Submission to the Education and Workplace Select Committee on the Employment Relations Amendment Bill

30 March 2018

Introduction

1. This submission is from the New Zealand Aged Care Association (NZACA), the peak body for the aged residential care (ARC) industry in New Zealand. With around 580 members, we represent 93% or approximately 37,000 beds of the country's ARC industry.
2. Our members range from the very small stand-alone care homes to the large co-located sites that include care services 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.
3. The number of people requiring ARC in New Zealand is steadily increasing and will continue to do so. The number of beds required for ARC is expected to increase from the current 38,000 to 52,000 by 2026.
4. There are 22,000 caregivers and 5,000 nurses working in the ARC industry.
5. Any enquiries relating to this paper should in the first instance be referred to Alyson Kana, Senior Policy Analyst at alyson@nzaca.org.nz or by phone on 04 473 3159.

Overall comment

6. While the NZACA largely supports the submission made by BusinessNZ to the Employment Relations Amendment Bill, there are particular aspects of the Bill that impact ARC facilities and these are discussed below.

General comments

Reintroduction of the 30-day rule

7. The proposed reinstatement of the earlier requirement that new workers be covered by an applicable collective agreement for the first 30 days of their employment is not supported by our industry.
8. We understand that the purpose of this change is intended to prevent 'free loading' of employees whom receive the same terms and conditions as union members when they have not paid any union fees. However, the current clauses have the opposite effect and encourage freeloading. By restricting the employee to receiving only a copy of the collective employer agreement (CEA) in the first 30 days and removing the presentation of the individual employer agreement (IEA) up front, which can be signed after the 30-day period, means that if an employee opts not to join the union in the first 30 days, they will automatically be deemed to be on an individual version of the collective agreement. This will mean all non-union members will benefit from the CEA terms regardless of financial membership.
9. We suggest the requirement for employers to only provide the CEA be removed as this reduces freedom of choice and increases administrative processes significantly for business.
10. If the 30-day rule is to stay, the Bill should at least allow the employer to present the IEA at the same time at the CEA with a clear indication that the employee will revert to the terms

of the IEA if they choose not to join the union within the first 30-days. This will prevent the freeloading on the unions' efforts.

11. Also, this puts a lot of pressure in smaller employers who often don't have a specialised HR presence. For example, at the moment some of our members give an IEA before the employee starts along with information related to the CEA. If the employee wants to change it is up to them.

12. In the past when the '30-day rule' was in place, employers used to have a difficult time trying to get employees to make a decision about whether they would then join the union and CEA or want to have an IEA. This can be frustrating for employers and their legal requirements around staff and contracts.

Union access without employer consent

13. The Bill proposes to restore the right of unions to access sites without the employer's consent. This change is overtly designed to enhance and facilitate the ability of unions to recruit new members. While union officials are required to comply with workplace policies and procedures, including health and safety, they may circumvent these requirements when they cannot find the employer or a representative of the employer.

14. The workplaces in our industry are the homes of older, vulnerable people. Our members have a requirement to provide a safe, enjoyable and healthy environment free of unwelcome disruption for the people that live there.

15. In the past year with the pay equity settlement, our members have occasionally experienced heavy-handed tactics from unions in a bid to get access to workplaces, particularly to talk to non-union members. ARC providers were happy for unions to hold meetings onsite with both union and non-union members. However, if non-union members were there it was entirely appropriate for a manager to be present. In some situations where managers were forced to leave the meetings, our members reported that non-union members were coerced into joining the meeting, being told they would not receive the benefits of the pay equity settlement unless they were a union member.

16. Our members, as employers and providers of care, need to be able to ensure they have adequate staffing numbers available and on the floor to care for their residents. If unions are given access to their sites without prior arrangement this cannot be guaranteed and may put residents and other staff at risk.

17. The approach of allowing union access to the sites of ARC facilities without prior arrangement could put vulnerable and sick older people at risk and put other staff in high risk situations. ARC is not a one size fits all industry. We request that restrictions be placed on union access to residential facilities by legislating aged care services under the 'essential services' umbrella.

Prescribed meal breaks

18. The amendments in the Bill to meal breaks are very detailed and prescriptive, particularly for our industry, which operates 24/7. The proposed amendments lack flexibility. For example,

part timer workers often insist on working their six hours at a stretch, and may strenuously resist having a full meal break part way through. This is very common with mums wanting to maximise their work hours between school drop off and pick up.

