

Chapter 2

Key provisions

2.1 As outlined in Chapter 1, the Aged Care Quality and Safety Commission Bill 2018 (Commission bill) is a bill for an act to establish the Aged Care Quality and Safety Commission (Commission) to replace the existing Australian Aged Care Quality Agency (Quality Agency) and Aged Care Complaints Commissioner (Complaints Commissioner) on 1 January 2019, by bringing these functions together into the Commission.¹

2.2 The Commission will be responsible for the accreditation, assessment, monitoring and complaints handling of approved providers of aged care services and service providers of Commonwealth-funded aged care services.²

2.3 The purpose of the Aged Care Quality and Safety (Consequential Amendments and Transitional Provisions) Bill 2018 (Consequential bill) is to deal with consequential and transitional matters that arise from the enactment of the *Aged Care Quality and Safety Commission Act 2018*.³

2.4 These consequential matters include the repeal of Acts related to the Quality Agency and Complaints Commissioner and the transfer of functions under those Acts to the Commission and the continuation of advisory council membership.⁴

2.5 This chapter will outline the key provisions of the bill and concerns raised by witnesses and submitters.

Objects of the Act

2.6 The Commission bill sets out the Objects of the Act under clause five, which outlines the regulatory framework of the Commission, and establishes its functions as:

- (a) the function of protecting and enhancing the safety, health, well-being and quality of life of aged care consumers; and
- (b) the function of promoting the provision of quality care and services by approved providers of aged care services and service providers of Commonwealth-funded aged care services; and
- (c) the consumer engagement functions; and
- (d) the complaints functions; and
- (e) the regulatory functions; and

1 Aged Care Quality and Safety Commission Bill 2018, [Explanatory Memorandum](#) (Commission bill EM), p. 1.

2 Commission bill EM, p. 3.

3 Aged Care Quality and Safety (Consequential Amendments and Transitional Provisions) Bill 2018, [Explanatory Memorandum](#) (Consequential bill EM), p. 1.

4 Consequential bill EM, p. 1.

(f) the education functions.⁵

2.7 Most submitters and witnesses expressed support for the primary purpose of the two bills in establishing the new Commission. Quality Aged Care Action Group Incorporated (QACAG) submitted that the bills would ensure 'a "one stop shop" for safeguarding people accessing aged care'.⁶ The NSW Nurses and Midwives Association submitted the bills would 'facilitate communication and intelligence gathering, which will be of benefit to both consumers and workers'.⁷

2.8 The Complaints Commissioner pointed to an improved complaints process that would result from the proposed merger:

The Commission will no longer have to refer matters to the Quality Agency where there are systemic concerns, or there is a need for an urgent assessment or audit, and it won't have to refer non-compliance to the Department - as once the transition is complete, all those functions will be held by the Commission itself. This also means we will also have more timely access to information currently held by the Quality Agency and compliance to inform our risk assessments of complaints.⁸

Expansion of Objects of the Act

2.9 In addition to expressing support for the current Objects of the Act, submitters and witnesses provided a range of recommendations to expand these objects and enhance the functions of the Commission across a variety of areas. As outlined later in this section, submitters recommended where this could not be incorporated into this legislative process, it could be considered in the second legislative amendment process expected in 2019.

2.10 The Australian Medical Association made a range of recommendations to enhance the powers of the Commission to improve and oversee aged care services, including oversight of aged care workforce issues and being a centralised clearing house of aged care and health information.⁹

5 Aged Care Quality and Safety Commission Bill 2018, clause 5.

6 Quality Aged Care Action Group Incorporated (QACAG), *Submission 1*, p. 1.

7 NSW Nurses and Midwives' Association, *Submission 2*, p. 4. Submitters and witnesses who expressed support for the proposed merger of the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner include: Aged and Community Services Australia, *Submission 13*, p. 3; Aged Care Complaints Commissioner, *Submission 3*, p. 1; Australian Association of Social Workers, *Submission 23*, p. 2; Australian Medical Association, *Submission 10*, p. 2; Community and Public Sector Union (CPSU); *Submission 25*, p. 1; COTA Australia, *Submission 7*, p. 3; Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 26*, p. 1; Leading Age Services Australia, *Submission 11*, p. 2; Maurice Blackburn, *Submission 6*, p. 2; Older Persons Advocacy Network, *Submission 8*, p. 2; Salvation Army, *Submission 17*, p. 3.

8 Aged Care Complaints Commissioner, *Submission 3*, p. 2.

9 Australian Medical Association, *Submission 10*, pp. 2–3.

2.11 The Queensland Nurses and Midwives' Union submitted that the purpose of the Commission should go beyond assuming the existing functions of the Quality Agency and the Complaints Commissioner. It recommended the Commission should include new functions such as working with the Australian Commission on Safety and Quality in Health Care to ensure there are consistent clinical and health care standards across all sectors, rolling the function of the Aged Care Financing Authority into the Commission to achieve a more integrated approach, acting as a data clearing house for the aged care sector, and incorporating a research capacity.¹⁰

2.12 Aged and Community Services Australia told the Community Affairs Legislation Committee (committee) that in its view, the Objects of the Act do not make specific reference to the regulatory role that the commission will perform, and while it supports the focus the bills have on consumer engagement and education, it considers there is not enough focus on the need to engage with aged care providers.¹¹

2.13 In response, the Department of Health (Department) told the committee that the focus of the Commission is on the consumer and its purpose will be 'to protect the consumer's wellbeing and safety'. The Department further stated the Objects of the Act 'are really there to demonstrate and to be representative of the recent failures of care'.¹²

2.14 Combined Pensioners & Superannuants Association of NSW and Aged Care Crisis argued that rather than expanding the functions of the Commission, the establishment of the Commission itself should be deferred until after the Royal Commission into Aged Care has concluded and made findings.¹³

2.15 A number of witnesses strongly disagreed with this position, and recommended that improvements and enhancements to functions being transferred to the Commission should not delay the expected start date of 1 January 2019, but could be considered as a second round of reforms.¹⁴ COTA Australia stated:

We would be horrified if that were to happen. This is an important initiative. The royal commission will undoubtedly look at it and see if it can

10 Queensland Nurses and Midwives' Union, *Submission 5*, pp. 3–4.

11 Ms Pat Sparrow, Chief Executive Officer, Aged and Community Services Australia, *Committee Hansard*, 10 October 2018, p. 36.

