Additional Comments by the Australian Greens

1.1 The Australian Greens broadly support the Aged Care Quality and Safety Commission Bill 2018 (Commission Bill) and Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018 (Consequential Bill), however, we consider some amendments are required.

1.2 The Commission Bill establishes the new, independent Aged Care Quality and Safety Commission (Commission), as announced in the 2018–19 Budget following the recommendation of the Carnell Paterson review. The Commission will initially bring together the functions of the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner.

1.3 There is to be a Commissioner appointed by the Minister to lead the Commission. The Commission Bill sets out the various functions of the Commissioner, including the consumer engagement functions, complaints functions, regulatory functions and education functions.

1.4 From 1 January 2020, the aged care regulatory functions of the Department of Health (Department), including the approval of aged care providers, compliance and compulsory reporting of assaults, will also transition to the Commission. A separate bill will be needed to transfer the regulatory functions from the Department and the Australian Greens understand that this bill is anticipated to be introduced and debated sometime during 2019.

1.5 The establishment of the Commission will allow a more holistic approach and better oversight of the aged care sector as a whole, where information will flow more readily and easily throughout the Commission, allowing better identification of where the risks are and for these to inform decision-making, rather than being siloed within the various agencies and the Department. This will allow better analysis of the data each agency is currently collecting and assist in working out why there are certain trends and help drive quality improvement.

1.6 We would like to a see a number of amendments to the Commission Bill to strengthen it before it passes. Given recent events that have played out in the media, it is incredibly important we get the Commission Bill right so that older Australians, providers and the public have confidence in the aged care sector and are clear on the purpose and the role of the Commission and there are fewer grey areas than what currently exist.

1.7 Our concerns about the Commission Bill relate to the exclusion of the Chief Clinical Advisor's role and the undefined scope of this position, the Commission not being a single point of contact as indicated, the lack of reference to the human rights of older Australians, the lack of reference to representatives of older Australians and access for these representatives, the scope of the Commissioner's consumer engagement and education functions, the lack of reference to Commonwealth-funded aged care services in section 59 and the lack of a review provision. There is also a need for clarity regarding what will be included in the next bill due next year.

1.8 This report outlines a number of the issues we have with the Commission Bill, but we acknowledge this report does not address all suggested recommendations and additions made throughout the inquiry.

Chief Clinical Advisor role

1.9 The Second Reading Speech for the Commission Bill refers to the Commissioner's specific function relating to:

> …seeking and receiving clinical advice in relation to the functions of the Commissioner, which is envisaged to occur through, the engagement of a Chief Clinical Advisor, with an Expert Clinical Panel to be established to support the role of the Chief Clinical Advisor.[1]

1.10 The Australian Greens welcome this reference to a Chief Clinical Advisor, but we are concerned that the role is not set out in the Commission Bill and is therefore not a statutory office.

1.11 During the hearing for the inquiry, a number of witnesses expressed their support, or their lack of objection, for this role to be set out in the Commission Bill and to be a statutory office.

1.12 Mr Toy, Director, Medical Practice Section, Australian Medical Association, said:

> I think we've made it fairly clear in our submission that it should be a mandatory position—absolutely. I think earlier iterations of our thinking were along the lines of the clinical adviser being potentially called a commissioner or a deputy commissioner, with our intent there being that this is an absolute must for the commission. How that gets enacted, I guess we'd leave up to the department and the parliament. But, for us, it's an absolute must, yes.[2]

1.13 Mr Richter, Chief Executive Officer, Aged Care Guild, said:

> In terms of whether the role is statutory, much like Pat, I don't have a strong view. But, if you look at chief psychiatrist-type roles around the states and territories, they are generally statutory, and there's a reason for that. So I think it should be something that's considered from a perspective of whether it helps or hinders the role—and it probably helps it and gives it authority. That's just a general view.[3]

1.14 While the Second Reading Speech makes reference to flexibility as a reason for a single statutory office,[4] that of the Commissioner, the Australian Greens cannot envisage a time when the Chief Clinical Advisor's position will not be needed and are

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1 The Hon. Ken Wyatt AM, MP, Minister for Senior Australians and Aged Care, *House of Representatives Hansard*, 12 September 2018, p. 9.

2 *Proof Committee Hansard*, p. 29.

3 *Proof Committee Hansard*, p. 40.

