Michael Patterson

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Hello Mr O’Farrell

I am writing to express concern over recent moves to amend legislation concerning the operation of ‘boarding houses’ with residents who were previously classified as “handicapped persons” under the YACS Act. Let me say immediately that changes to legislation is overdue and now urgent, so I have no problem with the fact that change is proposed. My concern is in relation to the very poor thinking that has gone into the proposed changes. There is evidence that the ‘usual suspects’ have been consulted and no outside voice has been considered. The Regulatory Impact Statement put out by ADHC is an in-house privileged conceit with inappropriate and unsubstantiated assertions that do not make it a professionally produced document of any intellectual integrity. You can look at the document yourself and see what I mean.

I’ll mention only one of many problematic statements to illustrate my point. The document says that costs of operating boarding houses will increase, but operators can profit from realizing increased property values. But that’s only if they close and sell up. In any case the days of canny operators buying large properties at a bargain price are long gone. These days we are seriously looking at built for purpose, not buying redundant hotels, orphanages and nurseries. The cost of meeting fire safety and other compliance concerns is higher than any reasonable value (knock down for the land or radical reconfiguration) for many. I think you will appreciate the simple fact that you do not off-set increased business costs by proposing the compensation of a capital gains benefit at some later stage if you want to establish a sustainable sector providing safe and affordable compensation to vulnerable people. You want a sustainable sustainable relationship betweencomings and outgoings on an ongoing basis. Under a properly disciplined rational this comment would not have appeared in a public document.

Back in 1993 I submitted a paper to an internal departmental review on licensed boarding houses. It was ‘lost’ and because the submission date had passed I could not resubmit it. I proposed a clear distinction between landlord functions (room, meals etc) and care functions (those additional responsibilities mandated by the state). I applied a simple logic. Landlords were entitled to fair profit from their ventures, regardless of who the customer is. It is immoral to profit from care services in this instance. There are proper businesses which profit from care services but given the class of customer here, that business opportunity should be denied. I arrived at my proposal after talking with boarding house operators. At the time I was responsible for licensing in northern New South Wales and I wanted to understand what the difference was between landlord and care costs, because I then saw a social justice issue about operators passing on compliance and care costs to customers. My view back then was that if the state presumed to mandate care services then it should pay, as it did with aged care hostels. Aside from restrictions aged clients, there was no essential distinction between what a licensed boarding house did and what an aged care hostel did. Both provided care and support services to people unable to care for themselves.

The present and long-term prevailing logic is that the government should impose upon the landlord certain prescribed duties of care in relation to their customer. But this is done in an uncontrolled way. The affect of this imposition of duty of care has also been to push the cost of additional mandated services upon the customer. Where else is the money coming from? The logic of squeezing the profitability of the business missed the compelling thought that the only source of funds is from customers, even those denied the full spectrum of supporting funds, and access to equal entitlements to funded care. Hitherto the absence of a proper tenancy agreement seems to have eliminated a range of benefits normally available to tenants of rented properties (rent assistance, utility allowance for example).

This has been a fundamental problem of having this policy area addressed by folk steeped in the welfare culture. There is no grasp of even rudimentary economics. The long-term objective of those involved in administering
boarding house legislation has been to return the residents to the care of the state. This philosophical outlook was
informed by the failure of government to provide promised support to ex-patients when the psych hospitals were
closed. It is important to get this fact, because the thinking permeated subsequent policy interpretations within
administering departments. It also resulted in government consulting with a tight community of people whose
sole interest is rooted in welfare, and whose attitudes toward licensed boarding house operators was inimical.
Historically the reaction against government’s failure to honour promises to provide sufficient community-based
care to those who were expelled from psychiatric hospitals fused with a just outrage over the abusive and
exploitative landlords who took advantage of a displaced and vulnerable class of customer. But while we may
understand the passions that drove the initial responses to what was a public policy disaster, the duty of public
administration is to develop and maintain a balanced policy that meets public interest requirements.

There are two distinct areas of concern. One is the provision of safe housing at a reasonable standard and the
allied freedom from exploitation and abuse by landlords. The other is about issues related to the provision of care
and support services. Under the past policy regime residents of licensed boarding houses became a privileged
minority, entitled to selectively funded services by virtue of the status of their residence, not their need. The
provision of healthcare services, personal care and social connection support in some cases exceeded what was
available to people in group-homes and tended to reflect what was provided in the old psychiatric hospital
system. It was an unbalanced, iniquitous and unsustainable system. This inequity was exacerbated when a
licensed boarding house closed and residents were moved into funded group homes costing far more than was
previously approved under licensing. We approved congregate care and then moved people into group homes,
when a boarding house closed. It would have been cheaper to buy the property and let the facility continue under
the management of a charity, and much wiser in the long run to have set up a sustainable sector that way.

