

The Senate

Community Affairs
Legislation Committee

Aged Care Quality and Safety Commission
Bill 2018 [Provisions]

Aged Care Quality and Safety Commission
(Consequential Amendments and Transitional
Provisions) Bill 2018 [Provisions]

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ABBREVIATIONS

ACATs	Aged Care Assessment Teams
Advisory Council	Aged Care Quality and Safety Advisory Council
AHPRA	Australian Health Practitioner Regulation Agency
CALD	Culturally and Linguistically Diverse
Carnell Paterson review	<i>Review of National Aged Care Quality Regulatory Processes</i>
Commission	Aged Care Quality and Safety Commission
Commission bill	Aged Care Quality and Safety Commission Bill 2018
Commission bill EM	Aged Care Quality and Safety Commission Bill 2018, Explanatory memorandum
Commissioner	Aged Care Quality and Safety Commissioner
Committee	Community Affairs Legislation Committee
Complaints Commissioner	Aged Care Complaints Commissioner
Consequential bill	Aged Care Quality and Safety (Consequential Amendments and Transitional Provisions) Bill 2018
Consequential bill EM	Aged Care Quality and Safety (Consequential Amendments and Transitional Provisions) Bill 2018, Explanatory memorandum
CPSA	Combined Pensioners & Superannuants Association of NSW Inc.
CPSU	Community and Public Sector Union
Department	Department of Health
FECCA	Federation of Ethnic Communities' Councils of Australia
LASA	Leading Age Services Australia
Minister	Minister for Senior Australians and Aged Care, the Hon. Ken Wyatt AM, MP
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>

QACAG	Quality Aged Care Action Group Incorporated
Quality Agency	Australian Aged Care Quality Agency
RASs	Regional Assessment Services
Scrutiny committee	Senate Standing Committee for the Scrutiny of Bills

LIST OF RECOMMENDATIONS

Recommendation 1

2.119 The committee recommends these bills be passed.

Chapter 1

Introduction

Purpose of the bills

1.1 The purpose of the Aged Care Quality and Safety Commission Bill 2018 (Commission bill) is to establish a new Aged Care Quality and Safety Commission (Commission).¹

1.2 The Commission bill establishes the Commission's objects as to 'protect and enhance the safety, health, well-being and quality of life of aged care consumers; promote confidence and trust in the provision of aged care; and promote engagement with aged care consumers about the quality of care and services'.²

1.3 The Commission is intended 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.³

1.4 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*.⁴

Background

1.5 In introducing the two bills, the Minister for Senior Australians and Aged Care, the Hon. Ken Wyatt AM, MP (Minister), outlined these two bills form part of a larger Australian Government reform of the aged care sector across Australia:

This bill gives effect to the government's announcement in the 2018-19 budget to establish this new independent commission, as part of providing for better quality of care for consumers of aged-care services in Australia.

The introduction of this commission is also a direct response to the findings and recommendations of the *Review of national aged care regulatory processes* undertaken by Kate Carnell and Ron Paterson.⁵

1.6 The review undertaken by Ms Kate Carnell AO and Professor Ron Paterson ONZM, *Review of National Aged Care Quality Regulatory Processes* (Carnell

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

2 Commission bill EM, p. 1.

3 Commission bill EM, p. 1.

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

5 The Hon. Ken Wyatt AM, MP, Minister for Aged Care, [House of Representatives Hansard](#), 12 September 2018, p. 8.

Paterson review), was commissioned by the Minister in May 2017 in response to incidents that occurred at the Oakden Older Persons Mental Health Service in South Australia.⁶ The review report was published in October 2017 and made ten recommendations, the first of which was to establish 'an independent Aged Care Quality and Safety Commission to centralise accreditation, compliance and complaints handling'.⁷ As part of the Australian Government's reform agenda, it is intended that as of 2020 the Commission will also assume responsibility for certain aged care regulatory functions currently undertaken by the Department of Health (Department).⁸

1.7 In the 2018–19 Budget, the Australian Government announced a range of aged care initiatives under the More Choices for a Longer Life package. The initiatives focused on safeguarding the quality of care include the establishment of the Commission, the introduction of published performance ratings, and a \$50 million Quality Care Fund to assist residential aged care providers to improve the quality of their services.⁹

Overview of bills

Commission bill

1.8 The purpose of the Commission bill is to establish the Commission to replace the existing Quality Agency and Complaints Commissioner from 1 January 2019.¹⁰

1.9 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.

