



New Zealand
Aged Care Association

Submission to the Health Select Committee
on the
Care and Support Worker (Pay Equity) Settlement
Bill

29 May 2017

Introduction

1. This submission is from the New Zealand Aged Care Association (NZACA), the peak body for the aged residential care (ARC) sector in New Zealand. With around 600 members, we represent over 90% of the approximately 38,000 beds in the country's ARC sector.
2. Our members range from the very small stand-alone rest homes, often run by welfare or religious based organisations, to large co-located sites that include care facilities and retirement villages. Our members' services include rest home, hospital, dementia and psychogeriatric care, as well as short-term respite care and a small number of YPD (young persons with disabilities) beds. The average ARC home has 57 beds.
3. We have a small team of five staff based in Wellington led by Chief Executive, Simon Wallace, a representative Board of eleven directors chaired by Simon O'Dowd and a network of 17 branches around New Zealand. Any enquiries relating to this paper should in the first instance be referred to Simon Wallace at simon@nzaca.org.nz or by phone on 04 473 3159.
4. In this submission, we set out the background to the settlement and legislation from NZACA's perspective, provide comment on behalf of the sector about some significant issues, particularly from a funding perspective, arising from the settlement, the legislation and the Government's proposed approach to implementation of the requirement to increase funding. We then make some particular comments on the Bill, including recommendations as to amendment.

Background

5. In 2012 caregiver Kristine Bartlett and the Service and Food Workers Union (now E tu) lodged a claim with the Employment Relations Authority, alleging Ms Bartlett's employer Terranova Homes and Care Ltd was in breach of the 1972 Equal Pay Act. As the major membership body for the country's ARC sector, the NZACA decided to stand behind defence of this case on behalf of our member Terranova on the basis that Ms Bartlett's equal pay claim was a sector wide issue.
6. We did this not because we didn't agree caregivers should be paid more, but because our members were hamstrung by a contract (the Aged Related Residential Care agreement or ARRC), which caps funding available to rest homes for the care they deliver. E tu had socialised an hourly caregiver wage of \$26.00 up from the current caregiver average then (2015) of \$15.30 an hour. At that time, our calculations showed that the ARC, homecare and disability sectors would need to have found an additional \$500 million annually to increase caregiver pay rates to such a level.
7. The NZACA had been lobbying successive governments for many years to put more money into the ARC sector which cares for New Zealand's most vulnerable citizens. It was our long held position that the contract we had with District Health Boards (DHBs) undervalued the worth of caregivers working in ARC, especially compared with their counterparts working in public hospitals who at that time had earned around \$2 more per hour. The Government's own modelling on which the Residential Care Subsidy (RCS) is based, proceeded on the basis of caregivers receiving the minimum wage.

8. If the Employment Court was to have made an arbitrary ruling setting a minimum rate of care giver pay at \$26 an hour, most NZACA members would have gone out of business with job losses and this would have led to a severe lack of rest home options at a time when the number of people requiring residential care was (and still is) increasing.
9. Many NZACA members are welfare, religious, privately run or not-for-profit rest homes. Most of these run on a break-even or operational loss situation with wages accounting for around 60% to 70% of their costs. There are five stock exchange listed companies in the ARC business in New Zealand which collectively account for less than 10,000 of the 38,000 beds nationwide.

The Equal Pay Case at a glance

2012

Kristine Bartlett and the Service and Food Workers Union lodge a claim with the Employment Relations Authority, alleging Ms Bartlett's employer Terranova Homes and Care Ltd was in breach of the Equal Pay Act 1972. Ms Bartlett's case referred to the Employment Court.

June 2013

A preliminary Employment Court hearing held on questions of law.

August 2013

Judgement favours the plaintiff's arguments about the jurisdiction and application of the Equal Pay Act 1972, allowing the case to proceed to its second, substantive stage.

January 2014

Terranova Homes and Care appealed this ruling to the Court of Appeal.

February 2014

Court of Appeal hearing, decision reserved.

October 2014

Court of Appeal upholds the Employment Court decision

November 2014

NZACA and Terranova appeals to the Supreme Court

December 2014

Supreme Court declines leave to appeal, saying it was premature.

July 2015

The Government announces it will enter into negotiations over pay rates for care and support workers, involving unions, NZACA and other providers. It also announces a proposal to set up a Joint Working Group to develop principles for dealing with claims of pay equity under the Equal Pay Act.

November 2015

Case scheduled to go before the Employment Court but adjourned in October 2015 to early 2016 (dates to be determined). Government-facilitated negotiations begin.

June 2016

Joint Working Group set up by the Government to develop principles that provide practical guidance to employers and employees in implementing pay equity makes its recommendations to Ministers.

November 2016

The Government-facilitated Equal Pay negotiations continue with separate meetings between unions and providers.

April 2017

On 18 April the Government announces a settlement.

July 2017

New rates of pay to be implemented for care and support workers.