The currently proposed changes to the way boarding houses are regulated offers some hope of important change,
but there are powerful problems that arise when government assumes a role in dictating care services it is not
willing to pay for. The most powerful problem is the forced closures of non-compliant businesses and the need to
address the ongoing needs of the then displaced customers. Typically this solution has been the high cost one of
restoring the customer to the care of the state in group-home settings. This is an absurd answer to a problem.
More than that, it is also irresponsible. ADHC’s policy is away from congregate care to normalised community
settings – typically expressed by a group home. But there is nothing normal about accommodating a group of 4 or
more unrelated people in the standard suburban home setting. There is no standard for accommodating any group
of unrelated people, but the norm has always been some form of congregate accommodation.

By setting the standard under proposed changes of up to 30 people the state implicitly understands that there are
acceptable and affordable situations to accommodate vulnerable people. That is not a problem. The problem
arises when a business supporting any such grouping or community closes and the vulnerable people have to be
supported. If the business was viable and of an acceptable standard it is actually more sensible for the state to
either purchase the proper or guarantee a mortgage (with protected interest) so that a not-for-profit can continue
to operate the business. This option has always been explicitly refused on entirely spurious grounds related to the
inappropriateness of government supporting anything remotely resembling a business.

This is a fundamental problem with having ADHC involved. Boarding houses are remote from its core business,
so there is not a strong grasp of the issues in a broader social policy framework. ADHC’s historical legacy is not
the doing of the agency, but one of inheritance and habit, as well as no experience in thinking in the context of a
private sector involvement in legitimate business. I am well aware that there were many exploitative and abusive
operators who should have been closed, but the solutions that arose reflected a misreading of the problem. The
historic logic to which ADHC is heir has been to restore the residents of boarding houses to the care of the state.
And because this dovetails neatly with the prevailing and legitimate business of the agency it is not questioned to
a sufficient degree.

I think it is important to review some of the thinking that has shaped boarding house policy. In response to the
prospect of funding boarding houses directly, at far less than subsequent support services would have cost, the
objection was that government does not fund businesses to provide care services (which was manifestly untrue).
It was argued that to make profit from providing a service to vulnerable people was immoral (apparently
excluding supermarkets, private rental, retailers in general, pubs, taxis and a whole list of businesses to provide services to vulnerable people – as if they may only be dealt with morally by not-for-profits). Government could not simply fund an NGO to run a boarding house that had closed because that meant that we were funding congregate care – which was licensed and approved while operating. There is an absolute duty as a public servant consider policy that serves the interests of the community and government, and that means stepping away from dogma arising from personal investment in political and social philosophies. The appeal of leftist social welfare is evident, but in our present political climate it more likely to create uneven benefit to a few, excessive unintended cost to government and penalty upon business operators.

There is an undeniable long-term risk to government that arises because it has a duty to intervene in the marketplace to ensure fair dealing. Regulation of boarding houses is an inescapable responsibility. But there is a need to draw a line under levels of responsibility. We do not make owners of McDonalds franchises responsible for the dietary wellbeing of customers. We limit the responsibility of pubs to the responsible service of alcohol, not to providing care to customers. We cannot make government universally responsible for the care of all people who may otherwise need it, by some asserted standard.

Hence my argument is that government has a duty to regulate the obligations of landlords to ensure fair dealing with vulnerable people – fair trading essentially. It may not impose obligations of care of any kind upon a landlord for the provision of any service that is not part of the usual spectrum of duties extant in the community. In consideration of those care services thought to be desirable or necessary, they are part of the wider public and social policy considerations of any government as it determines what means and priorities will direct its term in office. This is, I think, an important matter. If government deems it has a right to impose a duty of provision of care and support services upon unrelated persons you can imagine the political and philosophical issues this will invoke if it became a matter of wider public concern. But this has been able to occur to date because licensed boarding house operators are a repugnant class of persons for whom wider rights and dignities do not apply.

The critical consideration is the separation of duties and obligations. It is not a complex issue at all. I say a government does not have a duty or a right to impose upon a business operator a level of obligation toward the customer that exceeds the reasonable expectations of fair dealing related to the service provided. The NSW government has no implicit duty beyond that which it ordinarily owes to customers. If it wishes to fund additional care services it may do so at its discretion and according to its means.

