



Submission to

the Senate Community Affairs and Legislation Committee

*Aged Care
Quality and Safety Commission Bill 2018*

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submission

Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Senate Community Affairs and Legislation (the Committee) for the opportunity to provide feedback to the *Aged Care Quality and Safety Commission bill 2018* (the bill). The QNMU has long advocated for a strong, single point regulator for aged care, rather than the current fragmented approach which has demonstrably failed those Australians receiving aged care services.

Nursing and midwifery is the largest occupational group in Queensland Health and one of the largest across the Queensland government. The QNMU is the principal health union in Queensland covering all classifications of workers that make up the nursing workforce including registered nurses (RN), registered midwives (RM), enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 59,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses and midwives in Queensland are members of the QNMU.

Recommendations

The QNMU recommends the following:

- The legislation must regulate all aged care – whether Commonwealth funded or not;
- The legislation must require the Aged Care Quality and Safety Commission to work with the Australian Commission on Safety and Quality to ensure there are consistent health care and clinical standards across all sectors;
- The legislation must incorporate broad and strong investigation and enforcement powers;
- The Commission must have a prudential and financial regulatory and reporting role;
- The Commission must act as a data clearing house for the aged care sector and set reporting requirements across safety, quality, operations and finance;
- The Commission must incorporate a research capacity rather than having a separate entity as recommended by the Aged Care Workforce Taskforce Report (2018);
- The Committee should consider a process to move the development and maintenance of aged care standards out of the legislative and political domain to the Aged Care Quality and Safety Commission as an independent statutory authority.

In the alternative,

- The parliament pass the bill with the amendments outlined on pages 5-8.

Aged Care Regulation

The federal government's recent announcement to establish a Royal Commission underscores the stark reality that the aged care sector is in a state of crisis. Thus, there is significant impetus and justification for legislating a strong and comprehensive aged care regulator with the capacity, authority and tools to provide strong and effective governance to this sector.

The aged care sector is suffering from a number of systemic and interrelated issues which go beyond standards of care and complaints. These include:

- Widespread variation in staffing and skill-mix, with inadequate quality and quantity of care at a sector level;
- Increasing levels of care requirements for those receiving aged care, particularly residential aged care;
- A funding instrument that is no longer fit for purpose and the need to develop funding mechanisms that reflect the true cost of care and which require providers to account for how public funding is spent;
- Lack of transparency on reporting of safety, quality, operational and financial data. There is also an urgent need to expand the current level of reporting across these domains so the performance of the sector can be better analysed;
- An unregulated workforce that constitutes the bulk of the aged care sector and which is educationally underprepared to meet the increasingly complex care needs of those receiving care.

While we welcome the creation of the Aged Care Quality and Safety Commission, simply combining the functions of the current Australian Aged Care Quality Agency and the Australian Aged Care Complaints Commissioner into a new organisation is a missed opportunity. If a single regulatory agency is proposed, its functions should be of sufficient breadth to effectively regulate the sector in light of the systemic issues widely reported in a range of inquiries and reports over recent years.

The QNMU suggests the Committee consider the Productivity Commission's (2011) recommendations regarding the proposed functions of an Aged Care Quality and Safety Commission that were made as result of the *Caring for Older Australians Inquiry*. These functions are:

- Quality regulation;
- Prudential regulation;
- Pricing;
- Information;
- Complaints.

Based on the recommendations of the Productivity Commission (2011), the QNMU recommends the committee consider including the following additional functions of the Aged Care Quality and Safety Commission to enhance and better coordinate the regulation of the sector:

- The legislation must regulate all aged care – whether Commonwealth funded or not. Only regulating Commonwealth funded services risks creating a regulatory and standards of care gap that could potentially be exploited by unscrupulous service providers;
- The legislation must require the Aged Care Quality and Safety Commission to work with the Australian Commission on Safety and Quality to ensure there are consistent clinical and health care standards across all sectors. The Australian Commission on Safety and Quality in Health Care (ACSQHC) is a mature organisation with considerable expertise in standards development and the QNMU maintains that there must be consistent health care standards irrespective of where care is delivered;
- The legislation must incorporate broad and strong investigation and enforcement powers. The QNMU argues the existing aged care regulatory agencies have failed to adequately regulate the sector, and that regulatory failure has contributed to the current aged care crisis;
- The Commission must have a prudential and financial regulatory and reporting role to ensure the significant level of government funding given to aged care providers is spent on care and services and not used to generate profit via byzantine organisational arrangements. This may be achieved by rolling the function of the Aged Care Financing Authority into the Commission to achieve a more integrated approach;
- The Commission must act as a data clearing house for the aged care sector and set reporting requirements across safety, quality, operations and finance;
- The Commission must Incorporate a research capacity rather than having a separate entity as recommended by the Aged Care Workforce Strategy Taskforce Report (2018). The aged care sector lags the acute sector in the development and application of research and this capacity must be a core component of the planned commission to drive change in the sector.

Consideration should also be given to how aged care standards are developed and updated. Currently these standards are contained in subordinate legislation to the *Aged Care Act (1997)*. An alternative approach would be to give the Aged Care Quality and Safety Commission responsibility for the development of aged care standards and give these

standards the force of law through the *Aged Care Act (1997)*. Such an approach would ensure that development, review and updating of standards would not be part of a legislative cycle and would remove this vital regulatory mechanism from the political arena to an independent authority.

In the alternative we suggest the following changes to the wording in the bill.¹

At the outset we note the bill includes penalties for not returning identity cards and disclosure of information by an officer acting under the legislation, yet there are no penalties for providers who fail to give access to authorised officers or provide information.

Clause 18 Complaints Function of the Commissioner

The complaints functions of the Commissioner are to, in accordance with rules, ~~deal with~~ **investigate** complaints made, or information given, to the Commissioner about the following matters:

All further references to ‘dealing with’ complaints should read ‘investigate’ complaints. There is a vast difference between the ambiguity inherent in ‘dealing with’ a complaint and undertaking an investigation. Investigation should be a standard function of the commission.

The 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. It is therefore essential that persons undertaking this role on behalf of the Commission must be highly regarded as experts in the profession providing that form of care. This is extremely important in any assessment of nursing or personal care, which must be done by quality assessors who are expert in nursing care of the elderly.

We note here the Nursing and Midwifery Board of Australia (NMBA, 2007, p.8) reserves as the exclusive responsibility of the RN to make decisions about what is within the scope of nursing practice and the delegation of nursing activities to others. This extends of course to determining what is nursing care and, by exclusion, what is personal care, as well as assessing the appropriate delegation of activities to unregulated care workers. These two quality assessor functions are critical to establishing the quality of the care provided.

Amongst other regulatory functions, the bill lists accreditation, reviewing accreditation decisions, conducting quality reviews, monitoring the quality of care, registration of persons as quality assessors and their functions and education. In our view, the bill must also include

¹ Insertions in **bold**, deletion in ~~strike through~~

enforcement and penalty provisions for non-compliance or it will lack any ability to bring about change in the sector.

Clause 40 Membership of the Advisory Council

In our view, the key clinical professions and consumer representatives must retain full time core membership of the Advisory Council. As the bill now reads, nursing, other clinical areas and consumer advocates can be excluded as long as there are 6 others. This is not acceptable. Nursing, the other clinical professions and consumer representatives are critical to health care and must be constant members of the Advisory Council.

The Advisory Council consists of the following members:

- (a) A Chair; **and**
- ~~(b) At least 6, and not more than 10 members~~ **6 core members as identified under 41(3) and not more than 10 members in total.**

Clause 41 Appointment of Advisory Council Members

- (3) The core permanent membership of the Advisory Council will be comprised of persons the Minister is satisfied has substantial experience or knowledge in the following fields:**
- (a) geriatrics;**
 - (b) gerontology;**
 - (c) aged care nursing;**
 - (d) psychiatry of the older person;**
 - (e) allied health;**
 - (f) health consumer issues.**

The Minister may appoint up to 4 additional members with substantial experience or knowledge in any of the following fields:

- (a) clinical governance;**
- (b) adult education;**
- (c) public administration;**
- (d) management, including human resources management and information and data management;**
- (e) provision of care and services to aged care consumers including provision of care and services to people with special needs;**
- (f) aged care consumer issues.**
- (g) law;**
- (h) evaluation of quality management systems;**
- (i) Any other appropriate area of expertise.**

