



18 August 2023

Capability Review Gives Regulator a 'Poor Rating' yet Recommends More Funding and Resources

1.0 Introduction

A collective of organisations has developed this feedback in response to the 'Final Report of the Independent Capability Review of the Aged Care Quality and Safety Commission' and the recommendations made within. The response has been prepared by Aged Care Justice, Aged Care Reform Now, Aged Care Crisis, Allied Aged Care and Carers' Circle. We promote the findings of the Royal Commission into Aged Care in relation to an independent regulator that delivers a safe, publicly accountable, outcome and people focussed aged care regulatory system.

2.0 Key Points

- We are concerned that the Royal Commission recommendations are being overlooked to maintain an already flawed system.
- The current structure of the ACQSC should not be maintained given its deficiencies outlined by the Capability Report and the Royal Commission into Quality and Safety ('Royal Commission'). The Royal Commission recommended its abolishment and a new model be implemented, however the Capability Report is recommending to maintain the current model with increased resources.
- The Regulator's lack of independence has proven problematic given it is both accreditor and complaints handler, and acts on Ministerial direction. Commissioner Tony Pagone, recommended the Regulator be an 'independent statutory body'. We support this recommendation to restore public confidence in the sector and increase complaint handling efficacy.
- The highly centralised system of the ACQSC lacks local and community engagement and decreases complainant confidence in complaint investigation. A community-based approach is required to ensure local understanding of the issue, impartiality of the investigation and timely resolutions.

3.0 Overview

We have provided a short overview of the Aged Care Quality and Safety Commission (**ACQSC**) Capability Review, and some feedback. We welcome the Capability Review, as the role of the ACQSC is integral to the wellbeing of many Australians relying on aged care services.

The Capability Review is comprehensive on the limitations and the challenges faced by the Government and the Commission itself, to fix an ineffective aged care regulatory system, in a complex and time sensitive sector. We agree with David Tune, that the regulator to be effective needs strong structures, be well resourced and highly skilled, and its functions supported by improved regulations.

Whilst we agree with many of the Capability Review recommendations, we do not agree that retaining the current structure of the Regulator is the best model to lead the industry forward and restore public trust. This is contrary to the recommendations of the Royal Commission. Whilst Commissioner Pagone and Commissioner Briggs differed in their recommendations regarding the structure of the Regulator, they both agreed that the current Regulator should be abolished and replaced by a new model. We have had 30 reviews of the aged care system, without improved outcomes, especially for those receiving substandard care and being harmed by the system. For systemic change a new Regulator is imperative.

Commissioner Pagone said;

'The responses by successive governments have failed to tackle the underlying problems. There is, in my view, little point in repeating the same process again by asking the same Department that has overseen the current failings to build and run the new aged care system. This is why I recommend that the Australian Government implement governance arrangements for the aged care system that are independent of Ministerial direction, and that involve an independent statutory body—the Australian Aged Care Commission—as system governor, administrator and regulator.'

Commissioner Briggs recommended the establishment of the Australian Commission on Safety and Quality in Health and Aged Care, (for clinical and non-clinical standards), and the ACQSC to be replaced by an independent, new Aged Care Safety and Quality Authority (with a Board of 5 members and CEO), for accreditation, compliance, enforcement and complaints management, requiring strong Government leadership, and the Minister will continue responsibility for aged care. This recommendation was accepted by the Government of the day.

The Review of International Systems for Long-Term Care of Older People (Royal Commission, Research Paper 2, January 2020), said Australia's current system of an inspection based, centralised system of regulation was in contrast to other nations who applied multiple levels of responsibility and decentralisation, including at a community level for regulating aged care. The Royal Commission clearly took this research and recommendations into consideration in promoting an independent Regulator.

The Royal Commission recommendations were made in 2019, and July 2022 was the date set for the establishment of the new Regulator. We are asked now to wait until 2025 for a further review, further delaying the implementation of the Royal Commission recommendations, leaving the regulation of aged care in an ambiguous state, as we go to the next Federal election. Further, the review must be made by the Inspector General, who may not act independently of the Minister.