4 The Hon. Ken Wyatt AM, MP, Minister for Senior Australians and Aged Care, *House of Representatives Hansard*, 12 September 2018, p. 8.

of the view that the requirement for certainty for the position into the future outweighs the need for flexibility. The role should be explicitly included in the Commission Bill.

1.15 With regards to the Expert Clinical Panel referenced in the Second Reading Speech, the Australian Greens are of the view that it needs to be made up of a range of different clinical experts so that the Chief Clinical Advisor can draw on their expertise as required. We will continue to ask questions of the Government during the debate on this Bill regarding this Expert Clinical Panel to ensure that it is established and that it meets the needs of the Chief Clinical Advisor and the Commission more broadly.

Scope of the Chief Clinical Advisor role

1.16 The Australian Greens want to see the Chief Clinical Advisor's role given responsibility for oversight and monitoring of physical and chemical restraints and medication management. Both of these areas came up repeatedly during the hearing of the inquiry.

1.17 Mr Richter, Chief Executive Officer, Aged Care Guild, said:

> In terms of restraint, I think they do have a role here and we need to work out what it is. You are both saying things which are absolutely correct. In prescribing you should be considering the ambient environment that the individual is in. We know that doesn't always happen. So we clearly need an additional layer of something there to help with that. It's not just an aged-care thing; this is a health thing across the country. Prescription happens inappropriate all the time in communities as well as in hospitals. So that is something that we have to remember. If this role a can help that and help educate, then I think that's important.[5]

1.18 Mr Mitchell, Older Persons Legal Services Network, National Association of Community Legal Centres, said:

> We don't have an understanding of restrictive practices, because we don't collect information about them. Until we collect information about them, we don't even really know what it is we're regulating, because we don't know what the unregulated landscape looks like.[6]

1.19 Mr Gear, Chief Executive Officer, Older Persons Advocacy Network, said:

> Pointing to some mechanism where the clinical adviser's role could be further unpacked may be a way to start to determine what that role's scope is and its ability to look at or monitor some of these issues.[7]

1.20 Dr Brooke, Member, Australian Association of Gerontology, said:

> However, evidence and evidence based practice to support that needs to be improved. The bill should require the commission to provide leadership in this area—not just a function of it, but leadership—and open disclosure goes to that, as well as looking at resources. If you look at the resources that

5 *Proof Committee Hansard,* p. 40.

6 *Proof Committee Hansard,* p. 9.

7 *Proof Committee Hansard,* p. 9.

> are available in community care and residential care, many of those resources have not been reviewed in more than 15 to 20 years, including medication management, palliative care—you name it. It's very hard to stay contemporary if there's not leadership from the commission.[8]

1.21 Dr Kidd, Chair, Australian Medical Association Council of General Practice, said:

> Many of the cases of abuse and neglect in aged-care settings involve inadequate clinical care. The clinical care accreditation standard was the single highest outcome not met by residential aged-care facilities in 2016-17, followed by the 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. This must be improved to ensure older people receive high-quality care. The clinical adviser to the commission…needs to have real power to direct outcomes and be properly resourced.[9]

1.22 In relation to restrictive practices, the Carnell Paterson review recommended the Commission have oversight of the use of restrictive practices in residential aged care. While the Carnell Paterson review also recommended the Chief Clinical Advisor have responsibility for approving the use of antipsychotic medications, the Australian Greens would be satisfied with the Chief Clinical Adviser having oversight and monitoring responsibilities for restrictive practices and medication management in the first instance. This is incredibly important; we need to ensure that there is someone responsible for ensuring that restrictive practices are used only as a last resort and in the least restrictive way as well as someone advocating and pursuing the elimination of their use. Medication management is also desperately in need of oversight.

Not a single point of contact

1.23 The Second Reading Speech for the Commission Bill refers to the Commission as 'a single point of contact' for older Australians and their families with regards to concerns and queries about their aged care.[10]

1.24 Unfortunately, the Commission will not actually be a 'single point of contact' as the Commission will be unable to receive complaints about My Aged Care or the assessment processes. This seems counterintuitive.

1.25 As Mr Yates, Chief Executive, COTA Australia, said:

> There are complaints processes that apply there but, if this is supposed to be a one-stop shop, the consumer will find it confusing if there are different places to go to and complain.[11]

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8 *Proof Committee Hansard*, p. 24.

9 *Proof Committee Hansard*, p. 26.

10 The Hon. Ken Wyatt AM, MP, Minister for Senior Australians and Aged Care, *House of Representatives Hansard*, 12 September 2018, p. 8.

