



Senator Lucy Gichuhi
Chair
Standing Committee on Community Affairs
Legislation Committee
community.affairs.sen@aph.gov.au

2 October 2018

Dear Senator Gichuhi,

Inquiry into the Aged Care Quality and Safety Commission Bill 2018 and related Bill

The Victorian Office of the Public Advocate (OPA) welcomes the opportunity to make a submission to the Committee's Inquiry into the Aged Care Quality and Safety Commission Bill 2018 and related Bill.

OPA is a statutory office, independent of government and government services that works to protect and promote the rights, interests and dignity of people with disability in Victoria.

OPA provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments or mental illness. In 2017-2018, OPA was involved in 1806 guardianship matters, 389 investigations and 320 cases requiring advocacy. OPA is the coordinating body of four volunteer programs, including the Community Visitors Program and provides support to over 600 volunteers.

This letter makes comment on select provisions in the Bill.

Chief Clinical Adviser

OPA considers it essential that the Commissioner have access to expert clinical advice. It is especially important in relation to the use of restrictive practices and palliative care in aged care facilities.

On page 7 of the Explanatory Memorandum it states:

The Commissioner will have the ability to seek and consider clinical advice, including from the Chief Clinical Advisor and expert clinical panel, that is relevant to the performance of any of their functions.

Yet the Bill does not actually establish this Adviser. The Bill, in clause 16(1)(h), provides "if the Commissioner considers it is appropriate to do so in particular circumstances—to seek and consider clinical advice that is relevant to the performance of any of the above functions".

This role should be set out in the legislation, as is the role of the Senior Practitioner in Victoria's *Disability Act 2006*. The failure to establish the role in the Bill means it can be ignored or abolished where it raises unpalatable issues in the care of residents.

Commissioner's function in relation to consumer engagement

Clause 17 of the Bill sets out this function. The function solely concerns itself with the "development of best practice models for the engagement of approved providers ... with their aged care consumers".

This seems very remote from having a role to ensure the implementation of best practice models. It says nothing about how the Commission will engage with aged care consumers.

Protected information

The Bill prohibits the disclosure of protected information. Save for a number of exceptions set out in clauses 60 to 63, the Bill does not allow for the 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 (financial managers).

It is important that such tribunals be specifically mentioned. Section 118 of the Australian Constitution provides for the recognition of ‘the public Acts and records, and the judicial proceedings of every State’. However, tribunal proceedings appointing guardians and administrators are administrative, not judicial, proceedings.

Voluntary community visitors scheme

The Bill fails to establish a community visitors scheme that can visit aged care facilities.¹ The Community Visitors Program in Victoria, coordinated by OPA, performs an on-site monitoring role and quality safeguard. Community Visitors are an important safeguard for the rights of people with disability to access quality services and opportunities in the community. A core principle of the program is the elimination of violence, abuse, neglect and exploitation of people with disability.

Community Visitors have the authority to enter disability accommodation services, supported residential services and mental health facilities unannounced. Community Visitors are Governor-in-Council appointments, and are therefore independent of government. They provide an annual report to Parliament, with recommendations for sector change/improvement and can escalate more serious issues through the Community Visitors Program and the Public Advocate at any time.

OPA considers the role of such a scheme in the aged care sector as equally important. The ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) will have implications for aged care facilities (if aged care facilities are identified as a ‘place of detention’). OPA’s submission to the first consultation paper on the implementation of OPCAT in Australia, by the Australian Human Rights Commission, outlines a range of reasons as to why it is important for the national preventive mechanism (NPM) to have jurisdiction and responsibilities in relation to aged care facilities.²

Notwithstanding the uncertain future application of OPCAT, it remains that the mechanisms to enter aged care facilities under the Bill are inadequate. These limitations mirror the current limitations of an authorised complaints officer under the *Aged Care Act 1997* (Cth) Part 6-4A.³

OPA refers here to Part 8 of the Bill that sets out entry and search powers, and to clause 64 that states ‘premises may only be entered with the consent of the occupier of the premises and only for specified purposes’. The power to enter premises and exercise search powers is too limited in relation to aged care facilities as it relies on there being a ‘complaint or information’. Many frail elderly people lack agency to make complaints or provide information to the Commissioner in order to trigger an investigation.

Part 8 Division 2 sets out the powers of authorised complaints officers in relation to premises. This includes power to enter premises and exercise search powers in relation to complaints etc (cl 65), consent (cl 66) and asking questions and seeking production of documents (cl 67).

Clause 65(2) states:

An authorised complaints officer may:

- (a) enter any premises; and
- (b) exercise the search powers in relation to the premises;

for the purposes of the Commissioner resolving the complaint or dealing with the information.

Clause 65(3) states:

However, an authorised complaints officer is not authorised to enter premises unless the occupier of the premises has consented to the entry.

In order to pressure the service provider to permit access to the authorised complaints officer, the officer could point out that a failure to cooperate may result in a sanction under Part 4.4 of the *Aged Care Act 1997* (Cth) (Consequences of non-compliance), as suggested in the note to clause 66(1). However, the suggestion set out in the note would seem at odds with clause 66(2) which provides “a consent has no effect unless the consent is voluntary”. This inhibits the capacity of an authorised complaints officer to effectively investigate a complaint where their admission to an aged care facility rests on the consent of the occupier. There is a similar approach to the pressure regulatory officials can bring to bear in Division 3 of Part 8. This seems manifestly inadequate.

OPA notes the Australian Government’s recent announcement of a Royal Commission into Aged Care Quality and Safety. OPA made a brief submission to the development of the terms of reference. OPA suspects any developments during, and outcomes from, the Royal Commission will likely affect future operations of the Aged Care Quality and Safety Commission.

Yours sincerely,

John Chesterman
Acting Public Advocate

¹ In this submission, OPA refers to residential care (*Aged Care Act 1997* (Cth) s 41-3) as aged care facilities.

² Office of the Public Advocate, Submission No 14, Australian Human Rights Commission Australia, *OPCAT in Australia Consultation Paper* (2017) pp 3-9.

³ *Aged Care Act 1997* (Cth) pt 6.4A (Complaints and authorised complaints officers). OPA notes that under the *Aged Care Act*, an authorised complaints officer may apply to a magistrate for a warrant under section 92-1 (what powers can be exercised without an occupier’s consent) in relation to particular premises which includes for the purpose of assessing whether an approved provider is complying with its responsibilities under Chapter 4 (Responsibilities of approved providers). OPA further notes that, if the Bill passes, an authorised complaints officer under the *Aged Care Act 1997* (Cth) (an officer of the Department appointed by the Aged Care Complaints Commissioner), is taken, after the transition time, to be appointed as an authorised complaints officer under the Quality and Safety Commission Act: see *Aged Care Quality and Safety Commission (Consequential Amendments and Transitional Provisions) Bill 2018* (Cth) sch 2 cl 5. There is no provision in the *Aged Care Quality and Safety Commission Bill 2018* for an authorised complaint officers to apply for a warrant to enter premises; rather, the entry and search powers are limited to specified purposes where consent has been provided.

