CUPE Ontario
Brief / Submission to the
Standing Committee on Social Policy – Bill 140
Long-Term Care Homes Act, 2007 (LTCHA)

Wednesday, October 14, 2009

CUPE SCFP Ontario

"There is no doubt, with an aging population and some of the horror stories and allegations you hear, the public needs to have confidence that these places are working properly and that the checks and balances that are there are actually doing their job ....These are allegations that need to be assessed." – Andre Marin – July 3, 2008 Canadian Press

"We need to remember that long term care facilities are residents' homes and places of work, good quality care requires good working conditions" – Dr. Tamara Daly September 23, 2004

Introduction

The Canadian Union of Public Employees, Ontario (CUPE Ontario) welcomes this opportunity to provide comments on the appropriateness of the second and final set of draft regulations under Bill 140 – the Long Term Care Homes Act.

The Canadian Union of Public Employees is Canada's largest Union representing more than half a million workers across Canada including approximately 200,000 employees in Ontario. CUPE Ontario members are employed in Health Care, Education, Municipalities, Libraries, Universities, Social Services, Public Utilities, Transportation and Emergency Services. Our members include service providers, white-collar workers, technicians, and labourers, skilled trades people and professionals. Across Ontario's long-term care sector, CUPE represents 24,000 workers in 217 long-term care homes. CUPE represents workers at 35 charitable homes, 69 Homes for the Aged, 71 nursing homes and 42 retirement homes. 47% of CUPE members work in the non-profit sector and 53% work in the for-profit sector.

In addition, CUPE members are residents and users of Ontario's health system. Many of us have family members, colleagues and friends living in Ontario's nursing homes. The CUPE Ontario brief is submitted on behalf of our 200,000 members and in support of the 24,000 CUPE members working in the long-term care sector.

Our Union participated in the response process following the release of the first portion of the draft regulations. We were concerned that many significant issues were not adequately addressed but we were hopeful that they would be properly covered in the second set of draft regulations. We were also hopeful that the concerns we expressed about the process would be heard and acted upon. In short we eagerly anticipated being part of the process to complete the preparations for the enactment of Bill 140.

Our members supported the enactment of Bill 140. We supported the contention that residents of all long-term care homes in Ontario deserve a common set of rights and standards of care. Our members saw the legislation as an opportunity to immediately raise standards in the "for profit" nursing home sector at least to the levels of other long-term care homes and then begin to raise standards for all homes to the point where they will genuinely meet resident care needs.

Unfortunately we do not feel that the flaws in the process have been rectified. Neither CUPE nor other unions representing front line workers in Ontario's long term care facilities were consulted prior to the release of the first set of regulations. A very tight timeline was given to provide input and no formal process was available to access explanations from the Ministry on the objectives and rationale for different provisions.

When CUPE was invited to attend a consultation meeting on September 17, 2009, we believed that we were going to be given the opportunity to provide input to the ministry on what they should include in their draft of the second portion of the regulations. We were therefore surprised on September 15, 2009 when that second set was released prior to our consultation session. The second set had over 200 pages which made it difficult to have comprehensive discussions on their contents less than two days later in the 3 hours or so that we were allotted. Indeed the one month time period for input is also quite short for the massive amount of subject matter in the second draft.

The task of the public in providing input at this stage is also made more difficult given the absence of further technical sessions like the one on September 17, 2009. As well the Ministry has not distributed any compendium of sections of the previous set of regulations and the previous Program Manual (that is now being repealed) to enable the public to assess to what degree previous requirements that retain their validity have been incorporated into the new regime. The identification of one of the significant potential gaps is set out in Appendix 1 to this submission. We call on the Government to delay enactment of the new legislation until a comprehensive compilation is made public with an opportunity for interested persons to make representations on any gaps that are revealed.

When the Bill was enacted, the Legislature identified areas where they expected the Government to enact regulations. Not all of these expectations have been met. One of those areas is in Section 17 dealing with staffing and care standards that will be addressed in detail in these submissions. There are other areas as well where there is an absence of regulations. Some of them are set out in Appendix 2 to this submission. We call on the Government to delay

enactment of the new legislation until these gaps are filled with an opportunity for interested persons to make representations on the adequacy of the Ministry's response to fill these gaps.