11 *Proof Committee Hansard*, p. 10.

1.26 In COTA Australia's submission it says:

> Feedback received by COTA from consumers of aged care services starts with their interactions with My Aged Care and its subsequent assessment processes Consumers do not always know who employs the workers from Aged Care Assessment Teams and Regional Assessment Services – in consumers' minds they are part of the aged care 'system' and assessment is an essential and determinative component of accessing service delivery. Government communications to consumers and prospective consumers refer to the processes of assessment and determination of eligibility as part of the suite and continuum of aged care services.[12]

1.27 The Government should not be separating the processes of assessment and determination of eligibility from the service delivery – this is illogical as they are entwined with one another. The Commission's complaints function should be broadened to allow older Australians and their families to lodge complaints about their experiences with My Aged Care and the assessment teams with the Commission.

Human rights

1.28 Mr Mitchell, Older Persons Legal Services Network, National Association of Community Legal Centres, made an opening statement to the inquiry outlining his concerns regarding the Commission Bill's focus on consumer rights, rather than human rights. He acknowledged that the Department are currently consulting on a single charter of rights for aged care,[13] but said:

> The national association notes that the bills engage older Australians from the perspective of consumers and build a guarantee of a quality base within the frame of consumer rights. The various incidents, inquiries, reports and reviews that have led us to this point in time have been very clearly about the human rights of older persons. The national association respectfully submits that the framing of rights expectations for older persons within the regulatory framework of aged care should be on the basis of inherent human rights, acknowledging the interdependence and interconnectedness of those rights.[14]

1.29 Later in the hearing, he said:

> You could, in fact, make clause 18 of the bill clearer—that, in fact, the complaints functions of the commissioner are about resolving complaints about rights. At this stage, the form of the bill is that it's really talking about complaints functions in respect of responsibilities of the provider. Even it isn't framed in such a way as to be clear that the complaints functions are about the rights of older persons. Without having any time, unfortunately, to spend time looking at the words and the text, the absence of a clear rights base within clause 18 is of some concern. Again, it reduces the spirit of this bill to an accreditation focus, when it should include a rights focus as well.

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12 COTA Australia, *Submission 7*, p. 7.

13 *Proof Committee Hansard*, p. 2.

14 *Proof Committee Hansard*, p. 3.

> We are not saying the accreditation focus is not important—it's very important—but that's only one side of the coin. The other side of the coin is the right that older Australians have to have standing and agency to make their own complaints about the rights that they say have been infringed.[15]

1.30 The Australian Greens believe there should be reference made to the rights of older Australians in the Commission Bill.

Representatives of older Australians

1.31 As the Older Persons Advocacy Network (OPAN), who are funded by the Government to deliver the National Aged Care Advocacy Program (NACAP), says in its submission:

> It is important that the role of the NACAP be acknowledged as important, but independent, element of the overall Aged Care Quality and Complaints system. As the provider of NACAP OPAN recommends the NACAPs ongoing interactions with the Commission be formalised.[16]

1.32 OPAN propose having 'representative of aged care consumer' added to the definitions section of the Commission Bill and giving the Commissioner the power to determine additional classes of 'authorised officers' who may enter premises with consent.[17]

1.33 The phrase 'representative of aged care consumers' is used in section 20 of the Commission Bill, but is not defined in the Commission Bill. We understand that the term 'representative' in regards to care recipients is defined in Quality of Care Principles 2014 and that the definition is carried over in the Quality of Care Amendment (Single Quality Framework) Principles 2018, with a change only in technical terminology.

1.34 In relation to access, OPAN say in their submission:

> There is a risk that the specification of authorising entry by the Commissioner to only a Complaint Officer and regulatory officers may lead to confusions as to the right of access to support individual advocacy and information to aged care recipients. While strongly supporting the need for OPAN and NACAP to remain independent of the [Commission], the lack of mention of NACAP and access to advocates risks disconnecting advocacy from the rest of the quality, safety and complaints system.[18]

1.35 Mr Westacott, representing a Service Delivery Organisation in the Older Persons Advocacy Network, said:

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15 *Proof Committee Hansard*, p. 7.