Combining the compliance and accreditation functions of the Regulator with the complaints function, is also an issue with respect to public confidence in the Regulator, and any perception that the Regulator is 'consumer' focussed. This is regardless of the appointment of an Aged Care Complaints Commissioner as they are not independent given they report to the Commissioner. For example, when a complainant, refers a serious complaint to the ACQSC, and that Provider receives a poor rating in that sector resultant from the complaint but retains their accreditation, the complainant loses confidence in the Regulator. Another example is when the complainant is told discussions between the regulator and the Provider are confidential, when investigating a complaint, causing mistrust. It is an issue of public perception, and not an issue of competence process. It is also of consideration given the Australian Government's Regulator Performance Guide on the focus on behavioural change rather than enforcement. In both the new and old model (pyramid versus diamond) it appears that the Commission compliance strategy is based on the Provider's compliance posture rather than on the severity of the incident.

There are significant hurdles to be overcome in maintaining the current system, the time is now for a new model in aged care based on the Royal Commission recommendations as the issues in aged care are unique, and if not managed cause significant health issues to aged care recipients their family and friends.

4.0 The role of the Aged Care Regulator

The Regulator has the following functions;

Objective:

To protect the Safety and Wellbeing of Older Australians, by safeguarding quality and safety.

Role of the Regulator:

For Providers: Approve and accredit Providers; monitor compliance; enforce compliance; provide education; address non-compliance (enforceable undertakings, direction, civil penalties directors, and amend approve; revoke or approve accreditation).

For the Public: Engagement and education with older people; investigate and respond to complaints; provide timely and accurate data; reporting on SIRS and complaints by provider, publish information on outcome of regulatory actions; and publish enforcement against individual complainants.

5.0 Background

5.1 The ACQSC was established in January 2019, bringing together the Australian Aged Care Quality Agency and Age Care Complaints Commissioner.

5.2 In 2021, the Royal Commission recommended the establishment of a Government Leadership model, in which the roles of System Governor and Prudential Regulator would be undertaken by the Department, and the Quality Regulator role undertaken by a new Aged Care Safety and Quality Authority, with a 5 Member Board and Chief Executive, by July 2022 (rec 10 and 104)((Commissioner Briggs)). Noting that Commissioner Pagone recommended abolishing the current regulator and establishing an independent statutory body – independent of the Minister, as a Statutory Agency and Commissioner which is not subject to direction on individual regulatory decisions by the Government. We support Commissioner Pagone’s model and feel that the Complaints Commissioner should be independent of the Minister.

5.3 In 2021, the Royal Commission referred to the need to increase resources and skill set with the ACQSC, including investigative, regulatory, and clinical, and improved governance.

5.4 ACQSC changes;

a. Budget increased from \$106.4 m (2019/20) to \$329 m (2022/23), and staff of 430 (2019/20) to 1,423 (2022/23).

5.5 The ACQSC has been involved in Star Ratings for residential services, new financial reporting, the SIRS expansion into home care, new code of conduct for providers, and strengthening governance.

6.0 Capability Review

6.1 The scope of the Capability Review was to strengthen the ACQSC, to conduct its functions efficiently and effectively.

6.2 Numerous issues with the ACQSC;

- related to structure; priorities and strategy; leadership; skills set; staffing; internal communication and decision making; public communication, and collaboration with the Department of Health.

- the focus on process not outcome; not responsive; poor track record on enforcements; reactive approach to monitoring and compliance.