12 Ms Amy Laffan, Assistant Secretary, Department of Health, *Committee Hansard*, 10 October 2018, p. 53.

13 Combined Pensioners & Superannuants Association of NSW Inc. (CPSA), *Submission 21*, p. 4; Aged Care Crisis, *Submission 28*, p. 3.

14 See for example: Ms Pat Sparrow, Aged and Community Services Australia, *Committee Hansard*, 10 October 2018, p. 36; Ms Veronica Jamison, State Manager, Victoria and Tasmania, Leading Age Services Australia, *Committee Hansard*, 10 October 2018, p. 43; Mr Matthew Richter, Chief Executive Officer, Aged Care Guild, *Committee Hansard*, 10 October 2018, p. 43.

be improved upon, but the notion that we would wait to beyond April 2020 to initiate this important reform is extremely unpalatable and unwise.¹⁵

2.16 Dr Anna Howe, consultant gerontologist, concurred with this view and told the committee:

I'd really endorse the comments that were made earlier about not delaying and waiting for the outcomes of this and some of the other inquiries and steps that are underway. In fact, a number of recommendations from the Oakden report have already been implemented, so I don't think we have to wait.¹⁶

Future reforms

2.17 The Objects of the Act also outline the intention to later confer additional functions on the Commissioner currently undertaken by the Department, in relation to the approval of providers of aged care services and compliance functions that will be transitioned from 1 January 2020.¹⁷

2.18 Aged and Community Services Australia submitted it supported this proposed transfer of functions.¹⁸ COTA Australia recommended the future additional functions should be more explicitly outlined 'to make Parliament's intention clear as to what specific powers should be transferred from the Secretary of the Department to the Commissioner, and the scope of to whom those powers will apply'.¹⁹

2.19 The Department informed the committee that it will conduct additional consultations on the second round of legislative amendments, and that this consultation will go beyond the transfer of regulatory functions of the Department to also look at 'international best practice and the opportunities for enhancements' and stated the legislative amendment process provided 'a great opportunity to look at the system overall'.²⁰

2.20 The Department further informed the committee of other aged care reforms being undertaken, such as a consultation currently underway into drafting a new single charter of rights for aged care consumers²¹ and a Serious Incident Scheme to be incorporated into the *Aged Care Act 1997*.²²

15 Mr Ian Yates, Chief Executive, COTA Australia, *Committee Hansard*, 10 October 2018, p. 11.

16 Dr Anna Howe, Consultant Gerontologist, *Committee Hansard*, 10 October 2018, p. 22.

17 Commission bill EM, p. 5.

18 Aged and Community Services Australia, *Submission 13*, p. 3.

19 COTA Australia, *Submission 7*, p. 6.

20 Dr Lisa Studdert, Acting Deputy Secretary, Department of Health, *Committee Hansard*, 10 October 2018, p. 50.

21 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 54.

22 Dr Lisa Studdert, Department of Health, *Committee Hansard*, 10 October 2018, p. 53.

Service coverage

2.21 The new Commission will be responsible for aged care residential facilities which are a Commonwealth-funded aged care service. The Commission will also be responsible for services delivered under the Commonwealth Home Support Programme and the National Aboriginal and Torres Strait Islander Flexible Aged Care Program.²³

2.22 The Queensland Nurses and Midwives' Union submitted the Commission should regulate all aged care, whether Commonwealth funded or not.²⁴ The Mental Health Commission of NSW submitted the definition of 'Commonwealth funded' should clarify if this refers to services that are part-funded, joint-funded with a State or Territory, or receiving any part of Commonwealth funding for the provision of services to older people.²⁵

2.23 The NSW Nurses and Midwives' Association submitted the Commission should also oversee online platform care agencies due to the 'great risk to consumers who seek introduction to direct care workers, including registered nurses through online platform care agencies' and recommended the Commission also oversee care services provided within retirement villages.²⁶

2.24 COTA Australia submitted the complaints functions of the Commissioner should be extended to include My Aged Care and the assessment processes undertaken by Aged Care Assessment Teams (ACATs) and Regional Assessment Services (RASs).²⁷ Aged and Community Services Australia also made this recommendation, and extended it to services provided by the Department of Human Services.²⁸ Leading Age Services Australia made a similar recommendation that the Commission's role in the promotion of aged care consumers' engagement about the quality of care and services provided should include reference to My Aged Care.²⁹

2.25 The Department informed the committee that the Commission bill does not include My Aged Care, ACATs or RASs because the focus of the Commission is to be 'a single point of contact with respect to the quality of care and services. My Aged Care and RASs and ACATs are very much about access and information. So it's really a distinction between what the two functions are'.³⁰

23 Commission bill EM, p. 6.

24 Queensland Nurses and Midwives' Union, *Submission 5*, p. 2.

25 Mental Health Commission of NSW, *Submission 15*, pp. 3–4.

26 NSW Nurses and Midwives' Association, *Submission 2*, p. 6.

27 COTA Australia, *Submission 7*, pp. 7–8. This expansion of service coverage was also recommended by National Seniors Australia and Dementia Australia, *Committee Hansard*, 10 October 2018, p. 13.

28 Aged and Community Services Australia, *Submission 13*, p. 4.

29 Leading Age Services Australia, *Submission 11*, p. 4. A similar recommendation was made by Salvation Army, *Submission 17*, p. 3.