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

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

18 Older Persons Advocacy Network, *Submission 8*, p. 4.

> …in Seniors Rights Service experience in New South Wales, over the last two years we've been refused entry to aged-care facilities on 30 occasions.[19]

1.36 When asked why they were refused entry, he said:

> 'Too busy', 'Not a good time to see us'—they're all very vague. Or, 'We don't need you.' Sometimes it can be quite blunt: 'We don't need you here right now.' But the advocate is not allowed into the facility. Obviously that concerns us, because it means that we have limited capacity to go back and ensure that we get entry within 24 hours or whatever the time period might be. We go back and negotiate with the management of that facility, and it may be three months before we can get entry. It begs the question: what's happening?[20]

1.37 Mr Mitchell, Older Persons Legal Services Network, National Association of Community Legal Centres, said:

> Our own service here has, on occasion, had our lawyers seek to visit someone in a residential aged-care facility and has been refused the ability to enter on the basis that it was not convenient or, in fact, more recently, that the person lacked capacity to give us instructions, so why would we want to see them? In those cases, many times the person does, in fact, have capacity; they are simply having their legal capacity denied for no good reason. I do think the points that have been made by OPAN and Seniors Rights Service are important—that independent advocates and advisers can have contact with their clients and their persons of interest when they need to. If that's not clear in the bill, it is something that might need to be corrected.[21]

1.38 The Australian Greens want to ensure that advocates and other representatives are able to enter aged care services and Commonwealth-funded aged care services as appropriate. To ensure this, it may be appropriate to include a definition of 'representative of aged care consumer' in the Bill that aligns with the definition in the Quality of Care Amendment (Single Quality Framework) Principles 2018 and provide the Commissioner the power to determine additional classes of 'authorised officers' who may enter aged care services and Commonwealth-funded aged care services with consent.

Commissioner's functions

Consumer engagement functions

1.39 The consumer engagement functions of the Commissioner should include reference to representatives of consumers, including informal family and friend carers as well as more formal representatives in a similar vein to section 20 of the Commission Bill (Education Functions of the Commissioner). As COTA Australia says in its submission:

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19 *Proof Committee Hansard*, p. 7.

20 *Proof Committee Hansard*, p. 7.

21 *Proof Committee Hansard*, p. 7.

> … many consumers of aged care services (in particular those care recipients in residential aged care) require support to be involved in these functions of the Commissioner, and indeed family and friend carers are a key and absolutely valid consumer constituency.[22]

Education functions

1.40 The education functions of the Commissioner should include specific reference to the workforce. The Australian Greens are concerned that the education functions of the Commissioner, as set out in section 20, refer to providers, but not the workforce of these providers. At the inquiry, it was clear that the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner both currently provide education to the workforce, in the broader sense of the term.[23] We do not want to see this disappear once the Commission is established and want to see the workforce explicitly referenced in this section.

Making information publicly available

1.41 Section 59 of the Commission Bill should include specific reference to Commonwealth-funded aged care services. It is important that once all Commonwealth-funded aged care services come under the remit of the Commission that the Commissioner is empowered to release information about them publically, as they will be able to about an aged care service. COTA Australia says in its submission that we need:

> …to ensure Commonwealth Home Support Services, and any other Commonwealth-funded aged care services, are fully covered.[24]

1.42 At the hearing, the Department confirmed that the Commonwealth Home Support Program is not included in section 59.[25] The Australian Greens want to see Commonwealth-funded aged care services included in this section.

Consent

1.43 Section 66 and 69 of the Commission Bill respectively deal with consent in relation to the powers of authorised complaints officers and regulatory officials in relation to premises.

1.44 COTA Australia says in its submission, with regard to section 66 of the Commission Bill, that they believe:

> …the Bill must be amended to ensure that only consumers are required to give consent to meeting with authorised complaints officers when they are only onsite to meet with consumers and/or their representatives. Providers must not be able to prevent access to residents or consumers by refusing consent for authorised officers to enter the premises. This is particularly the

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22 COTA Australia, *Submission 7*, p. 7.