Finally and most importantly in terms of process, the Ombudsman of Ontario is just about to complete his review of the adequacy of the Ministry's regulation of the sector and the protection or lack thereof provided to residents. Any recommendations made by the Ombudsman are going to be an essential component of an action plan to finally seriously meet the challenges of long-term care in this province. Pre-empting the report of the Ombudsman sends a damaging message to Ontario's seniors.

Given the immensity of the material to comment on, these submissions will necessarily cover only a portion of the scope of the draft regulations. We seek to benefit from the work of other seniors' advocacy groups and their insights into the draft regulations. For any issues not specifically dealt with in these submissions CUPE endorses the submissions of the Ontario Health Coalition.

Substantive Concerns

Levels of Care

Section 17 of the Act anticipates that there will be regulations enacted to establish staffing and care standards. No such standards were contained in the first set and once again the second set of draft regulations ignores this legislative expectation. CUPE cannot overstate its disagreement with this failure on the part of the Ministry to protect long term care residents and believes it will be self defeating.

The Ministry instead seems to be moving to an outcomes based approach to regulations. In that situation, it is clear that there must be regulations setting out minimum acceptable outcomes for each program. The regulations must further expressly state that Inspectors are empowered to issue any order necessary to remedy failures to secure adequate outcomes and specifically that inspectors are empowered to issue orders directing the licensee to devote additional staff hours to remedy the inadequate outcome without reducing staff hours assigned to meet other outcomes.

In the event that a licensee believes that current staffing resources can be redeployed to both remedy the inadequate outcomes and not prejudice the ability to meet all other outcomes, there should be a process to enable the licensee to prove its claims to the satisfaction of the inspector, the Residents Council and the Family Council. The regulations must provide that the Inspector's order to devote additional staffing resources without reducing staffing resources to other outcomes is to be implemented immediately. Should the licensee wish to establish that a redeployment of current staffing resources can meet the requirements of the order, such efforts cannot delay the implementation of the inspector's order in the interim.

Finally the regulation must provide that representatives of all front line staff involved in securing outcomes be a party to the licensee's discussions with the Inspector, the Residents' Council and the Family Council and that where any of these staff are unionized, the representatives for these discussions shall be designated by the Union representing such staff.

Without such a process required by the regulations the Compliance Inspector may be powerless to effectively remedy deteriorations in resident condition. In the consultation held by the Ministry on September 17, 2009, Ministry officials indicated that where resident outcomes were inadequate to the point of an Officer issuing orders, the Officer would have to have evidence to back up the need for orders. Concern has been expressed that if an Officer finds that residents for example are not being bathed sufficiently often, that the Officer will be limited to ordering the operator to bath the residents more often but may not be able to order the operator to increase hours of care in total to ensure that the missing bathing can be corrected without depriving residents of other types of care.

The concern is that the operator will simply shift staffing resources from delivering other resident care needs, say from toileting to bathing to comply with the order. The result will be that residents will begin showing poor outcomes from toileting, which when it comes to the attention of the officer will result only in an order to improve toileting care, which will then result to a shift of staff back to toileting from bathing, thereby re-creating the bathing problem. If there is no specific regulation providing for a minimum staffing formula based upon acuity, how will the Officer be able to remedy insufficient overall care/staffing levels?

Moreover the draft regulations do not contain outcomes to be met by the licensee for each program, nor any outcome measures. Thus the Officer may not even be able to make a finding that the licensee is in violation of the legislation for not complying with outcomes.

Whatever outcomes are enacted, it is clear that the principal factor in determining whether they are met is whether there are sufficient staff resources to deliver the care to achieve the outcome. It continues to beg the question of why the Government is resisting enactment of a minimum staffing/care formula based upon resident care need which can be supplemented when an Officer notes conditions warrant. The Government uses a formula to determine resident care need and then uses that formula to provide funding presumably to enable the licensee to hire the staff necessary to deliver the care. Why shouldn't that funding come with enforceable accountability mechanisms through legislation to ensure that residents receive the care that is being funded.

This resistance to enacting a staffing formula for front line nursing and personal care staff is in stark contrast to the Ministry's acceptance to the need for such regulations for other classifications:

i. The Administrator – Section 111
ii. The Director of Care – Section 112
iii. Dietician – Section 52
iv. Nutrition Manager – Section 53
v. Food Service Worker – Section 55.