30 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 48.

2.26 The Department further informed the committee of existing complaints schemes for My Aged Care, ACATs and RASs, as well as external reviews available through the Commonwealth Ombudsman.³¹

Consultation

2.27 A number of submitters and witnesses raised concerns with the level of consultations conducted in the drafting of the bills, as well as the memberships of ongoing Commission advisory or consultation groups. QACAG submitted there was a lack of consultation of consumer representative organisations in the development of the proposed Commission, and noted that 'many of the limited number of consumer advocacy organisations who are members of consultative committees (current and proposed) also have connections to the aged care Industry, either current or historical'.³²

2.28 The NSW Nurses and Midwives' Association concurred with this view and submitted the consultation approaches had a bias towards aged care industry peak groups, and there was a need for greater inclusion of consumers and the aged care workforce in future consultation.³³

2.29 Conversely, COTA Australia, a national consumer peak body for older Australians, acknowledged in their submission that matters they had advocated for, such as additions to the objects and functions of the Commission, had been picked up during the consultation with the Department and included in the bills.³⁴ Likewise the Federation of Ethnic Communities' Councils of Australia (FECCA), acknowledged being included in consultation leading to the development of the bills.³⁵ Ongoing consultation issues are discussed further in the later section on consumer engagement.

2.30 As outlined above in the section on future reforms, the Department informed the committee that consultations are continuing with the aged care sector, advocacy organisations and consumers and their representatives on a range of additional reforms, which will include the future expansion of the functions of the Commission.

Advisory Council

2.31 The Commission will include an Aged Care Quality and Safety Advisory Council (Advisory Council) of up to 10 members in addition to the Chair of the Advisory Council.³⁶ The role of the Advisory Council is to provide advice to the Commissioner on its own initiative, or at the request of the Commissioner, about those matters that relate to the functions of the Commissioner.³⁷

31 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 48.

32 QACAG, *Submission 1*, p. 3.

33 NSW Nurses and Midwives' Association, *Submission 2*, p. 2.

34 COTA Australia, *Submission 7*, p. 3.

35 FECCA, *Submission 26*, p. 1.

36 Commission bill EM, p. 6.

37 Commission bill EM, p. 13.

2.32 Members will be appointed by the Minister and will hold office on a part-time basis for up to three years, and may be re-appointed for further terms. To be appointed, members must have substantial experience or knowledge in at least one of a number of specific fields such as:

- evaluation of quality management systems;
- provision of aged care, including provision of aged care to people with special needs;
- aged care consumer issues;
- geriatrics, gerontology, aged care nursing or psychiatry of the older person;
- adult education;
- public administration, management or law; or
- health consumer issues.³⁸

2.33 The current members of the advisory body to the Quality Agency, the Aged Care Quality Advisory Council, will transition to the Commission's Advisory Council with their existing terms to be served.³⁹ Some submitters argued this transition of membership should not occur due to recent failings of the regulatory system to protect aged care residents.⁴⁰

2.34 Submitters put forward recommendations of expertise the Advisory Council should include, which was generally the sector represented by the submitter. These included:

- workforce representation, consumer advocates and aged care clinicians;⁴¹
- aged care consumer representatives;⁴²
- experience or knowledge in geriatrics, gerontology, aged care nursing, psychiatry of the older person, allied health or health consumer issues;⁴³
- experience in older persons' mental health;⁴⁴
- people with expertise in integrating the health care, social care and aged care systems;⁴⁵
- palliative care issues;⁴⁶ and

38 Commission bill EM, p. 14.

39 Commission bill EM, p. 14; Consequential bill EM, p. 6.

40 Pain Australia, *Submission 19*, p. 4. See also: New South Wales Nurses and Midwives' Association, *Submission 2*, pp. 5–6.

41 NSW Nurses and Midwives' Association, *Submission 2*, pp. 5–6.

42 COTA Australia, *Submission 7*, p. 11.

43 Queensland Nurses and Midwives' Union, *Submission 5*, p. 6.

44 NSW Mental Health Commission, *Submission 15*, p. 4.

45 Leading Age Services Australia, *Submission 11*, p. 6.

- Culturally and Linguistically Diverse (CALD) communities.⁴⁷

2.35 The Department advised the committee that in the establishment of the new Advisory Council, there are four vacant positions available to be immediately filled by new members and this allows for 'a broader range of members, reflecting the range of issues that are of great concern to the stakeholders in terms of the representativeness of that advisory council'.⁴⁸

Clinical advice

2.36 The Commission will establish a role of Chief Clinical Advisor, and establish an expert clinical panel.⁴⁹ These advisory positions are new, and are not currently included in the Quality Agency or Complaints Commission.

2.37 Submitters and witnesses saw the establishment of these new advisory positions as an important step forward in quality care, but expressed some reservations about how it was to be implemented. The Australian Medical Association told the committee:

We consider it of central and great importance that there is a clinical adviser, and, as we said, preferably a medical adviser—a GP or a geriatrician—with the right sort of experience and skill set. It would be really desirable to have that in the legislation.⁵⁰

2.38 The Office of the Public Advocate Victoria raised concerns that the role of Chief Clinical Advisor is not an explicit requirement under the Commission bill, and recommended the role be set out in legislation.⁵¹ COTA Australia noted that establishing the role as a statutory position may confer additional powers within the medico-legal system.⁵²

2.39 The Australian Medical Association expressed support for 'an approach that will not limit the clinical issues being looking into at a deeper level' but recommended that the role of the Chief Clinical Advisor should be documented subject to public or parliamentary feedback and scrutiny. The Australian Medical Association made a range of recommendations as to the issues which should be contained within the role, and recommended the position be filled by a general practitioner or a geriatrician experienced in aged care.⁵³

46 Palliative Care Australia, *Submission 20*, p. 3.

47 FECCA, *Submission 26*, p. 2.

48 Dr Lisa Studdert, Department of Health and Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 46.

49 Commission bill EM, p. 7.

50 Dr Richard Kidd, Chair, Australian Medical Association Council of General Practice, *Committee Hansard*, 10 October 2018, p. 28.