1.10 The Commission bill:

- establishes the Commission as a prescribed agency under the *Public Governance, Performance and Accountability Act 2013*;
- describes the functions of the Commission, Aged Care Quality and Safety Commissioner (Commissioner) and Advisory Council;
- describes the appointment process for the Commissioner and Advisory Council members;

6 The Hon. Ken Wyatt, AM, MP, Minister for Aged Care, [Media release - Federal Aged Care Minister to Commission Review of Aged Care Quality Regulatory Processes](#), 1 May 2017.

7 Ms Kate Carnell AO and Professor Ron Paterson ONZM, [Review of National Aged Care Quality Regulatory Processes Report](#), October 2017, p. xi.

8 Commission bill EM, p. 1. It is intended the Commission will assume the Department of Health responsibilities of approval of providers of aged care, compliance and compulsory reporting of assaults from 1 January 2020. This will require separate legislative amendment.

9 Budget 2018, Fact Sheet 5: [More Choices for a Longer Life Package](#).

10 Commission bill EM, p. 1.

- describes the sharing of information obtained by the Commission for the purposes of its functions including the protection, use and disclosure of such information; and
- describes operational matters relating to the Commission including entry and search powers, reporting requirements and delegations.¹¹

Consequential bill

1.11 The Consequential bill provides for the administrative matters required to transfer the functions and operations of the Quality Agency and Complaints Commissioner into the new Commission.

1.12 The Consequential bill will repeal the *Australian Aged Care Quality Agency Act 2013* and the *Australian Aged Care Quality Agency (Transitional Provisions) Act 2013* and will make consequential amendments to the *Aged Care Act 1997* and Associated Principles to replace references to the Chief Executive Officer of the Quality Agency and the Complaints Commissioner with the new Commissioner.¹²

1.13 Importantly, the Consequential bill provides for the transfer of the members of the existing Aged Care Quality Advisory Council to become members of the new Aged Care Quality and Safety Advisory Council:

This will enable the new Advisory Council to commence operations immediately, and will provide stability and experience in the advice being provided to the Commissioner and to the Government.¹³

1.14 Key provisions of the two bills, including concerns raised by submitters and witnesses, are discussed in greater detail in chapter two of this report.

Consultations

1.15 A range of consultations have been conducted in the development of the bills to establish the Commission.

1.16 The Carnell Paterson review, which made the recommendation to establish the Commission, undertook extensive public consultation with a range of stakeholders, including aged care regulators, consumers, carers and approved providers, to inform its final recommendations. Additionally, targeted sector meetings and consumer forums were held and 423 submissions were received via an online portal established by the Department.¹⁴

1.17 In drafting the provisions of the bills, the Department undertook its own consultations with the Aged Care Quality Advisory Council and the Aged Care Sector Committee Quality Subgroup, as well as a targeted sector meeting held in early

11 Commission bill EM, pp. 1–2.

12 Consequential bill EM, p. 2.

13 Consequential bill EM, p. 2.

14 *Review of National Aged Care Quality Regulatory Processes Report*, October 2017, pp. 163–165.

