November 6, 2000

The Honorable Frank Brogan, Chair
Task Force on Availability and Availability of Long Term Care
Florida Policy Exchange Center on Aging
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Dear Lt. Governor Brogan,

The Florida Life Care Residents' Association (FLiCRA) is the singular organization in the state whose membership includes individuals who are receiving assisted living or nursing home care, or who have continuing care contracts to receive such care if it becomes necessary. No others can speak with such a unique voice for the consumers of nursing home services. FLiCRA is independent of individual nursing homes or their organizations, the insurance community, and any other self proclaimed advocates for nursing home residents. We represent a statewide membership of over 9,300 residents living in continuing care retirement communities from Pensacola to Miami.

The concerns regarding quality of care, cost of liability insurance, tort reform, state support and regulation of nursing homes, and the related topics before the Task Force have already become acutely personal to the members of FLiCRA. Our members or their spouses have been, are, or will be in nursing homes; the monthly maintenance fees paid by our resident members have soared to cover increases in liability insurance premiums; we have seen the best of nursing homes, and some that do not meet that standard.

Most importantly, FLiCRA and its members do not make money from any source in this situation. Our members pay the nursing homes for our care; our members pay the insurance industry for the insurance premiums through their monthly fees; our claims are the basis for the recovery of attorneys' fees. FLiCRA suggests that its opinions and suggestions for the Task Force are of higher priority than any others interested in the outcome of this process.

FLiCRA has participated in the Task Force process by attending and testifying at each of the public hearings to date. We appreciate the courtesy shown our members and staff at those meetings. In particular, FLiCRA applauds the

members of the Task Force and its highly professional staff for the enormous work already completed and for the remaining difficult production of the final report which remains.

We will continue to provide all assistance possible in order that FLiCRA's unique perspective on the issues be included in that report. We are grateful for the opportunity to present the attached set of recommendations for the Task Force's consideration. The FLiCRA State Board of Directors met on November 1 and 2 to formalize the association's positions on the issues and to approve this submission in behalf of our membership.

The singular most important facet of our proposal is that we strongly urge the Task Force to address solutions to this problem only in a comprehensive manner. Just as there is no individual issue that has brought this situation to the forefront of public consideration, there is no one direction that will prove to be a successful solution to the problems at hand. Only a combination of solutions will find the right balance among all the groups whose interests must be addressed. FLiCRA sincerely wishes to be an integral part of finding that balance and will support recommendations and legislation, which properly consider the widest number of issues. We feel it will be inappropriate to identify only a limited field of issues as being solutions.

FLiCRA's second priority is the highest quality of care at the lowest possible cost. We join with the numerous, wide-range of interests who have spoken to this matter, especially as it centers on increased staff for nursing homes with elevated numbers of AHCA citations, or civil claims and lawsuits. The logic expressed in testimony before the Task Force, and by Task Force members demonstrates that sufficient numbers of highly trained, well paid and motivated staff is the singularly most identifiable factor in limiting claims, lawsuits, liability, and higher insurance costs. The first step toward making more and better staff available is an increase in Medicaid reimbursement rates. Increased staffing of the AHCA inspection teams and ombudsman will help nursing homes avoid problems at an earlier stage of their development, and will reduce the number and severity of care violations, which can lead to unnecessary lawsuits.

Our third area of concern is the protection of patient rights while finding ways to limit the economic impact on good nursing homes for the deficiencies of others. Just as in automobile liability insurance or homeowners liability insurance, those with good records and low risk are entitled to lower insurance premiums. Regardless of who writes the policy, a nursing home with a low number of deficiencies, claims, successful lawsuits, or judgments should not have to pay the same premiums as a nursing home with a higher number of those risk factors.

At the same time, the rights of nursing home patients are special because they have so very little control over their day to day care. Any claim for injury should have to be proved to have occurred from deficient care. It should not be harder to either bring or prove a claim than under current law, but there are areas of tort reform that are appropriate. These include mandatory mediation before formal lawsuits, capping punitive damages under some circumstances, new ways of setting attorney fees, and shortening the statute of limitations. Creating a state Quality

of Care Trust Fund into which certain lawsuit awards would be paid will also avoid awards going to persons who have no real interest in a patient's harm.