51 Office of the Public Advocate Victoria, *Submission 24*, p. 1.

52 Mr Ian Yates, COTA Australia, *Committee Hansard*, 10 October 2018, p. 15.

53 Australian Medical Association, *Submission 10*, pp. 3–4.

2.40 Dr Brooke from the Australian Association of Gerontology noted that a registered nurse, especially with experience in gerontology, may also be a good candidate for the role of Chief Clinical Advisor.⁵⁴

2.41 The NSW Mental Health Commission recommended that clinical advice be sought from relevant clinical experts in mental health, and further submitted that the Commissioner should also receive advice on clinical care from 'people with a lived experience of mental illness who are accessing Commonwealth funded-services and/or aged care mental health peer workers and/or lived experience researchers or academics.'⁵⁵ The Older Persons Advocacy Network expressed concern that the bill does not explicitly include a role for the Chief Clinical Advisor in approving antipsychotic medications.⁵⁶

2.42 The Department provided evidence on the way in which clinical advice will be sought by the Commission, which will include both internal and external expert advice. The Department told the committee that details on the expert clinical panel are not enshrined in the legislation, as it is intended to be established with the input of the Chief Clinical Advisor once the Commission is established. The intention of the Department is that the panel will consist of a number of people with different areas of expertise, such as pressure injuries, gerontology or incontinence, who can be called upon as required.⁵⁷

2.43 Further to the expert clinical panel, a number of clinical experts will be employed by the Commission, or kept on retainer, who will be responsible for providing immediate internal clinical advice specific to issues that arise.⁵⁸

2.44 The Australian Medical Association told the committee that this approach is similar to other parts of the health system and works well.⁵⁹

Clinical governance

2.45 In discussing issues beyond the initial scope of the Commission bill, a number of witnesses and submitters raised the role of the Chief Clinical Advisor and the expert clinical panel could have in improving standards of clinical governance from aged care services providers.

2.46 The Australian Medical Association noted that the:

...clinical care accreditation standard was the single highest outcome not met by residential aged-care facilities in 2016-17, followed by the

54 Dr Nicole Brooke, Member, Australian Association of Gerontology, *Committee Hansard*, 10 October 2018, p. 29.

55 NSW Mental Health Commission, *Submission 15*, p. 4.

56 Older Persons Advocacy Network, *Submission 8*, p. 3.

57 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 47.

58 Dr Lisa Studdert and Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 47.

59 Dr Richard Kidd, Australian Medical Association, *Committee Hansard*, 10 October 2018, p. 26.

medication management standard. This shows that aged-care staff find it difficult to understand or are unable to carry out what is expected of them, in terms of clinical care.⁶⁰

2.47 The Australian Association of Gerontology noted that while the new Aged Care Standards include a requirement for organisations to demonstrate they have a clinical governance framework where clinical care is provided, some aged care services are subject to other types of clinical governance frameworks relating to health, disability or community services. The Australian Association of Gerontology recommended the functions of the Commissioner should include developing a clinical governance framework for aged care that aligns with other relevant clinical governance frameworks.⁶¹ The Salvation Army made a similar recommendation on a future role for the Commission in taking a leadership role in developing clinical governance frameworks,⁶² as did COTA Australia.⁶³

Consumer engagement

2.48 The Commission bill explicitly outlines the consumer engagement functions of the Commissioner as being to advance ways and means to protect the safety, health, well-being and quality of life of aged care consumers. The Commission bill outlines that this is to be achieved by developing and promoting best practice models that are made in consultation with consumers and aged care industry leaders, which will then be promoted for use by service providers of aged care.⁶⁴

2.49 COTA Australia submitted that the definition of aged care consumer in section 17, which outlines the consumer engagement functions of the Commissioner, does not make reference to representatives or other roles, such as informal family and friend carers. COTA Australia recommended the Commission bill should explicitly include care recipients' representatives.⁶⁵

2.50 The Older Persons Advocacy Network concurred with this view and recommended the definitions section of the Commission bill be amended to include 'representative of aged care consumer' and that National Aged Care Advocacy Program advocates are included in this definition.⁶⁶ Leading Age Services Australia also noted the need to include reference to legal representatives of aged care consumers within the Commission bill.⁶⁷

60 Dr Richard Kidd, Australian Medical Association, *Committee Hansard*, 10 October 2018, p. 26.

61 Australian Association of Gerontology, *Submission 9*, pp. 3–4.

62 Salvation Army, *Submission 17*, pp. 3–4.

63 Mr Ian Yates, COTA Australia, *Committee Hansard*, 10 October 2018, p. 15.

64 Commission bill EM, p. 8.

65 COTA Australia, *Submission 7*, pp. 6–7.

66 Older Persons Advocacy Network, *Submission 8*, p. 3.

67 Leading Age Services Australia, *Submission 11*, p. 3.

2.51 The Department responded that it considers engagement with consumer representatives as one of the functions of the Commissioner.⁶⁸

2.52 FECCA raised concerns that the consumer engagement functions outlined in the Commission bill do not explicitly mention engagement with CALD communities and submitted that 'CALD Australians are often left out of the consultation processes because they are frequently perceived as hard to engage with, as they may require interpreting, or may prefer to engage with bilingual workers'.⁶⁹

2.53 Aged and Community Services Australia submitted the Commission bill does not reflect the level of engagement required with aged care providers whom the Commission will accredit and investigate when complaints are made and further submitted that '[p]romoting engagement with aged care consumers and not providers has the potential to distort the regulatory framework'.⁷⁰

2.54 The Department responded that engagement with aged care providers and health professionals falls under the Commission's functions as part of its responsibility to ensure the quality and safety of aged care services for consumers.⁷¹

Complaints handling

2.55 The Complaints Commissioner's current functions for the management of complaints will transfer to the new Commissioner. Many of the functions of the Complaints Commissioner are detailed in rules made under section 96-1 of the *Aged Care Act 1997* which will transfer to rules made under the *Aged Care Quality and Safety Commission Act 2018* (once enacted).

