review and assess the effectiveness of the Authority's administration of the statute and the regulations; and giving the Minister the power to appoint an administrator to assume control of the Authority and responsibility for its activities. However, all of these mechanisms appear to be after-the-fact enforcement and do not, in our view, constitute an effective substitute for the day-to-day control and accountability which would obtain if the Authority was a government agency.

C. Definition of Retirement Home

In our opinion, the Bill fails to provide a definition of "retirement home" which clearly and effectively differentiates retirement homes from chronic care homes, or even from private or public hospitals. While the Bill's definition of retirement home provides that a retirement home cannot be a premises governed by or funded under the various statutes now governing long term care homes (including, for example, the *Nursing Homes Act* and the *Homes for the Aged and Rest Homes Act*) and does not include premises government by the *Private Hospitals Act* or the *Public Hospitals Act*, it fails to establish clear and meaningful distinctions between the services provided in other health care facilities and the services to be provided in retirement homes.

In this respect, the Bill defines a retirement home as follows:

> "retirement home" means a residential complex or the part of a residential complex,
>
> (a) that is occupied primarily by persons who are 65 years of age or older,
>
> (b) that is occupied or intended to be occupied by at least the prescribed number of persons who are not related to the operator of the home, and

(c) where the operator of the home makes *at least two care services* available, directly or indirectly, to the residents [emphasis added]

The term "care service" is defined to mean,

(a) a prescribed health care service provided by a member of a College as defined in the *Regulated Health Professions Act, 1991*,

(b) administration of a drug, as defined in the *Drug and Pharmacies Regulation Act*, or another substance,

(c) assistance with feeding,

(d) assistance with bathing,

(e) continence care,

(f) assistance with dressing,

(g) assistance with personal hygiene,

(h) assistance with ambulation,

(i) provision of a meal, or

(j) any other service prescribed as a care service

but does not include any service that is prescribed as not being a care service.

This definition of "care service" gives the Minister an open ended authority to determine by regulation which "care service(s)" will be provided by retirement homes. Services prescribed by regulation may include any service provided by health care professionals under the *Regulated Health Professions Act*. In short, the government could not only prescribe care services provided by such professionals as chiropractors and massage therapists, but also any services provided by nurses regulated under the *Nursing Act* or physicians regulated under the *Medicine Act*.

As a result, the services provided in retirement homes might well include the types of services which to date have been provided only in nursing homes, and yet retirement homes will not be subject to the same regulatory requirements to which these other public entities are required to adhere. Consequently, this open ended authority to prescribe care services threatens to undermine the regulatory structure governing health facilities in the Province. While recent amendments to Bill would require the government to consult prior to enacting such regulations, the consultation process in no way constrains this wide-open discretion and, indeed, the Bill specifically provides that the enactment of such regulations will be subject only to legal challenges alleging a failure to follow procedural requirements.

D. Restraint and Confinement Provisions

We are also concerned about the provisions in the Bill allowing for the restraint or confinement of residents of retirement homes.

In particular, the Bill provides that residents may be restrained by the use of a physical device or the administration of a drug where the requirements of section 71 of the Bill are met. Section 71 refers to a caregiver's common law duty to retrain or confine a person when immediate action is necessary to prevent serious bodily harm to the person or to others.

Similarly, the licensee of a retirement home will be allowed to confine a resident to a secure unit of the home by the use of barriers, locks or other devices or controls such confinement is included in the resident's plan of care. The Bill sets out a number of requirements before confinement may be included in a plan of care, including a significant risk that the resident or another person would suffer serious bodily harm if the resident were not so confined.

First, it is unclear, given the nature of retirement homes and retirement home residents to date, why these powers have been included in the Bill. We are concerned that residents who would require the kind of restraints or confinement envisaged by the Bill would likely have health conditions requiring significant medical or nursing support and at a level of acuity more severe than ordinarily envisaged for a person living in a retirement home. It is unclear why the provisions regarding restraint or confinement are included in the Bill unless it is envisaged that retirement homes will start to provide a level of care similar to that now provided in nursing homes or similar facilities. Again, this raises significant concerns regarding the failure of the legislation to clearly demarcate the differences among health care facilities and suggests a significant possibility that the existing regulatory structure may be eroded.

Second, aside from this broader concern as to whether statutory provisions allowing for constraint and confinement should even be permitted in legislation governing retirement homes, the Bill's procedural protections in respect to restraints and confinement do not appear to be adequate.

In this respect, while the Bill envisages that, in certain circumstances, a rights advisor may be consulted by a resident or by substitute decision maker, there is no automatic right to a rights advisor. Rather, a request for a rights advisor must be made either by the resident or the resident's substitute decision maker. Given the frail state of individuals who may be subject to such controls, particularly where they are represented by a substitute decision maker, it appears unreasonable to place the onus on the resident to seek out rights advice. In contrast, the *Long Term Care Homes Act, 2007* entitles a resident represented by substitute decision maker to an automatic meeting with a rights adviser. There is no reason why a lesser standard should apply to residents of retirement homes.

Finally, the ability to review a decision to confine or restrain a resident is not set out in the legislation itself, but is left to be determined by regulation. Consequently, there is no guarantee that any review process will be independent or effective.

As you are aware, amendments to the *Health Care Consent Act* and the *Long Term Care Homes Act, 2007*, which are soon to be in force, entitle a resident of a long term care home to apply to the independent Consent and Capacity Board for a determination as to whether a substitute decision maker has complied with the Act in consenting to admit the resident to a secure unit. There are no equivalent provisions in this Bill and the extent to which the provisions of the *Health Care Consent Act* will be applicable to residents of retirement homes is left entirely to regulation.

In our view, at a minimum, the Bill should contain equivalent protections allowing for the independent scrutiny of the decisions of substitute decision makers. It is also our view that the Bill should contain a statutory right to an independent review mechanism so that all decisions respecting confinement or restraint can be the subject of review by an independent body. Leaving these essential safeguards to be determined by regulation, which can be unilaterally altered by Cabinet at any time, is not consistent with the importance of the protection of these fundamental rights.

E. Conclusion

This Bill raises significant questions in relation to safeguarding the public interest in regulating Ontario health facilities and respecting fundamental human rights. It is to be hoped that the Legislature will subject the provisions of the draft Bill to more thorough scrutiny to ensure that residents of Ontario retirement homes are adequately protected. Should you have any additional questions please do not hesitate to contact me.

Yours very truly,

Ethan Poskanzer
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