6.3 Some Recommendations from the Capability Review:

- a. that the ACQSC is an 'end to end' function, that is it regulates the Providers (accreditation, compliance and enforcement), and the complains handling function, and therefore no function of the current Regulator is to be removed;
- b. it is more cost effective and efficient to support the current structure of the ACQSC, with a review in 2025 (by the Inspector General), than abolish the ACQSC and replace it with an independent new Aged Care Safety and Quality Authority as recommended by the Royal Commission;
- c. that the aged care legislation is not fit for purpose and it needs to change to allow a risk based approach and continuous improvement in regulations. This will include giving the Regulator more scope and decision making power in reviewing compliance and accreditation and enforcement;
- d. there is a review of the capability of the ACQSC in 2 years, in 2025 by Inspector General that opens door for a new authority/regulator if the current model is not working;
- e. The recommendations to retain and strengthen the existing ACQSC structure include;
Improving leadership, Internal communication, increasing management and staff skills and numbers, empowering senior staff, and cultural changes.
 1. Appoint new Deputy Commissioner Corporate, and Chief Clinical Advisor.
 2. Governance: strengthen the skills of the existing National Advisory Council, (<https://www.health.gov.au/committees-and-groups/national-aged-care-advisory-council?language=en>) that provides advice on reforms, and to increase the number of representatives on the Advisory Council to (currently maximum 8, to 8-12), and make the Advisory Council autonomous and independent. The report states that the Advisory Council does not currently operate independently of the Commission.
 3. To fix significant problems in the complaints handling process and Serious Incident Response Scheme, by appointing an Aged Care Complaints Commissioner (reporting to the Commissioner); triage complaints, follow up on complaints; provide regular and more detailed reporting on SIRS.
 4. Improve transparency and accountability by working with Providers openly, sharing information, performance etc.
 5. Collaborate with peak bodies and consumers.
 6. Data share with the Health Department.
 7. The revised Aged Act and Regulations to provide greater powers to the Regulator to provide for risk assessment of decisions and enforcement.
- f. the recommended internal structure is for the new Deputy Head, Regulatory Operations, the Deputy Commissioner Stakeholder Engagement and Sector Capability, the new Aged Care Complaints Commissioner, the Deputy Commissioner Corporate and the Chief Clinical Advisor to report to the Commissioner. The Complaints Commissioner is not an independent statutory role;
- g. there are 32 recommendations in the Capability Review, 21/32 recommendations are related to internal issues related to structure, systems and reporting, workforce, skills, structure, and governance improvements. Then 11/32 related to community and industry communication and consultation, transparency and accountability, and complaints management improvements.

7.0 Conclusions

If David Tune had to give the Regulator a Star Rating for quality and safety – what would it be? We guess 2 stars out of 5, given that the review found major deficiencies in its regulatory and compliance functions as well as in managing complaints and public education. Yet the capability recommendations are to reject the Royal Commission recommendations on the corporate structure of the Commission and potentially delay change by another 4/5 years. The time to act is now, and deliver resources and funds to an organisation that is structured to withstand the changes in aged care, and successive Governments. Any delays in appropriate changes will greatly impact the health of those receiving care.

There are no sufficient reasons to retain the current corporate structure of the Regulator, and there are many reasons for change as past initiatives have failed to produce results in a time sensitive aged care sector.

National Advisory Council: this past initiative, of an independent diverse body to assist the Commission is not functioning as intended. The Advisory Council is appointed by the Minister consisting of independent experts, that has the current power to review the performance and function of the Commission. Yet the capability review says they are not functioning independently of the Commission, no real explanation as to why? The suggestions of further empowering the National Advisory Council and increasing its numbers do not provide any confidence that it will meet its intended objectives, as the issues appears systemic.

Accreditation and compliance functions; there has been lack of transparency, criticisms of lack of procedural fairness, and inconsistency in decision making over a long period of time. We note ‘the Commission managed the accreditation issue, by using an own motion reconsideration power to extend accreditation periods for up to 18 months for lower risk services’ – again this is a problem of public perception. This is problematic as Star Ratings are determined over the last 12 months when giving a compliance score. A facility may not have been visited/reviewed in this period.

Complaints handling and management of SIRS: there has been a continued lack of timely responses to complaints, lack of transparency in investigations, lack of communication and feedback, and low consumer engagement and education. Whilst a dedicated Complaints Commissioner is a good step, there is lack of confidence the structure will deliver different outcomes. We refer to the recommendations to improve consumer engagement and communication, noting the reliance on digital communication in an industry that requires diverse communication methods with older people.

Funding: The large increase in funding and number of staff is also an issue, as it requires a strong base and established organisation to manage a larger organisational structure. We believe that there is a need to have more localised community services engagement. Complaints need to be dealt within the community in which they occur and there needs to be more eyes on the ground, as opposed to a centralised Regulator. When complaints handling is dealt with outside of the local area there is risk of more provider input than active investigation. The hotline only operates on AEST. If the Regulator had resources across the country to respond to complaints, they could be dealt with expeditiously and assist in increased understanding, at a local level, of how to prevent or respond to the issue.