2.56 Clause 18 of the Commission bill provides that the complaints functions of the Commissioner are to, in accordance with the rules, deal with complaints and information related to:

- an approved provider's responsibilities under the *Aged Care Act 1997* or the Aged Care Principles; and
- the responsibilities of a service provider of a Commonwealth-funded aged care service under the funding agreement that relates to the service.⁷²

2.57 The Queensland Nurses and Midwives' Union suggested that clause 18 could be reworded from 'dealing with' complaints to 'investigate' complaints, submitting that investigation is different from 'dealing with' a complaint and should be a standard function of the Commission.⁷³

68 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 49.

69 FECCA, *Submission 26*, p. 2.

70 Aged and Community Services Australia, *Submission 13*, p. 3.

71 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 49.

72 Commission bill EM, p. 8.

73 Queensland Nurses and Midwives' Union, *Submission 5*, p. 5.

2.58 In contrast, Leading Age Services Australia (LASA) recommended that a distinct aged care complaints service should be maintained within the new Commission:

LASA believes that separating Complaints from Regulation would support a speedier complaints resolution process because it will be less mired in the deep investigative approach taken to regulative issues.⁷⁴

2.59 However, the Complaints Commissioner told the committee that the current complaints process requires significant referrals to the Department and the Quality Agency, and that having all of the functions within one commission would be a 'much more streamlined and better process'. Ms Rae Lamb described that:

Many complaints that come to [the Complaints Commissioner] now are resolved quickly and relatively informally, and they're often closed on the basis of complainant satisfaction. With compliance coming in, the new commission will have a bigger stick once it's fully complete—and that's good—but I wanted to emphasise the need, as is proposed, to keep the focus on resolution as well as regulation and enforcement within the new commission.⁷⁵

2.60 Some witnesses and submitters have raised the topic of human rights and consumer rights in relation to complaints handling.

2.61 The Older Persons Older Persons Legal Services Network explained that the mechanisms by which the rights of those in aged care are protected don't appear in any one place, but across a suite of legislation, and that this may be leading to failures in protecting the rights of people and in people making complaints. The organisation recommended that there should be a view to bring the rights of older persons in aged care into a single framework.⁷⁶

2.62 The Department of Health told the committee that development is currently underway for a new single Charter of Aged Care Rights, with the five-week public consultation period closing on 10 October 2018.⁷⁷

Education functions

2.63 The Commission bill brings together the education functions of the Quality Agency and Complaints Commissioner, which include providing information and education on aged care services matters relating to the Commission's functions, such as community engagement, complaints handling and the delivery of quality care and services, among others.⁷⁸

74 Leading Age Services Australia, *Submission 11*, p. 5.

75 Ms Rae Lamb, Aged Care Complaints Commissioner, *Committee Hansard*, 10 October 2018, p. 44.

76 Mr William Mitchell, Older Persons Legal Services Network, National Association of Community Legal Centres, *Committee Hansard*, 10 October 2018, p. 4.

77 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 54.

78 Commission bill EM, p. 9.

2.64 National Seniors Australia told the committee a recent survey conducted by their organisation found 60 per cent of older Australians had never heard of the Complaints Commissioner and 65 per cent felt they had no options to complain. The organisation noted 'older Australians lack the knowledge, skill and motivation to access aged-care services, including where to lodge complaints' and that more education is needed 'before the act will work'.⁷⁹

2.65 The Complaints Commissioner submitted the new Commission will have 'broader opportunities to combine and use data and other information to educate people, including consumers and providers, in the pursuit of quality aged care'.⁸⁰

2.66 Discussion in submissions of the new Commission's education functions was limited. Leading Age Services Australia supported identifying specific education topics in the bill such as accreditation, best practice, drivers of consumer focus and continuous quality improvement.⁸¹ The Salvation Army submitted the Commissioner should also be responsible for educating the aged care workforce to ensure consistency of training and improved delivery of care and clinical governance.⁸²

2.67 The Department informed the committee that the education functions of the Commission include educating service providers and 'under the Aged Care Act, providers are obligated to ensure that their staff are adequately trained'.⁸³ The Quality Agency explained that despite it not being one of its explicit responsibilities, it trains the workforce through its education of service providers.⁸⁴ The Complaints Commissioner added that it interpreted its function of educating 'people' as including the workforce.⁸⁵

2.68 Aged and Community Services Australia and Leading Age Services Australia submitted that they expected the current education of the aged care workforce conducted by the Quality Agency and the Complaints Commissioner would continue under the new Commission.⁸⁶

79 Professor John McCallum, Chief Executive Officer, National Seniors Australia, *Committee Hansard*, 10 October 2018, p. 11.

80 Aged Care Complaints Commissioner, *Submission 3*, p. 1.

81 Leading Age Services Australia, *Submission 11*, p. 5.

82 Salvation Army, *Submission 17*, p. 3.

83 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 56.

84 Ms Christina Bolger, Executive Director, Regulatory Policy and Performance, Australian Aged Care Quality Agency, *Committee Hansard*, 10 October 2018, p. 57; Mr Nicholas Ryan, Chief Executive Officer, Australian Aged Care Quality Agency, *Committee Hansard*, 10 October 2018, p. 57.

85 Ms Rae Lamb, Aged Care Complaints Commissioner, *Committee Hansard*, 10 October 2018, p. 57.

86 Aged and Community Services Australia, answers to questions on notice, 10 October 2018 (received 11 October 2018); Leading Age Services Australia, answers to questions on notice, 10 October 2018 (received 11 October 2018).