19. Also, rest homes currently have time frames for breaks in their employee agreements. However, as rest homes are 24/7 operations the night shift is an exception and employees generally receive a paid 'meal break'. Our members operate with minimum staffing levels during the nights. This limits their ability to provide an unpaid rest break as required by this Bill. ARC providers do acknowledge this reality by agreeing to pay staff if they are likely to be interrupted during their meal break.

20. The Bill does not make it clear whether ARC facilities are currently classified as an 'essential service' under Schedule 1, and therefore able to agree to an exemption.

21. Once again, we call for aged care services to be legislated under the 'essential services' umbrella.

Ability to opt out of collective bargaining

22. The proposed changes repeal the current ability of employers to opt out of bargaining for a multi-employer collective agreement (MECA). This means that all employers cited by the relevant union(s) as potential parties to a new MECA (or the renewal of one) must participate in bargaining.

23. Further changes under this Bill will require all cited employers to agree to a MECA unless there are genuine reasons not to, and to remain at the bargaining table until all matters have been dealt with. This package of provisions considerably strengthens the ability of unions to obtain MECAs.

24. Changes to the legislation such as these would have a material impact on the small independent providers in our industry. These changes would also open the door for different organisations within the industry to be saddled with punitive agreements.

25. The ability of providers in our industry to have competitive advantage will be reduced. The proposed changes also risk reducing terms for employers who lead the way in employee conditions in the industry.

Employer to provide the union with personal details of new employees

26. The proposed changes to this Bill will require the employer to give details of new employees (including prospective employees) to the relevant union and to require new employees to complete forms containing their details, which would be passed to the union by the employer.

27. Requiring employers to provide details of new employees to unions is a step too far and raises issues of privacy and duress.

28. These proposed changes will also put a significant administrative burden on the employer.

29. We suggest the changes be made that ensure the unions have the obligations to inform the employer if employees join the union or choose to leave the union.

The removal for the right for pay reductions for partial strikes

30. Proposed changes in the Bill to remove the right of employers to pay reductions for partial strikes by employees is likely to have the opposite effect of its intent.

31. The intent of bargaining is for all parties to work together to achieve an outcome. This proposed change is likely to encourage parties to jump to partial strikes as there is no financial impact on employees should they undertake a partial strike.

32. Employers in the ARC industry need to retain the right to address concerns with employees if their actions put the health and safety at risk of the vulnerable older people they care for.

33. Also, what constitutes a partial strike and when does it cross the line? This is not defined.

Restoration of reinstatement as a primary remedy

34. The proposed change for the Employment Relations Act 2000 to provide for reinstatement whenever it is practicable and reasonable to do so in realty is unrealistic. In many cases where an employee has been dismissed there has been a breakdown in the relationship. Often the relationship is severely impacted or irreparably damaged if the employment matter has made it to the Employment Relations Authority, therefore reinstatement is going to have a significant impact on the employee concerned and the company culture.

Duty to conclude bargaining

35. The Bill proposes to require bargaining parties to conclude a collective agreement unless there are genuine reasons not to. They also require parties to continue bargaining until all matters have been exhausted even when some matters are already at stalemate.

36. Changes like these would have consequences on the ARC industry. Our industry, in recent years, has been put under considerable strain due to legislative and other changes beyond the control of the industry. Many ARC providers are having to restructure their businesses to ensure survival. Under the proposed changes to conclude bargaining, these restructures could be held up. The courts have held that affecting conditions of workers covered by a collective agreement that is being bargained for, by attempting to conduct a restructuring exercise via consultation away from the bargaining table, is a breach of the employer's good faith obligations. The proposed changes strengthen that view and make it likely that the requirement to settle a collect agreement will become a tactical tool in any attempt to resist change. This would have negative connotations on businesses already struggling to survive.

Earlier initiation timeframes for unions in bargaining

37. We are unsure as to why this Bill proposes that unions be given a time frame to initiate bargaining earlier than employers, i.e. 60 days versus 40 days before the collective agreement expires.

Conclusion

38. Overall this Bill as it stands will have implications on not only the way businesses in the ARC industry can be operated, but the biggest impact will be on the vulnerable and sick older people that our industry provides care for. It is imperative the aged care industry be

legislated under the ‘essential services’ category to ensure that these 24/7 businesses that provide care are able to continue to do so in the manor that is required.