The Ministry may claim that a regulatory staffing formula is needed for these other classifications because they are funded from the "other accommodations" envelope from which the operator takes its profits. The Ministry may believe that without such a regulation, the Operator may have an economic incentive to understaff those classifications in order to enhance profits. The RNs, RPNs and PSWs however are funded through the Nursing and Personal Care envelope from which profits cannot be taken therefore the ministry may feel that no staffing regulation is required.

This explanation ignores the fact that the Director is currently being funded through the Nursing and Personal Care envelope. Is the Ministry intending to require that the Director position be funded in future from the Other Accommodations envelope. This would be a welcome development but insufficient to meet our concerns. There are other costs funded from the Nursing and Personal Care envelope that impinge on the funding available for front

line care. This includes other nurse managers, equipment and supplies such as incontinence products, as well as some costs of operations such as WSIB premiums. The more of these costs that are funded out of the Nursing and Personal Care envelope the less that remains for care hours from The RNs, RPNs and PSWs. The more of these costs that are funded out of the Nursing and Personal Care envelope the less the licensee has to expend for them from the Other Accommodations envelope and thus the greater its profit levels.

Moreover the Ministry has yet to identify any problems that would be caused through the enactment of a minimum staffing formula based upon resident care need. The Ministry may say that if such a formula is enacted then homes that staff above the formula may lower staffing levels. This concern can be addressed in the text of the regulation by making it clear that the hours required by the formula are only a minimum and that the licensee needs to continue employing sufficient staff each day to meet the full needs of the residents. The regulation can and should expressly empower the Officer to order additional hours where circumstances warrant.

The Ministry may claim that their external expert consultant Shirlee Sharkey rejected the need for staffing formulas. Nowhere in her report however has she cited the studies that state such standards are not necessary and nowhere has she rebutted the numerous studies identifying the clear need for such standards.

There is another problem with the Ministry moving to an "outcomes data" basis for inspections and orders. What will be the delay between the time that inadequate care is provided to then show up in unsatisfactory outcomes, for those outcomes to be entered into the computer, for the computer to forward its data to the Ministry, for the Ministry to analyze the data and identify the problem at a specific home and then for the inspector to arrive at the home?

The Ministry may feel that it has responded to at least some of the community's concern through its inclusion with Regulation 18. While that regulation has no numerical formula it does require a staffing plan. However that regulation does not contain any clear criteria of what needs to go into the staffing plan other than the requirement that the "staffing mix be consistent with residents' assessed care and safety needs". This draft regulation is also

weaker that the current regulation under the Nursing Homes Act in Section 60(6) that the" licensee of a nursing home shall ensure that there is a sufficient number of registered nurses, registered practical nurses and health care aides on duty in the home at all times to provide the nursing care required by the residents of the home".

The problematic terms are "consistent" but also "staffing mix". The latter term can be argued to relate only to the proper proportion of RNs to RPNs to PSWs based upon resident acuity even though there may be insufficient hours attached to each of these classifications to provide the care that must be delivered under Section 6(7) of the Bill.

Other Concerns

1. Section 19 Personal Care – There needs to be specific language requiring toileting of residents who are capable and desirous of such as opposed to sing incontinence products and where briefs are used they are to be changed on request.
2. Section 23 – Transferring and Positioning - There needs to be specific mention of turning and skin care as often as required.
3. Section 32 24/7 RN
    a. Why should there be any exception to the 24/7 requirement when there is no exception in Section 58 to the 24 hour requirement to access to medical services.
    b. There is currently a requirement that operators make best efforts to recruit RNs as a condition for the exemption. Why isn't that obligation included in the draft regulation
    c. Shouldn't there be a requirement to try option a) before moving to option b)
    d. There need to be tight definitions for "emergency" and unforeseen circumstances" for when these exemptions can be triggered.
4. Section 34 of the draft regulation appears to prevent the employment of a PSW without the new qualifications even though that PSW has already been working in long term care homes. When the College of Nurses of Ontario instituted new entry to practice rules around 2005 requiring RNs to have a university issued B.Sc.N. as opposed to the Community College Certificate, the CNO expressly grandparented every RN already working in Ontario. No limitation was placed on such RNs in terms of limiting them to their then current employer. They were allowed to switch from one employer to another.

If this flexibility was available for the RN classification with a higher level of accountability why should PSWs be subject to a much moiré severe form of grandparenting.