This is not meant to be a criticism of the present government, which has inherited the current situation. Rather it is an opportunity to escape from a high risk situation that exposes the public purse to an uncontrolled and unlimited liability. How to escape without losing intellectual and moral integrity? By asserting the proper duty of government to not intrude upon the reasonable conduct of a business.

But by coupling care and accommodation together the government takes on both as a single logic, and that is a risky business. Past the closure of the psych hospitals those who exited went into two extreme situations – to services operated by ex-psych nurses who essentially ran mini institutions to the best of their abilities and a completely unregulated and predatory accommodation sector. The need for additional supports was self-evident and in some cases those supports were provided as a response to need. The immediate and urgent imperative of the early regulation of boarding houses was to eradicate the predatory operators. But the logic of the state-driven intervention did not decouple the care/accommodation logic of the old hospital/institution logic – and that remains the dominant thinking among those who inform boarding house policy. There is an absolute antithetical sentiment in that community, which will have nothing to do with the validation of any business interest.

As a consequence government remains exposed to the risk of high cost solutions to closures, especially as local government responds to obligations to report facilities that may be subject to formal regulation and control. I have offered some brief thinking points intended to stimulate thought in a wider frame:

1. Decouple landlord and care services. Outside a formal institutional setting there is no natural affiliation. Governments fund accommodation/care services – group homes, aged care hostels, nursing homes, hospitals. The failure to decouple these functions represents a fundamental act of political subversion.
and intellectual dishonesty that has hampered and distorted policy formation for the past two decades at least. There are duties and obligations that are fairly part of operating a business, and other duties and obligations that have no implicit function in business operation. By mixing the two the closure of a boarding house is addressed only in the familiar accommodation/care fusion implicit in higher cost government funded services.

2. Frame regulation in terms of fair dealing, not care provision – giving the same rights to these businesses as enjoyed by other businesses. This also removed role and duty confusion. It also removes political confusion. If there is a section of public service advocacy that seeks to enhance care provision let that be a debate unrelated to the right to have a safe place to live. There are innumerable people whose personal circumstances would warrant care and support services under better economic and policy conditions. Many residents in Housing NSW properties should be entitled to funded care supports as well, but it is not the duty of Housing NSW to provided that care. Housing has struggled with the landlord role versus the welfare role for good reason. We do not fund unfettered care services to support the innumerable people whose life circumstances render them less able to live a successful self-managed life, because we cannot presently afford to do so. Why might we impose on a private landlord what we do not impose on the state landlord of last resort?

3. If you review the care provision landscape it is patchy and uneven and down to ways and means. Under the present policy culture that links accommodation and care social justice advocates have had a free run. They have had strong links with regulators and between the two they have shaped the policy landscape. This has been a conflict of interest for both parties – funded advocacy agents have had a safe haven from just criticism and government workers have had allies outside the department and in the media to support their agendas. By separating the landlord and care functions that conflict of interest will be broken to a substantial degree.

We are going to have vulnerable people needing safe and affordable accommodation. They may also need care that requires funded government assistance, but that assistance has to be considered within the broader spectrum of both state and commonwealth forms of assistance. We cannot give what amounts to privileged aid to one class of persons, when we do not offer the same to residents of public housing, where the need for additional supports and care may be justly found in sufficient instances.

My ‘innovation’ is that these two issues have to be completely separate and distinct. If local government closes down a crappy boarding house there can be absolutely no expectation that residents should be accommodated in funded group homes. That nexus has to be broken completely. Also there must be no nexus between status of residence and duty to pay for care services where the client/customer is not housed and supported by a state or commonwealth funded service (group homes, aged care hostels and prisons). This does not mean the state may not exercise its discretion to provide such services, only that it is not a requirement linked to the regulation of accommodation standards.

There is a lot of thinking to be done to develop a sustainable approach here. What I argue is that ADHC should not have a lead responsibility in development of such policy because it lacks the distance from historic context as well as the expertise needed to cross the spectrum of issues to be considered. Far better this be handled by Premiers & Cabinet. We need a fusion of economic, business and welfare thinking to build the best kind of intellectual foundation, and you are not going to find that if you let the policy be driven by welfare thinking.

To be clear here I have no aversion to ADHC at all. I still work for ADHC and it does the ageing and disability role well enough. I have great affection and respect for it as a culture. I have no aversion to welfare either. It’s just that when we need hard headed and pragmatic solutions we need to introduce a counter mentality to balance the idealism.

Kind regards

Michael Patterson