Regulatory functions

2.69 The regulatory functions of the Quality Agency are set out in the *Australian Aged Care Quality Agency Act 2013* and these functions are to accredit, review and monitor aged care services. These functions will be transferred to the Commission, and will operate in the same way.⁸⁷

2.70 One notable change is that the current Accreditation Standards have been amended by the *Aged Care (Single Quality Framework) Reform Bill 2018*, which replaced the Accreditation Standards, the Home Care Standards and Flexible Care Standards with a single set of quality standards to be called the Aged Care Quality Standards. This amendment will commence on 1 July 2019 and, following its commencement, the Commission would become responsible for accrediting, reviewing and monitoring services under the new Aged Care Quality Standards.⁸⁸

2.71 The Commission will also assume the responsibility for conducting quality reviews of home care services, Commonwealth-funded aged care services and any other kind of service specified in the rules. The Commissioner will also be responsible for monitoring the services that have been accredited or have undergone a quality review.⁸⁹

2.72 Issues relating to the Commission's regulatory functions were not raised as a concern by submitters and witnesses during the inquiry, except for the skill level of quality assessors, discussed below.

Quality Assessors

2.73 The Commissioner will be responsible for registering quality assessors of aged care services, who will assess approved providers against the rules.

2.74 One area for potential improvement raised by witnesses was assessors' skill level. The Australian Association of Gerontology stated that they sometimes question whether assessors have the skills and knowledge to determine whether a facility is providing appropriate care to patients.⁹⁰ The Australian Medical Association agreed and added 'you really need clinicians who are experienced in this area as part of that team'.⁹¹

2.75 The Queensland Nurses and Midwives' Union submitted that 'assessment, mentoring and review of any form of care cannot be properly undertaken unless the person performing those functions is experienced and competent in providing that care'. The Queensland Nurses and Midwives' Union recommended that the assessment

87 Commission bill EM, p. 8.

88 Commission bill EM, p. 9.

89 Commission bill EM, p. 9.

90 Dr Nicole Brooke, Australian Association of Gerontology, *Committee Hansard*, 10 October 2018, p. 29.

91 Dr Richard Kidd, Australian Medical Association, *Committee Hansard*, 10 October 2018, p. 30.

of nursing or personal care should be conducted by quality assessors who are expert in nursing care of the elderly.⁹²

2.76 The Community and Public Sector Union (CPSU) made a similar recommendation that all staff assessing residential aged care should be registered to do so, and further recommended the creation of a role for a Registrar.⁹³

Information protection, disclosure and privacy

2.77 The Commission bill establishes the information that must be shared by the Commissioner and Secretary of the Department for the purposes of their functions or powers, the information the Commissioner may make publicly available, and measures for the protection, use and disclosure of such information.⁹⁴

2.78 The Complaints Commissioner submitted that timely information sharing between the Commission and the Department regarding their complaints, quality and compliance functions is essential to ensure appropriate action is taken where care fails.⁹⁵

Publishing information

2.79 Clause 59 sets out the type of information regarding aged care services the Commissioner may make public: for example, the information in relation to an approved provider's accreditation status, in addition to any failure by approved providers to meet the standards.⁹⁶

2.80 The Complaints Commissioner welcomed the new Commission's capacity to make certain information publicly available, including information about provider performance, as this would provide 'greater opportunities for transparency in the quality of care that is delivered'.⁹⁷ The Complaints Commissioner informed the committee that the bill grants more discretion for the new Commissioner to release information than the Complaints Commissioner currently possesses.⁹⁸

2.81 Dementia Australia also commended the introduction of public reporting of this kind of information, as it will provide decision-making support for consumers choosing aged care settings.⁹⁹

92 Queensland Nurses and Midwives' Union, *Submission 5*, p. 5.

93 CPSU, *Submission 25*, p. 2.

94 Commission bill EM, p. 19.

95 Aged Care Complaints Commissioner, *Submission 3*, p. 2.

96 Commission bill EM, p. 20.

97 Aged Care Complaints Commissioner, *Submission 3*, p. 1.

98 Ms Rae Lamb, Aged Care Complaints Commissioner, *Committee Hansard*, 10 October 2018, p. 44.

99 Mr Nigel McPaul, General Manager, Service Quality, Dementia Australia, *Committee Hansard*, 10 October 2018, p. 12.

2.82 Dr Anna Howe told the committee that 'there is a risk of going overboard with more data and less information' and noted the type of information shared should be able to be used to identify and investigate 'patterns of quality' in aged care facilities.¹⁰⁰

2.83 Some submitters recommended amendments to clause 59 to further increase transparency:

- The NSW Nurses and Midwives' Association argued that the clause should be amended to state information *should* be made publicly available, with an opt-out clause where this might not be in the public interest, arguing that this would increase transparency and raise consumer confidence.¹⁰¹
- QACAG submitted that the publishing of aged care facility accreditation and assessment information should be expanded to include information such as staffing models, staffing ratios and skills mix, clinical outcomes including use of anti-psychotics and pressure sores, and the arrangements for provision of clinical governance at the facility.¹⁰²

Disclosing information

2.84 Clause 61 sets out a number of situations where a disclosure of protected information by the Commissioner is authorised and provides that the Commissioner may determine, in writing, that it is necessary in the public interest to disclose the information in a particular case.¹⁰³

2.85 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny committee) noted that this clause grants the Commissioner broad discretion to disclose protected information, which may include sensitive personal information, by determination.¹⁰⁴

2.86 However, the explanatory memorandum notes that the Commissioner must have the ability to disclose protected information swiftly when an aged care consumer's safety, health or well-being is or may be at risk, and that this provision is in place to allow action to be taken immediately when required.¹⁰⁵

2.87 The Office of the Public Advocate Victoria recommended in its submission that 'disclosure of information where that information is relevant to adult protection bodies in states and territories, such as tribunals or courts appointing guardians and administrators' should be specifically mentioned in this clause.¹⁰⁶

100 Dr Anna Howe, Consultant Gerontologist, *Committee Hansard*, 10 October 2018, p. 22.

101 NSW Nurses and Midwives' Association, *Submission 2*, p. 7.

102 QACAG, *Submission 1*, p. 4. A similar recommendation was made by the Queensland Nurses and Midwives' Union, *Submission 5*, p. 6.