~~A person is not eligible for appointment to the Advisory Council unless the Minister is satisfied that the person has substantial experience or knowledge in at least one of the following fields:~~

- ~~(a) Evaluation of quality management systems;~~
- ~~(b) provision of care and services to aged care consumers including provision of care and services to people with special needs;~~
- ~~(c) aged care consumer issues~~
- ~~(d) geriatrics;~~
- ~~(e) gerontology;~~
- ~~(f) aged care nursing;~~
- ~~(g) psychiatry of the older person;~~
- ~~(j) adult education;~~
- ~~(k) public administration~~
- ~~(l) management, including human resources management and information and data management;~~
- ~~(m) law;~~
- ~~(n) health consumer issues;~~
- ~~(d) Any other appropriate area of expertise.~~

59 Information about an aged care service may be made publicly available

(1) The Commissioner may make publicly available the following information about an aged care service:

- (a) the name and address of the service;
- (b) the number of places included in the service;
- (c) the services provided by the service;
- (d) the staffing numbers and skill mix of staff allocated to provide direct care to recipients of government funding;**
- (e) financial information identifying the distribution of all government funding and accommodation deposits received by each approved provider and service;**
- ~~(d)~~ **(f)** the facilities and activities available to care recipients receiving care through the service;
- (g) safety and quality outcomes for residents**
- ~~(e)~~ **(h)** the name of the approved provider of the service;
- ~~(f)~~ **(i)** information about the variety and type of service provided by the approved provider;
- ~~(g)~~ **(j)** information about the service's status under this Act or the Aged Care Act (for example, the service's accreditation record);

- ~~(h)~~ **(k)** information about the approved provider's performance in relation to the provider's responsibilities under this Act or the Aged Care Act;
- ~~(i)~~ **(l)** any action taken, or intended to be taken, under this Act or the rules to protect the welfare of care recipients receiving care through the service, and the reasons for that action;
- ~~(j)~~ **(m)** any other information of a kind specified in the rules for the purposes of this paragraph.

Clause 65 Power to enter premises and exercise search powers in relation to complaints etc.

Given one of the major aims of this legislation was to enable authorised officers to make unannounced visits to premises, the bill only enables entry to the premises with the consent of 'the occupier'. Clearly, this will allow 'the occupier' the opportunity to deny access to authorised officers until such time as they can rectify staffing or other deficits. This is why current announced visits often fail to identify significant problems in aged care facilities. Authorised officers must have greater powers to enter premises for the purposes of inspection under this legislation.

Clause 71 Search powers

The QNMU notes the bill provides authorised officers may make any still or moving image or any recording of the premises or any thing on the premises. This must not include staff members or the families of the resident unless they give consent.

71 (2) (d) the power to make any still or moving image or any recording of the premises or any thing on the premises **providing this excludes staff members employed by the facility and the families of the resident unless they give explicit consent.**

Clause 73 Appointment of authorised complaints officers

We note there is no similar section on appointment of quality assessors. In our view, quality assessors must be experienced aged care clinicians. Their work is not just administrative but rather requires a sound knowledge of aged care nursing or other clinical practice. The health care component of residential aged care, in particular, is growing and constitutes a significant proportion of services provided to aged care residents. This proportion must be reflected in the numbers, knowledge and skills of quality assessor teams.

References

- Aged Care Workforce Strategy Taskforce (2018) *A Matter of Care – Australia’s Aged Care Workforce Strategy* retrieved from https://agedcare.health.gov.au/sites/g/files/net1426/f/documents/09_2018/aged_care_workforce_strategy_report.pdf
- Nursing and Midwifery Board Australia (2007) *The National framework for the development of decision-making skills for nursing and midwifery practice* retrieved from <https://www.nursingmidwiferyboard.gov.au/codes-guidelines-statements/frameworks.aspx>
- Productivity Commission (2011) *Caring for older Australians – Productivity Commission Inquiry Report*, Volumes 1 and 2, Final Inquiry Reports, Canberra retrieved from <https://www.pc.gov.au/inquiries/completed/aged-care/report>