5. Section 50 Food Production – There needs to be an emphasis that the food products purchased should be as "raw" as possible, that funds from the Raw Food envelope can only be spent on raw food and that prepared food should only be brought in when required for special dietary purposes. Please recall that the preponderant proportion of Ontarion's affected by last year's Listeriosis outbreak from Maple Leaf prepared meats were long term care home residents. Such meats should not be part of the menu.
6. Section 56 – Food Service Qualification Upgrade - The regulation should provide that time spent by existing staff getting their qualifications is deemed work time (as with health and safety training) and require the operator to pay for the expenses and wages of existing staff.
7. Section 64 – Housekeeping - Once it is recognized that there needs to be sufficient staffing hours for food service workers, why is there no parallel requirement for housekeeping staff to reduce the risk of institutional acquired infections?
8. Section 78 – Misuse of Funding Where will the rules be about limitation on use of Envelope funding?
9. Section 101 – Specialize Units - Where are the criteria setting out the requirement for when specialized units are required?
10. Section 124 – Emergency plans – There need to be special provisions for fire evacuation plans
    a. Plans need to be reviewed quarterly as resident condition is a key factor in how long it will take to safely evacuate the home.
    b. Subsection 11 delaying for one year, compliance with paragraph 3 of subsection 4 dealing with consulting community agencies/resources, should not apply to consulting the local Fire Commissioner.
11. Section 137 Criminal Reference checks – The regulation should require the operator to reimburse any employee for costs associated with securing the reference.
12. Section 163 – Pharmaceutical restraints - The documentation on drugs administered for restraining purposes should be peer reviewed to identify any incidents where it wasn't appropriate and to identify potential alternative courses of action to reduce future situations where it might otherwise be necessary.

13. Section 165 – Reports – There needs to be a regulation requiring quarterly reports to the Director on staffing levels and there needs to be a regulation requiring such reports to be publicly available. See below for comments on more transparency.
14. Section 166 – Non Arms Length transactions – These reports must be made publicly available.
15. Section 192 – Licenses – Retirement homes should not be exempt from this requirement until legislation regulating Retirement Homes is enacted and implemented.
16. Section 196 – Switches from not for profit to for profit –
    a. This should only apply for debt instruments entered into prior to the enactment of the regulation but not for any subsequent renegotiation of such mortgages etc.
    b. The "for profit" holder of the debt instrument should be obliged to return the home to operation by a not for profit entity as soon as possible.
17. Section 197 share transfers – similar obligations should be imposed as in Section 196 above.
18. While we have made an overall statement endorsing the submissions of the Ontario Health Coalition we want to emphasize the importance of that portion of their submissions dealing with assessments and plans of care. We share their concern that the regulations not dilute the content nor delay the timing of comprehensive plans of care. Staff need such assessment and plans in order to ensure that residents receive proper timely care and that other residents are not endangered by new residents or residents with changed conditions.
19. The Ministry states that their new Compliance Enforcement model will include speaking to numerous residents as well as numerous front line staff for each inspection. There must be regulations enacted to ensure this happens and to ensure that such consultation will be comprehensive and effective. For this to happen, the regulation in addition to specifying that the inspector must engage in such conversations with residents, family members and front line staff must also include:
    a. A prohibition on the Licensee interfering in such discussions and specifically prohibiting any management representatives being present during such discussions
    b. That where any staff are unionized, that for each unionized group the inspector must speak to at least one employee designated by that union. Without such a regulation there is no assurance that the inspector will receive comprehensive

information expressed by someone who has at least some protection against retaliation.

c. Effective whistleblower protection. The licensee will likely be aware of who spoke with the Inspector. In order to give meaningful protection to such employees, the provisions of Section 26 of Bill 140 must be enhanced through regulation with a prohibition against the imposition of any adverse action on an employee who has spoken to an inspector unless and until the licensee or person to whom the service has been contracted out proves to the satisfaction of the OLRB or a rights board of arbitration that the adverse action is not in any way motivated by the disclosure and is for just and sufficient cause. Finally the Regulation should entitle employees who have given information to the inspector and who have been subject to an adverse action from the licensee etc to apply to the OLRB on an ex-parte basis and upon the filing of an affidavit to receive an immediate interim order revoking the adverse action and providing a full remedy including reinstatement where necessary and full compensation.

d. To give credibility to the inspection process, residents, family members, employees and their unions should have the right to appeal against any inadequate or non issuance of orders to an independent tribunal and to have the right to be made a party to any appeals filed by any other party. Otherwise if such persons making disclosures see that nothing is being done based upon the information disclosed then they may cease to be willing to offer full and comprehensive information to the Inspectors.