103 Commission bill EM, p. 21.

104 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, pp. 4–6.

105 Commission bill EM, p. 21.

106 Office of the Public Advocate Victoria, *Submission 24*, p. 2.

2.88 The Australian Health Practitioner Regulation Agency (AHPRA) submitted that the power in clause 61(1)(f) for the Commissioner to disclose protected information to a body responsible for the standards of conduct in the profession (such as a National Board of a health profession) would support the timely referral of matters regarding registered health practitioners to AHPRA and National Boards. AHPRA further submitted that similar powers under clause 61(1)(h) may potentially assist the functions of AHPRA with respect to the investigation and prosecution of offences under the *Health Practitioner Regulation National Law*.¹⁰⁷

2.89 The Department of Health also noted that powers in clause 61 would allow the Commission to disclose protected information to law enforcement, if that information relates to a criminal matter.¹⁰⁸ An example is provided in the explanatory memorandum:

[An] alleged assault is uncovered in the course of a complaint investigation. The organisation best placed to deal with this is the police force in the particular State or Territory. The Commissioner may disclose protected information to the police under Clause 61(1)(h).¹⁰⁹

2.90 The Department of Health further clarified that staff of aged care services would not be prevented from disclosing protected information, as defined in the bill, to the Commission under whistleblower provisions in the *Aged Care Act 1997*.¹¹⁰

Delegated legislation

2.91 The Scrutiny committee commented that significant aspects of the regulatory functions of the Commission, such as accreditation, quality reviews and complaint management, are to be set in rules and are not included in the primary legislation.¹¹¹

2.92 The rules may make provisions that allow for the Commissioner to do what may be required in order to perform their functions. This may include formation of a system for complaints and detail of how complaints are to be received, managed and resolved, what can be done to achieve this, and the actions that may be taken by the Commissioner, including referral of complaints to more appropriate bodies.¹¹²

2.93 While acknowledging the desire to provide the Commissioner with flexibility, the Scrutiny committee considered that significant matters such as complaints and regulatory functions should be included in the primary legislation. It stated that the

107 Australian Health Practitioner Regulation Agency, *Submission 18*, p. 1.

108 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 52.

109 Commission bill EM, p. 21.

110 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 52.

111 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, pp. 3–4.

112 Commission bill EM, p. 9.

primary legislation should at least set out some high-level requirements relating to these functions.¹¹³

2.94 It is notable that submitters and witnesses did not express concerns with the use of rules. COTA Australia told the committee it was confident appropriate rules would be drafted¹¹⁴ and the Australian Medical Association noted that the use of delegated legislation for items such as the Chief Clinical Advisor role would deliver appropriate levels of flexibility.¹¹⁵

Review rights

2.95 Review rights are intended to be outlined within rules which will maintain a process of review where a complainant or provider does not agree with the decision made by the Commissioner in relation to their complaints functions.¹¹⁶

2.96 The Scrutiny committee supported including the review rights in primary legislation. It added that the Commission bill's explanatory memorandum does not set out the type of review rights that will be available for complainants and providers. If these matters are to be provided for in delegated legislation, the Scrutiny committee considered that they should be provided for in regulations rather than in rules.¹¹⁷

2.97 The Older Persons Advocacy Network also noted it has dealt with consumer concerns about investigations into aged care services and 'at this stage, this bill is mute about the role of advocacy in supporting someone in raising their complaint back to the system'.¹¹⁸

2.98 Leading Age Services Australia submitted that there should be an external and independent body of review for aged care providers where there are complaint or accreditation issues disputed by the aged care provider. Leading Age Services Australia argued this may strengthen the regulatory functions of the Commission 'because assessors may be more confident to make tough assessments if they know that providers can access an external and independent process of review'.¹¹⁹

2.99 The Quality Agency noted that complainants currently may request reconsideration of a decision, and if unsatisfied, may escalate their complaint to the

113 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, p. 2.

114 Mr Ian Yates, COTA Australia, *Committee Hansard*, 10 October 2018, p. 18.

115 Australian Medical Association, *Submission 10*, p. 3.

116 Commission bill EM, p. 10.

117 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, p. 2.

118 Mr Craig Gear, Chief Executive Officer, Older Persons Advocacy Network, *Committee Hansard*, 10 October 2018, p. 9.

119 Leading Age Services Australia, *Submission 11*, p. 5.

Administrative Appeals Tribunal. This process will continue with the new Commission.¹²⁰

Annual reports

2.100 The Commission bill provides that the annual report prepared by the Commissioner under section 46 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) must also include:

- an assessment of the extent to which the Commission's operations during the year have contributed to the objectives set out in the corporate plan and the priorities set out in the annual operational plan;
- particulars of variations (if any) of the corporate plan and the annual operational plan taking effect during the year; and
- an evaluation of the Commission's overall performance during the year against the performance indicators set out in the annual operational plan.¹²¹

2.101 COTA Australia submitted the Commission bill does not require the Commissioner to report annually on all the Commission's functions, and expressed concern with future reporting of the consumer engagement and consumer education functions of the Commission.¹²²

2.102 However, the Department explained that, under the PGPA Act, an entity's annual report is required to include a report on the performance in achieving its purposes and that 'purposes' is a defined term which includes the function of the entity:

Therefore the commission will be required to report on all of its functions, including the new consumer functions, as part of its annual reporting.¹²³