August 2018. The bills were also developed in partnership with the Quality Agency and Complaints Commissioner.¹⁵

Financial impact

1.18 These bills will have no financial impact. The Commission will be partially funded from existing Government budget allocations for the functions of the Quality Agency and Complaints Commissioner, and partially funded through the Commission charging fees for services. This is consistent with the current funding arrangements for the Quality Agency.¹⁶

Reports of other committees

Parliamentary Joint Committee on Human Rights

1.19 The Parliamentary Joint Committee on Human Rights sought the Minister's advice on the following aspects of the Commission bill:

- Whether provisions relating to disclosure of information have a proportionate limitation on the right to privacy.
- Whether provisions relating to the sharing of information have a proportionate limitation on the right to privacy.
- Whether the provisions relating to reverse burden of proof and protected information are compatible with the right to be presumed innocent.¹⁷

1.20 The Minister's response was not available at the time of tabling this report.

1.21 The Parliamentary Joint Committee on Human Rights reported that the Consequential bill did not raise any human rights concerns.¹⁸

1.22 The statements of compatibility with human rights for the bills discuss the impacts the bills have on the human rights and freedoms recognised or declared in the international Instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. These impacts are discussed further in chapter two.

Senate Standing Committee for the Scrutiny of Bills

1.23 The key concerns of the Senate Standing Committee for the Scrutiny of Bills include:

- Significant aspects of the regulatory functions of the Commission are to be set in rules, and are not included in the primary legislation.
- The Commissioner is granted broad discretion to disclose protected information, which may include sensitive personal information.

15 Commission bill EM, p. 2.

16 Commission bill EM, p. 2; Consequential bill EM, p. 1.

17 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report No. 11 of 2018*, 16 October 2018, pp. 2–8.

18 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report No. 10 of 2018*, 18 September 2018, p. 20 and p. 81.

- Offences in relation to disclosing protected information are drafted in a manner which may reverse the burden of proof, requiring officials to raise evidence to demonstrate they were performing authorised functions lawfully.¹⁹

1.24 Discussion of these concerns are contained in chapter two.

Conduct of inquiry

1.25 The bills were introduced into the House of Representatives on 12 September 2018.²⁰

1.26 Pursuant to a resolution of the Senate, the provisions of the Bill were referred to the committee on 13 September 2018, for inquiry and report by 12 October 2018.²¹ On 19 September 2018, the Senate granted an extension of time for reporting until 15 October 2018.²² On 15 October 2018, the Senate granted a further extension until 19 October 2018.²³

1.27 Information regarding the inquiry was placed on the committee's website.

Submissions

1.28 The committee wrote to relevant organisations and invited them to make a submission to the inquiry by 28 September 2018. Submissions continued to be accepted after this date.

1.29 The committee received 33 public submissions which were published on the committee's website. A list of submissions received is at Appendix 1.

Witnesses

1.30 A public hearing for the inquiry was held on 10 October 2018 in Canberra. The committee heard evidence from 16 organisations and experts. A list of witnesses is at Appendix 2.

Note on references

1.31 References to the *Committee Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and official *Hansard* transcripts.

Acknowledgments

1.32 The committee would like to thank the organisations and experts that made submissions to the inquiry and provided evidence at its public hearings.

19 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, 19 September 2018, pp. 1–9.

20 House of Representatives, [Votes and proceedings](#), No. 135, 12 September 2018, pp. 1803–1804.

21 Selection of Bills Committee, [Report No. 10 of 2018](#), p. 1.

22 *Journals of the Senate*, No. 120, 19 September 2018, p. 3823.

23 *Journals of the Senate*, No. 122, 15 October 2018, p. 3892.

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

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 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

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 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 Adviser 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

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.

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:

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:

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

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

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.