20. There needs to be a regulation specifying that certain information be made available to the public including but not limiting posting data on the Ministry's LTC Homes' website:

a. The full text of current Ministry Inspection Reports and Orders together with previous reports and orders going back at least two years

b. The average number of worked hours per resident per day by classification of staff

c. Assessment and Outcomes data for the residents as a whole as long as personal information is not revealed (the current standard is to only withhold summary data covering 5 or fewer residents) at least equivalent to that included in the annual Facility Specific Reports under the CMM/CMI system keeping in mind the switch now being implemented to the MDS RUGS III RAI system. These reports should restore reporting of data on items removed from the Facility Specific

Reports such as the average number of different medications being received daily by residents as well as the number of psychotropic medications ordered and or administered.

d. A bottom line summary figure for each home that will give data keeping in mind the switch now being implemented to the MDS RUGS III RAI system, equivalent to the figures released in the past for each home's CMM and CMI.
e. Provincial reports for the entirety of the province as well as data for each sector (municipal, charitable, other "not for profit" and for profit") for each of the headings above (a, b, c and d) for example, Provincial Summary Reports at least equivalent to those provided by the Province under the CMM/CMI system keeping in mind the switch now being implemented to the MDS RUGS III RAI system showing the average assessment and outcomes data for the totality of residents in the province.

Without such data it is not possible for:

1. Current residents and their families to hold their home accountable for the care received
2. Prospective residents and their families to make informed decisions on which home to seek admission to.
3. Elected representatives and other seniors advocates to hold the home and the government accountable for care levels and funding decisions.

It is insufficient to achieve these objectives to only release such data to Residents and Family Councils. While these Councils may perform a valuable role, their existence cannot address the legitimate interests of the other stakeholders in this area.

Conclusions

We conclude on the issue upon which we started – the need for and yet absence of any clear requirements for residents to get the care they need, and the massive removal of protections that are part of the new deregulatory approach.

CUPE members will support efforts by long-term care residents and their families and community supporters to obtain real action. We call on the government to scrap this farce and finally respect the inquiry process of the Ombudsman and commit to broad public consultations on the nature of regulations required once the Ombudsman's report is released.

Appendix 1 Concerns about gaps between scope of prior and proposed regulations

f. There appears to be no mention of service accountability agreements (SEA) in either the Bill or the draft regulations other than Section 79(3)(g.1) of the Bill which requires that the licensee make available a copy of the agreement. All the other references are just a more general one to "agreements".
g. The following are references to this subject in the Nursing Homes Act
    i. Section 2 which requires that the SEA be interpreted in a way to meet the residents' rights in the Bill of Rights
    ii. Section 4(2)(a) which requires that a licensee be party to an SEA
    iii. Section 4(2)(b) which requires that the SEA comply with this Act and the Commitment to the Future of Medicare Act
    iv. Section 13(a.1) which empowers the Director to revoke or refuse to renew a license if the licensee breaches the SEA
    v. Section 21.17 which empowers the Director to prohibit new admissions if the licensee breaches the SEA
    vi. Section 20.13(3)(b) which empowers the Minister to withhold funding if the licensee breaches the SEA
h. The following are references to this subject in the Nursing Homes Regulation
    i. Section 107(2) which prescribes that funding for a home shall be in accordance with the SEA (the regulation uses the previous term " service agreement")

Appendix 2 Other Concerns about gaps in draft regulations in relation to Bill 140 expectations

a. One area unaddressed of crucial importance is Section 3(4) which provides
    "The Lieutenant Governor in Council may make regulations governing how rights set out in the Residents' Bill of Rights shall be respected and promoted by the licensee. 2007, c. 8, s. 3 (4)".

b. Nowhere is it stated that compliance with the Manual will continue to be a requirement of the license and you seem to be concerned that there may be a gap in which homes are covered by the Design Manual.
    Section **101. (1)** of Bill 140 states A license is subject to the conditions, if any, that are provided for in the regulations. 2007, c. 8, s. 101 (1).
    This power could be used to enact a regulation requiring every license to require compliance with the Design Manual. You also expressed concern that the requirements in the Design Manual only apply to the construction of the Home and not to the ongoing operation of the Home. Similarly there could be a regulation stating that a further condition of the license is that the Design Manual requirements must be adhered to full the full period that the Home is operational.