NZACA CommentUplift in caregiver wages welcomed

The unions have not been alone in advocating for the valuable work done by caregivers as NZACA calls for caregivers to be paid more have been at the heart of our previous election campaigns.

10. After five years and nearly two years of negotiations, the NZACA expressed its delight when the settlement between unions and the Government was announced by the Prime Minister on 18 April. The unions have not been alone in advocating for the valuable work done by caregivers as NZACA calls for caregivers to be paid more have been at the heart of our previous election campaigns.
11. In our press release on 18 April we lauded the settlement saying an uplift in caregiver wages was long overdue and well deserved. We acknowledged Kristine Bartlett for championing the case of other caregivers. We gave credit to the Government for their support and investment to settle the matter out of Court, and many of our members celebrated alongside their caregiver staff.

Funding - imminent closures, redundancy and reduced hours

In the past few weeks, the NZACA has been contacted by a number of its members (around 150) many of whom say they will post significant operational losses and for some this will mean they may have to close their doors.

12. A month on from the announcement, with details of the proposed funding mechanism now being made available, there is a new reality for a number of our members that will see actual funding fall short of the Government's long stated intention to 'fully fund' the settlement.
13. Those most affected are smaller rest homes, often in regional centres and rural areas, as well as those run by welfare, trusts or religious based organisations. It is these rest homes that tend to provide above average care hours per resident per day, have less staff turnover and have more qualified and experienced staff. With a funding formula based on average care hours per resident, average level qualifications and average years of experience, it is these facilities that will struggle to be financially viable as a result of this settlement.
14. In the past few weeks, the NZACA has been contacted by a number of its members who say they will post significant operational losses and for some this will mean they may have to close their doors. They have said they will need to make staff redundant, cut back staff hours or close, outcomes that are surely counter to this settlement. They will be penalised for their investment in staff. This will happen immediately due to the urgent introduction of this legislation on 1 July 2017. It gives them no time to adjust to the new environment.
15. By way of example, a one rest home in the Waikato has confirmed its intention to close. Another facility in Taranaki and one in Wellington are considering closure now that they

have assessed the details of the settlement. Yet another provider, this time a 26 bed rest home in a regional town, known for its innovation in dementia care, is sadly too weighing up closure as an option. A larger 80 bed facility in Hamilton is likely to make caregivers redundant in order to cut its losses and stay open, while a number of other NZACA members are in a similar plight.

16. The pending closures, reduction in staff hours and redundancies will be hard felt in smaller communities and rural areas where rest homes provide sustainable and meaningful employment for people that might not otherwise have jobs. . And, from a resident perspective, it will reduce options for care and force some of our older and vulnerable citizens to move outside their communities and away from their friends and families to find suitable rest home care.
17. The reason for these concerning implications is that the funding mechanism that has been announced by the Ministry to address increased costs works on the basis of an increase of \$9.41 per night per rest home bed across the board and \$13.92 for hospital level care beds. This use of an average sum to represent the additional costs of care means that organisations which generally employ more highly trained staff, or have higher staffing levels than average per resident will lose out.
18. Further, the proposed use of this average increase per bed does not take into account that smaller providers are not able to take advantage of the economies of scale available to large providers, meaning that smaller providers who often provide more care hours per bed, will in general, receive less than the actual increased costs they will face as a result of the settlement.
19. The background to the average rates to be applied is that NZACA assisted with the collection of data to enable the MOH to arrive at these figures (paragraph 17). NZACA participated in this exercise in good faith and with the objective of assisting officials to arrive at a workable and practical mechanism, however, we would not have anticipated the application of this daily average on a no exceptions basis which now appears to be MOH's intention. Coupled with the funding provision of the Bill as presently drafted, NZACA is concerned that the MOH will apply this no exceptions average which will ultimately force some providers out of business and will result in job losses.
20. The Government has indicated it will meet some of the costs for accrued leave up to 30 June 2017 that is being held as a liability by employers. An announcement was expected post the Budget on 25 May. As yet there has been no confirmation of this. The NZACA has provided Ministry of Health officials with information on the amount of outstanding leave sitting with employers in the ARC sector.
21. While two days of training has been included in the Ministry's proposal to meet increased costs, the stringent training requirements will place yet more cost on providers without the commensurate increase in funding. More than two days will be required in most cases.
22. NZACA is very concerned that the proposed funding mechanism will have adverse consequences for the sector that are not consistent with the Government's stated intention to fund the additional costs of equal pay. The legislation is drafted to refer to the funder paying additional amounts "towards offsetting the additional costs faced by the employer as a result of this Act": cl 18(1).
23. **NZACA's primary submission is that the legislation should be enacted in a form that requires the settlement to be fully funded by Government.** This is addressed further below under "Recommendations."

Relativities

While nurses do not begrudge caregivers being paid more for the work they do, tensions are already beginning to surface and in the end it will be the employers who will be pressured to pay nurses more to retain them.