There are other areas addressed in our comprehensive list of recommendations. We call on all other interested groups and individuals to join in this broad and open-minded approach to resolving this enormous public policy matter. Our advocacy team of Eric Thorn, Jeffrey Barker, and I are committed to working with the widest range of other participants as we seek the most balanced reforms appropriate to the primary needs of nursing home and other long term care facility residents.

Below are our forma1 recommendations to the Task Force, which address mainly Tasks 3 & 4:

Task 3 - Nursing Home Quality

- Appropriate $1 million dollars to provide additional AHCA nursing home field inspectors, additional paid Ombudsman staff support and fund increased volunteer ombudsman training.
- Allocate a portion of punitive damages from nursing home lawsuits into a newly created Quality of Care Trust Fund administered by the state to provide funds for increased staffing. In addition, any damages recovered by "non-eligible" suit filers would be paid into the Quality of Care Trust Fund.
- Increase the daily Medicaid reimbursement rate.
- Impose minimum staffing levels upon any nursing home, which falls below lowest risk category in terms of number of ACHA survey deficiencies.

Task 4 - Lawsuits and long-term care:

- Establish mandatory pre-suit mediation.
- Encourage arbitration as in 766.207, F.S. with financial incentives to the defendant.
- Reduce the Statute of limitations for filing suit from 4 years to 2 years.
- Define difference between medical services and non-medical services since HCFA has determined that 80% of services are residential in nature and 20% are medical.
- Limit who can bring suit to the following: The resident, or his/her guardian, a public guardian, a legally recognized health care surrogate or the personal representative of the estate of a deceased resident when the cause of death resulted from the deprivation of the decedent's rights, so long as the resident is survived by a spouse or child.
- Attorney's Fees Above and Beyond Contingency Fees. These fees should be capped. Allow nursing home to defend attorney fee claims with proof of compliance with existing state and federal staffing regulations.
- For Economic Damages. For cases that are arbitrated, damages should cover cost of past and future medical expenses, offset by any collateral source payments.
- For Non-Economic/Compensatory Damages. For cases found negligent and settled through arbitration, a maximum of $250,000 per incident but no more than $350,000 in the aggregate would be awarded. For cases where the arbitrator finds the defendant's conduct was willful, wanton, and intentional the award is limited to $500,000 per incident and $700,000 in the aggregate. If clear and convincing evidence of pain and suffering is determined, then an

- additional award of up to double the amount could be awarded. However, such a finding must be made by a jury and included in final judgment.
- For Punitive Damages. For cases that are arbitrated, no punitive damages. For cases that go to trial, 3 times the amount of compensatory damages or the sum of $500,000. Where wrongful conduct is motivated solely by unreasonable financial gain and the dangerous nature of the conduct, together with the high likelihood of injury from the conduct, was known by the managing agent, director, officer or other person responsible for policy decisions, punitive damages may not exceed 4 times compensatory or the sum of $2 million dollars. When the defendant acted with specific intent to harm and harm occurred, there is no cap on punitive damages.
- Maintain strict liability as standard of proof unless new standard is defined that also protects the known vulnerability of nursing home residents.
- Do not move claims or lawsuit procedures into medical malpractice model.
- Provide Department of Insurance statutory authority to regulate surplus lines relative to nursing home liability insurance.
- Establish a 3 tier rating system based on claims and settlements where liability insurance premiums are based on performance.
- Consider feasibility of state supported risk pooling program for liability insurance.
- If medical malpractice model is adopted in part, make nursing homes subject to public disclosure laws for claims and settlement history.

On behalf of the members of FLiCRA, I thank the Task Force for its serious consideration of our recommendations.

Sincerely,

Bennett Napier, CAE
Executive Director