23 See *Proof Committee Hansard*, pp. 56–57.

24 COTA Australia, *Submission 7*, p. 14.

25 Dr Studdert, Acting Deputy Secretary, Department of Health, *Proof Committee Hansard*, p. 52.

> case in residential aged care settings, where the resident may not be deemed to be the only "occupier of the premises."[26]

1.45 With regard to section 69 of the Commission Bill, COTA Australia says in its submission that it:

> …holds similar views in respect of the entry of regulatory officials to premises that are occupied by approved providers or service providers yet are the home(s) of consumers as residents. We are concerned that in some cases providers could withhold consent and wish to ensure that this does not occur where consumers may be at risk.[27]

1.46 As Mr Yates, Chief Executive, COTA Australia, said at the hearing:

> The final one is…around the 'consent to enter' issue. Our belief is that, if a commission officer is trying to enter a provider premises to investigate a complaint or an issue, they shouldn't be able to be refused consent—or, if they should, it should be on extremely restricted grounds. The bill has become a bit convoluted in terms of the issue of consent by consumers. Yes, a consumer should be able to decline consent, particularly if it's someone in a home care service in their own home—they might want a support person there. But, if a consumer wants someone to come into a residential care facility, the provider shouldn't be able to refuse consent.[28]

1.47 The Australian Greens agree that only consumers should be able to withhold consent if the premises are their own home, and that only consumers should be able to withhold consent in residential aged care facilities if the Commission officer is there to see them.

Review

1.48 The Australian Greens want to see a review provision added to the Commission Bill. As Dr Brooke, Member, Australian Association of Gerontology, said:

> The review of legislation needs to occur not just with crisis. We know that the 1997 act came out of a crisis. We know the royal commission has come out of crisis. We have been speaking as an industry to the challenges of a contemporary piece of legislation for a long time, and it needs to be able to be responded to more effectively. The current bill doesn't actually stipulate that a review of this legislation needs to occur. With the acuity changing and the expectations of the community and the needs of our residents and customers changing, we know that the changes are happening more substantially than ever before. With the changing population and cohort that we're expecting, we need to be more fluent in our responsiveness.[29]

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

27 COTA Australia, *Submission 7*, p. 16.

28 *Proof Committee Hansard*, p. 11.

29 *Proof Committee Hansard*, p. 24.

1.49 The Australian Greens believe a review should be undertaken after three years of operation of the Commission.

Next bill

1.50 The Australian Greens understand that the process to transfer the regulatory functions, including the approval of aged care providers, compliance and compulsory reporting of assaults, from the Department is a more complicated one and that the Government made the decision to proceed with the Commission Bill and Consequential Bill and then bring a separate bill to the Parliament in 2019 for the transfer of the regulatory functions.

Sanctions

1.51 While there was discussion with the Department during the hearing that sanctions will be part of the compliance functions of the Commissioner from 1 January 2020,[30] the Australian Greens will be expecting reference to sanctions, specifically under Part 4.4 of the *Aged Care Act 1997*, in the next bill. We will continue to ask questions of the Government regarding sanctions to ensure that they too are transferred to the Commission in due course.

Serious incidents

1.52 One of the recommendations of the Carnell Paterson review was for the enactment of a Serious Incidence Response Scheme. Senator Siewert asked the Department about this during the hearing for the inquiry and where they were up to implementing this.[31] The Department indicated that they were working on options for Government and consulting on those options.[32] The Australian Greens will continue to ask questions regarding this recommendation and whether it will sit within the *Aged Care Act 1997* or be part of the next bill.

1.53 Concerns were raised by numerous submitters regarding the Commission Bill's lack of reference to quality improvement. As Mr Gear, Chief Executive Officer, Older Persons Advocacy Network, said:

> Also there is the fact that there isn't in this bill focus on a continuous quality improvement framework that would allow organisations to demonstrate a continuous journey to improvement in care rather than just meeting audit requirements.[33]

1.54 Dr Kidd, Chair, Australian Medical Association Council of General Practice, said:

> In that regard, the serious incident reporting is very important, but it's a little bit like the horse has bolted. The other thing that you really want in this space is to actually encourage a culture of near-miss reporting, where

30 Ms Laffan, Assistant Secretary, Department of Health, *Proof Committee Hansard*, p. 50.

31 *Proof Committee Hansard*, p. 53.

32 Ms Laffan, Assistant Secretary, Department of Health, *Proof Committee Hansard*, p. 53.

33 *Proof Committee Hansard*, p. 8.

> people are actually picking things up before there is some bad outcome and starting to put policies and behaviours in place that are going to start avoiding things before they become a problem.[34]

1.55 The Australian Greens want to see a quality improvement framework adopted – in some form – to ensure that near-misses are being reported and that work is being done to continuously improve care for older Australians.

Recommendation 1

1.56 The Commission Bill be amended to address the issues outlined above.

Senator Rachel Siewert

34 *Proof Committee Hansard*, p. 30.