The issue of the dual role of the regulator in compliance and enforcement and complaints handling remains an issue. We cannot continue to do the same thing and expect a different outcome. All previous reviews have shown us this. We all want the same outcome - a safe, quality, person centric delivery of aged care services. An independent regulator, free of conflicting demands, to focus on the issues, and to deliver clearer outcomes for the industry, with the involvement and consultation of Providers and aged care participants, is vital. Further, the Aged Care Act must be human rights based and should support an enforceable Charter of Rights. There must be scope for financial and civil penalties. As a community, we have already spent substantial funds on the Royal Commission that relied on significant input and research to deliver a comprehensive review of aged care. We know the problems, let's be strong on the solutions.

The organisations behind this joint feedback:

Aged Care Justice

Aged Care Justice Inc. (ACJ) is a registered charity supporting Australians living in residential aged care or receiving home care, by providing access to legal services, educational material on aged care rights and lobbying for sector reform. ACJ was formed in 2020 by senior legal and clinical professionals to ensure all Australians receive quality aged care services and are treated with dignity and respect. When a person contacts ACJ, we listen to their issue and connect them with a lawyer with experience in aged care issues who will provide a free legal consultation anywhere in Australia. Our panel of firms have agreed to identify the most efficient and economical way to proceed after the initial consultation, which may include pro bono assistance. Our Chair is Sue Williamson, Partner, Holding Redlich, and our joint Patrons are the Honourable Tony Pagon AM KC, a former Federal Court Judge and Chair of the Royal Commission into Aged Care Quality and Safety, and ACJ Founder, Dr Bryan Keon-Cohen AM KC . **Website:** <https://www.agedcarejustice.org.au/> **Contact:** info@agedcarejustice.org.au

Aged Care Reform Now

Formed in 2021, Aged Care Reform Now's (ACRN) grassroots advocacy has been informed by its membership's lived experience of the aged care system, and the associated grief and trauma. Having made submissions to the Royal Commission and formal complaints to aged care facilities, the Aged Care Quality and Safety Commission (ACQSC), the ACQSC Health and Disability Services Complaints Office, HaDSCO, and Advocare, to no avail, ACRN members are channelling their energy and desire for closure into advocacy for comprehensive, systemic reform. Our Patron is award winning poet, academic and aged care advocate, Sarah Holland-Batt. ACRN Committee Members are located in NSW, QLD, Victoria and WA and proactively engage with politicians, participate on Department of Health webinars, participate in consultations with the ACQSC Consumers and Families Panel, and have been invited by Aged Care Inspector General, Ian Yates, to join a working group within the Council. ACRN's Amina Schipp has also been appointed to the National Older Person's Reference Group as an aged care consumer representative. **Website:** www.agedcarereformnow.com.au **Contact:** info@agedcarereformnow.com.au

Aged Care Crisis

Aged Care Crisis Inc. (ACC) are an independent volunteer consumer-based advocacy group who provide a consumer voice for aged care residents' and their loved ones. Aged Care Crisis has been a place where residents and staff can express their concerns about care. We warned government in 1999 that the policies introduced in 1997 had already failed in the USA. We have watched them fail in Australia and made many submissions urging change. Those who have experienced the system first hand have found a system beyond broken. We have pressed for changes that would make aged care worth living and working in. **Website:** <https://www.agedcarecrisis.com/about> **Contact:** <https://www.agedcarecrisis.com/contact-us>

Carers' Circle

Carers' Circle is Australia's only general website dedicated to helping the children (or nieces or nephews) of ageing parents. We cover a wide range of issues that will help both you and your ageing parents – written from your perspective, because we're going through it too. We want to help make it easier for you by giving you the best information available from experts in their field and for those who have gone through it, to help you care for ageing parents. **Website:** <https://carerscircle.com.au/> **Contact:** editor@carerscircle.com.au

Allied Aged Care

Allied Aged Care evolved from principal physiotherapist Alwyn Blayse's private practice business in QLD. We have a passionate team of experienced and caring Occupational Therapists and Physiotherapists, supported by a wonderful administrative team to support them. We are always determined to do aged care better. Allied Aged Care commits to become a force of change in the world of community and aged care in regional areas. **Website:** <https://www.alliedagedcare.com.au/what-we-do/> **Contact:** info@alliedagedcare.com.au