APPENDIX 1

Submissions and additional information received by the Committee

Submissions

- 1** Quality Aged Care Action Group Incorporated
- 2** NSW Nurses and Midwives Association
- 3** Aged Care Complaints Commissioner
- 4** Australian Nursing and Midwifery Federation
- 5** Queensland Nurses and Midwives' Union
- 6** Maurice Blackburn
- 7** COTA
- 8** Older Persons Advocacy Network (OPAN)
- 9** Australian Association of Gerontology
- 10** Australian Medical Association
- 11** Leading Age Services Australia
- 12** Department of Health
- 13** Aged and Community Services Australia
- 14** Royal Australian and New Zealand College of Psychiatrists
- 15** Mental Health Commission of NSW
- 16** HammondCare
- 17** The Salvation Army Australia
- 18** Australian Health Practitioner Regulation Agency

- 19 PainAustralia
- 20 Palliative Care Australia
- 21 Combined Pensioners and Superannuants Association of NSW Inc (CPSA)
- 22 Estia Health
- 23 Australian Association of Social Workers
- 24 Office of the Public Advocate, Victoria
- 25 Community and Public Sector Union (CPSU)
- 26 Federation of Ethnic Communities' Councils of Australia (FECCA)
- 27 Office of the Public Advocate, South Australia
- 28 Aged Care Crisis
- 29 Australian and New Zealand Society for Geriatric Medicine
- 30 Elder Care Watch
- 31 Queensland Government
- 32 Office of the Public Advocate, Queensland
- 33 Associate Professor Maree Bernoth

Additional Information

- 1 Submission to Inquiry into Aged Care Amendment (Staffing Ratio Disclosure) Bill 2018, from Aged Care Crisis Inc., received 5 October 2018

Answers to Questions on Notice

- 1** Answers to Questions taken on Notice during 10 October public hearing, received from National Seniors Australia, 10 October 2018
- 2** Answers to Questions taken on Notice during 10 October public hearing, received from Aged and Community Services Australia, 11 October 2018
- 3** Answers to Questions taken on Notice during 10 October public hearing, received from Older Persons Advocacy Network, 11 October 2018
- 4** Answers to Questions taken on Notice during 10 October public hearing, received from Leading Age Services Australia, 11 October 2018

Correspondence

- 1** Feedback on the Bill, received from Public Sector Residential Aged Care Leadership Committee, 10 October 2018

APPENDIX 2

Public hearings

Wednesday, 10 October 2018

Parliament House, Canberra

Witnesses

National Association of Community Legal Centres

MITCHELL, Mr William, Older Persons Legal Services Network

Older Persons Advocacy Network

GEAR, Mr Craig, Chief Executive Officer

WESTACOTT, Mr Russell, Service Delivery Organisation

COTA Australia

YATES, Mr Ian, Chief Executive

Dementia Australia

McPAUL, Mr Nigel, General Manager, Service Quality

National Seniors Australia

McCALLUM, Professor John, Chief Executive Officer

Australian Medical Association

BARTONE, Dr Tony, President

TOY, Mr Luke, Director, Medical Practice Section

KIDD, Dr Richard, Chair, Australian Medical Association Council of General Practice and Australian Medical Association Queensland Council of General Practice

HOWE, Dr Anna, Consultant Gerontologist

Australian and New Zealand Society for Geriatric Medicine

MADDISON, Dr John, President-elect

LEONG, Dr Ronald, Honorary Secretary

O'SULLIVAN, Dr Robert, Treasurer

Australian Association of Gerontology

BROOKE, Dr Nicole, Member

Australian Nursing and Midwifery Federation

BUTLER, Ms Annie, Federal Secretary

REEVES, Ms Julie, Federal Professional Officer

Aged and Community Services Australia

SPARROW, Ms Pat, Chief Executive Officer

Aged Care Guild

RICHTER, Mr Matthew, Chief Executive Officer

Leading Age Services Australia

JAMISON, Ms Veronica, General Manager, Member Support, and State Manager,
Victoria and Tasmania

Department of Health

STUDDERT, Dr Lisa, Acting Deputy Secretary

LAFFAN, Ms Amy, Assistant Secretary

Australian Aged Care Quality Agency

RYAN, Mr Nicholas, Chief Executive Officer

BOLGER, Ms Christina, Executive Director, Regulatory Policy and Performance

Aged Care Complaints Commissioner

LAMB, Ms Rae, Aged Care Complaints Commissioner