

DEPARTMENT OF HEALTH

TRANSFER OF AGED CARE REGULATORY FUNCTIONS TO THE AGED CARE QUALITY AND SAFETY COMMISSION

Submission

September 2019



ABOUT ACSA

Aged & Community Services Australia (ACSA) is the leading aged care peak body supporting church, charitable and community-based, not-for-profit organisations. Not-for-profit organisations provide care and accommodation services to about one million older Australians.¹

ACSA represents, leads and supports its members to achieve excellence in providing quality affordable housing and community and residential care services for older Australians.

Aged care providers make a significant \$17.6 billion economic contribution to Australia, representing 1.1% of GDP by producing outputs, employing people and through buying goods and services. The direct economic component is akin to the contribution made by the residential building construction and sheep, grains, beef and dairy cattle industries.²

ACSA members are important to the community and the people they serve, and are passionate about the quality and value of the services they provide, irrespective of their size, service mix or location.

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¹ Australian Government, Department of Health, 2016-17 Report on the Operation of the *Aged Care Act 1997*, November 2017.

² Deloitte Access Economics, Australia's aged care sector: economic contribution and future directions, Aged Care Guild, June 2016, page 24.

TRANSFER OF AGED CARE REGULATORY FUNCTIONS TO THE ACQSC

BACKGROUND

The Australian Government announced in April 2018 that it intended to create the Australian Aged Care Quality and Safety Commission (the Commission). Provision for this was made in the 2018-19 Budget.

The Government indicated it would bring together the functions of the Aged Care Complaints Commissioner (ACCC) and the Australian Aged Care Quality Agency (AACQA) from 1 January 2019 with the aged care regulatory functions of the Department of Health (the Department) to transition to the Commission from 1 January 2020. The transfer of additional functions to the Commission is contingent on the passage of amending legislation by Parliament. Subject to decisions of Government and Parliament, it is proposed that the required legislation will be introduced and passed during the spring 2019 sittings – 9 September 2019 to 5 December 2019.

The Department has released a briefing paper³ which outlines the functions to be transferred to the Commission on 1 January 2020 and related processes for this to occur.

This is the briefing paper to which ACSA is responding.

FUNCTIONS TRANSFERING TO THE AGED CARE QUALITY AND SAFETY COMMISSION

As indicated, January 2019 saw the commencement of the Commission bringing together the functions of the

- Aged Care Complaints Commissioner; and
- The Aged Care Quality Agency

It is now proposed that on 1 January 2020 the following functions of the aged care regulatory section of the Department are transferred to the Commission

- a) The approval of aged care providers (including the revocation of approval)
- b) Compliance and enforcement action where providers do not meet their responsibilities (other than ACFI Reviews and Compliance)
- c) The receipt of aged care providers' compulsory reports of assaults

The briefing paper indicates that following the transfer of these additional functions the Commission will be able to expand its functions to include

- Education and dissemination of information regarding the approval of providers
- Compulsory reporting of assaults
- Compliance matters associated with the responsibilities of providers (including quality of care and prudential requirements)

³ Transfer of Aged Care Regulatory Functions to the Aged Care Quality and Safety Commission Briefing Paper, Department of Health, Commonwealth Government of Australia, August 2019

The commission will also handle internal reconsiderations of reviewable decisions, including

- decisions to reject or revoke approval
- to impose sanctions
- or to refuse to lift sanctions

FUNCTIONS REMAINING WITH THE DEPARTMENT OF HEALTH

The briefing paper indicates the Department will retain responsibility for

- aged care policy and funding

and will undertake a number of related regulatory functions such as

- ACFI reviews of aged care providers and any subsequent compliance action

The Department will retain

- administration of the Accommodation Deposit Guarantee Scheme for residential aged care providers
- and other matters under the Aged Care Act 1997 such as the allocation of residential and flexible aged care places

ACSA COMMENTS

ACSA supports the bringing together of compliance related functions into one body to support integrated end-to-end oversight of compliance.

To this end we support the following functions being transferred to the Commission as outlined in the briefing paper:

- The approval of aged care providers (including the revocation of approval)
- Compliance and enforcement action where providers do not meet their responsibilities
- The receipt of aged care providers' compulsory reports of assaults

There is no reference in the briefing paper on the reporting of 'unexplained absences' of residents, specifically whether this is to stay with the Department or transfer to the Commission. It would make sense that reporting of unexplained absences follows the reporting of reportable assaults across to the Commission.

The paper highlights that 'the Commission will also handle internal reconsiderations of reviewable decisions, including decisions to reject or revoke approval, to impose sanctions or to refuse to lift sanctions⁴'.

This proposed transfer of the additional activities (as described in the briefing paper) to the Commission, from the Department, creates at the very least a perception of a lack of separation

⁴ Ibid, section 6, p5

of ‘decision making’ from ‘auditing compliance’. Whereas to date these functions have been attended by separate bodies (the Department and the Commission respectively) both functions would be attended by the one body.

Given this, there is a need for a clear independent process on ‘reviewable decisions’ made by the Commission.

Providers must have access to a simple and efficient appeals process independent of the Commission. In addition, the performance of the Commission in relation to internal review mechanism (‘reviewable decisions’) should be subject to an annual independent review.

The new arrangements must ensure procedural fairness and natural justice given decision making and review will reside within the one body. Appropriate checks and balances need to be in place, and these should be transparent to the sector as a whole.

ACSA supports consideration being given to ‘the removal of processes which may be duplicative when performed within the same organisation’⁵. The example given in the paper relates to overlap of ‘serious risk’, decisions made under the Aged Care Quality and Safety Commission Rules 2018 (currently made by the Commission) and ‘immediate and severe risk’ decisions made under the Aged Care Act 1997 (currently made by the Department). The sector requires clarity and consistency of approach in relation to matters of ‘serious risk’.

As the Commission is not responsible for ‘funding’ related matters, we believe it is appropriate that compliance monitoring that relates to provider funding claims remains with the Department.

Where crossover continues to occur between the Department and the Commission these cross-over points should be covered by the Memorandum of Understanding referred to in the briefing paper.

An issue that requires clarification from the briefing paper relates to prudential matters. The paper states that the Department will ‘retain administration of the Accommodation Deposit Guarantee Scheme for residential aged care providers’⁶ and yet separately the paper states ‘compliance matters associated with the responsibilities of providers (including quality of care and prudential requirements’⁷)’ will be picked up by the Commission.

ACSA RECOMMENDATIONS

1. The bringing together of all aged care related compliance activities into the Commission is supported
2. The reporting of ‘reportable assaults’ be transferred to the Commission

⁵ Ibid, section 5, p4

⁶ Transfer of Aged Care Regulatory Functions to the Aged Care Quality and Safety Commission Briefing Paper, Department of Health, Commonwealth Government of Australia, August 2019, section 7, p5

⁷ Ibid

3. The reporting of 'unexplained absences' be transferred to the Commission
4. Annual independent review of the performance of the Commission in relation to 'reviewable decisions', processes and performance
5. A clear and transparent process be available for approved providers who wish to apply for review of 'reviewable decisions' to an independent external body such as the Administrative Appeals Tribunal
6. That the appeals process available to approved providers is simple and efficient
7. Duplication of processes and activities, including those relating to the calling of 'serious risk', are eliminated or streamlined where possible
8. That policy and funding related matters remain with the Department, including prudential matters and funding compliance audit (ACFI) activities