24. The NZACA was at pains to point out to Government officials during the negotiations the impact of relativities in the ARC workforce particularly with regard to nurses, a point that we understand was acknowledged by Ministers. While it was understood that registered nurses (RNs) and enrolled nurses (ENs) were always out of scope, because the Court decision related to the valuation of the caregiver role, the coalface reality for employers is that they now have a nurse workforce, some of whom will be earning the same, less or only a little more than a caregiver. In most circumstances these nurses, who have a high level of responsibility for patient care, will be managing or supervising these caregivers.
25. While nurses do not begrudge caregivers being paid more for the work they do, tensions are already beginning to surface and in the end it will be the employers who will be pressured to pay nurses more to retain them. The annual general funding increase that the sector negotiates each year (this year 1.8%) will go some way to alleviating any shortfall in compensatory increases for nurses, but mostly this money will need to be found from within providers' own budgets.

Private Payers

This will see private payers facing increases in the order of approximately \$4,000 per year.

26. Around 25% of residents (9,000) in ARC facilities are not fully subsidised for 'rest home' level care as they do not meet the Government's asset and income criteria to qualify for funding. These are what the industry refer to as private payers. With the increase in the bed day rate as a result of the pay equity settlement (\$9.41 per resident per day for rest home care), private payers will need to meet this cost. This will see private payers facing increases of up to \$4,000 per year.
27. The NZACA understood Ministers had agreed to front the communication on this, so they did not receive flak from residents or families for what is a substantial increase in annual fees. To date, the Association has not had this confirmed and members are obliged under their contract to advise fee increases by 1 June.

Recommendations – amendments to Bill

28. NZACA's recommendations for amendment of the Bill are set out below.

Clause 3 (Purpose)

29. NZACA recommends that clause 3(2)(c) be amended to read:
"provides for the Ministry of Health, DHBs, and ACC to pay additional funding to employers to meet the increased costs of employers' obligations under this Act."
30. The proposed amendment would reflect the Government's commitment to pay for the increases in caregiver wages brought about by the settlement, discussed above. A similar amendment to the operative provision (cl 18) is proposed, below.

Clause 4 (Interpretation) – definition of qualification levels – overseas qualifications

31. As drafted, the Act allows for "equivalent" overseas qualifications to be taken into account as a Level 2, 3 or 4 qualification.

32. Members of NZACA have commented that in their experience, whether an overseas qualification is equivalent to a NZ qualification can be a difficult judgement to make, and we suggest it would be preferable to either rule out all overseas qualifications (making it necessary for staff to obtain a NZQA qualification, similar to the nursing industry approach), or refer to overseas qualifications deemed to be the equivalent of a NZ qualification by NZQA or an accredited provider.

Clause 9 – weekend and night penal rates and clause 10 (additional payments for long service or qualifications)

33. Clause 9 makes it clear that weekend and night penal rates are to be paid on the basis of a caregiver’s ordinary hourly wage immediately before the commencement of the Act. Clause 10 provides that additional allowances provided for in employment agreements before the commencement of the Act that recognise long service or level of qualification are abolished.
34. NZACA notes that these clauses could be added to cover all additional allowances, to avoid potential disputes. Examples would be “grand parented” allowances from old collectives relating to call outs or allowances for a requirement to work at short notice; we suggest that the Bill should make it clear that allowances of this kind should be paid at the pre-existing rate.

Clause 18 (Funding amounts increased)

35. NZACA recommends that clause 18(1) be amended to read:

“A funder must pay an employer with whom the funder has a funding agreement additional amounts over and above the amounts required by the funding agreement to meet the increased costs of employers’ obligations under this Act.”

36. NZACA is concerned that while disputes as to compliance by employers with the Bill are expressly brought within the dispute resolution processes of the Employment Relations Act 2000, the Bill provides no express statutory mechanism for providers to enforce their rights to receive additional funding to cover the costs of compliance, and there is no right of appeal or review in respect of funding decisions: clause 18(3). Given the very serious consequences for a provider of funding decisions that do not allow it to meet its increased wages bill under the Act, that is not an acceptable state of affairs.
37. NZACA suggests a review process to provide recourse for providers aggrieved by funding decisions under cl 18 should be inserted in the Act. Any review process should be conducted by a person independent of the funder and should be subject to a right of appeal.
38. NZACA also notes that cl 18(4), as presently drafted, provides that “this section applies only in respect of funding agreements entered into before the commencement of this Act.” **This appears to be an error, as funding agreements between rest home providers and funders are entered into on a yearly basis**, and whereas it is obviously not intended that additional funding will be restricted to the first year of operation under the new legislation. New providers who have entered into ARRC agreements with DHB should also be covered by the funding clause. **NZACA accordingly suggests deletion of this sub clause.**

Schedule 2 (Minimum hourly wages)

39. There appears to be an error at clause 1(3) of Schedule 2: the words in parentheses should read “(but, if **paragraph (a)(vii)** of the definition of continuous employment...)” (amendment underlined).

End.