Entry and search powers

2.103 Part 8 of the Commission bill outlines the powers of authorised complaints officers and regulatory officials to enter premises with consent of the occupier and exercise their search powers in relation to premises.¹²⁴

2.104 The Department explained in its submission that these powers were previously dealt with administratively and in the relevant principles under the *Australian Aged Care Quality Agency Act 2013* and *Aged Care Act 1997*, but are now included in the primary legislation.¹²⁵

120 Ms Christina Bolger, Australian Aged Care Quality Agency, *Committee Hansard*, 10 October 2018, p. 58.

121 Commission bill EM, p. 17.

122 COTA Australia, *Submission 7*, p. 11.

123 Ms Amy Laffan, Department of Health, *Committee Hansard*, 10 October 2018, p. 55.

124 Commission bill EM, p. 22.

125 Department of Health, *Submission 12*, p. 9.

2.105 The Queensland Nurses and Midwives Union submitted the Commission bill should go further, and should provide authorised officers with greater powers to enter premises for the purposes of inspection.¹²⁶

2.106 The CPSU recommended the Commission bill be amended so that providers are restricted to specific reasons in denying consent for Commission staff to enter the premises, such as the outbreak of contagious illness at the identified facility.¹²⁷

2.107 COTA Australia expressed concern that an aged care facility may refuse entry to an authorised complaints officer seeking to meet with a consumer about a complaint they have made, and that the right to refuse entry could extend to the residential premises of a care recipient which is occupied by a service provider. COTA Australia recommended the Commission bill be amended to ensure providers are not be able to prevent access to residents or consumers by refusing consent for authorised officers to enter the premises.¹²⁸

2.108 The Complaints Commissioner noted that the entry and search arrangements 'are not new to aged care providers and all providers should be aware of their existing responsibility to cooperate with authorised complaints officers as well as other regulatory officials'.¹²⁹

2.109 Aged and Community Services Australia also expressed concern that the Commission bill authorises complaints officers and regulatory officials to take photos or videos while on the premises of an aged care facility, but does not explicitly require consent from any person who, or whose property, may be filmed.¹³⁰ However Aged and Community Services Australia's Chief Executive Officer, Ms Pat Sparrow, told the committee that issues such as consent for images may be able to be dealt with in regulations and that this should not prevent passage of the legislation.¹³¹

Entry by advocates

2.110 The Office of the Public Advocate Victoria raised concerns that the entry and search powers in the Commission Bill are only being triggered by a complaint or information, which does not take into account that '[m]any frail elderly people lack agency to make complaints or provide information to the Commissioner in order to trigger an investigation', and further expressed disappointment that the legislation does not include the establishment of a Community Visitor or Public Advocate program.¹³²

126 Queensland Nurses and Midwives' Union, *Submission 5*, p. 6.

127 CPSU, *Submission 25*, p. 2.

128 COTA Australia, *Submission 7*, p. 15.

129 Aged Care Complaints Commissioner, *Submission 3*, p. 2.

130 ACSA, *Submission 13*, p. 4.

131 Ms Pat Sparrow, Aged and Community Services Australia, *Committee Hansard*, 10 October 2018, p. 36. See also: Mr Ian Yates, COTA Australia, *Committee Hansard*, 10 October 2018, p. 13.

132 Office of the Public Advocate Victoria, *Submission 24*, p. 2.

2.111 The Older Persons Advocacy Network noted that advocates' access to aged care facilities is covered by the *Aged Care Act 1997*, but is not specifically included in the Commission Bill.¹³³

2.112 The Older Persons Advocacy Network notes that because the Commission Bill does not include advocate access specifically:

There is a risk that the specification of authorising entry of the commissioner to only a complaint officer or a regulatory officer may lead to confusion as to the right of access to support individual advocacy and information to aged-care recipients.¹³⁴

2.113 For this reason, the Older Persons Advocacy Network recommends consideration of extending entry and search powers to allow the Commissioner to appoint additional classes of authorised officers, including appointing a person as an authorised consumer representative if they are an advocate, and to specify that an authorised consumer representative may perform duties in line with the *Aged Care Act 1997*.¹³⁵

Committee view

2.114 The committee strongly agrees with the clear consensus from witnesses and submitters to this inquiry that the establishment of the new Commission is a positive step forward in protecting the rights of older Australians receiving aged care services in their homes, or within aged care residential facilities.

2.115 This inquiry received recommendations from representatives of aged care recipients, advocacy and rights organisations, workforce representatives, medical experts and providers of aged care services, that the objects and functions of the Commission could be expanded beyond the current proposal to merge the existing functions of the Quality Agency and Complaints Commissioner. The committee acknowledges that some of these recommendations would require legislative consideration, while others could be incorporated into the work of the Commission once established.

2.116 The committee believes that these recommendations show a desire from all people with an interest in the aged care sector for continued improvement and oversight of aged care service delivery, as well as an endorsement that the new Commission is seen as the appropriate entity to show leadership in the Australian Government's continuing reform agenda to improve aged care services and regulation.

2.117 The committee agrees with the consensus view expressed to this inquiry that these recommendations for expanded functions should not delay the establishment and commencement of the Commission, proposed to begin from 1 January 2019.

133 Mr Craig Gear, Older Persons Advocacy Network, *Committee Hansard*, 10 October 2018, p. 2.

134 Mr Craig Gear, Older Persons Advocacy Network, *Committee Hansard*, 10 October 2018, p. 2.

135 Mr Craig Gear, Older Persons Advocacy Network, answers to questions on notice, 10 October 2018 (received 11 October 2018), pp. 2–3.

2.118 The committee also acknowledges evidence from the Department indicating the intention to undertake consultations on the second round of legislative reforms required for the transfer of departmental functions to the Commission, and that this will include consultation of opportunities for enhancements of the Commission.

Recommendation 1

2.119 The committee recommends these bills be passed.

Senator Lucy Gichuhi

Chair