
Rebecca de Boer
Social Policy Section
Daniel Weight
Economics Section

Due to the interrelated nature of these Bills, this Digest will consider both. The focus of the Digest will be on the establishment of the Australian Aged Care Quality Agency.

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Date introduced: 13 March 2013

House: House of Representatives

Portfolio: Health and Ageing


Links: The links to the Bill, Explanatory Memorandum and second reading speech for the Australian Aged Care Quality Agency Bill 2013 and the Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013 can be found on the Bill's home pages, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bills

The purpose of the Australian Aged Care Quality Agency Bill 2013 (the Bill) is to establish the Australian Aged Care Quality Agency (the Quality Agency) (replacing the existing Aged Care Standards and Accreditation Agency) as the sole agency that approved providers under the Aged Care Act 1997 will deal with in relation to the quality assurance of the aged care services that they deliver. It will also establish the Aged Care Quality Advisory Council.

The Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013 (Transitional Provisions) sets out the transitional arrangements from the existing Aged Care Standards and Accreditation Agency to the Australian Aged Care Quality Agency.

Structure of the Bills

The Bill has six parts. Of note:

- Part 2 establishes the Australian Aged Care Quality Agency
- Part 3 sets out the functions and powers of the Chief Executive Officer, the appointment of and matters relating to staff and consultants
- Part 4 establishes the Aged Care Quality Advisory Council
- Parts 5 and 6 outline the strategic and annual operational places and the reporting requirements
The Transitional Provisions Bill has one schedule with five parts. Part 2 details the arrangements for the transfer of the assets and liabilities of the Aged Care Standards Accreditation Agency (ACSAA) Limited, which is now subject to the CAC Act,\(^1\) to the Commonwealth. This will facilitate the establishment of the Quality Agency. Part 4 determines the arrangements for current office holders and staff of the ACSAA. The remaining parts are technical in nature.

**Structure of the Living Longer Living Better legislative package**

On March 13 2013, the Government introduced five bills simultaneously into the Parliament to give effect to the Living Longer Living Better (LLLB) initiative announced in April 2012. LLLB was the Government’s response to the recommendations of the Productivity Commission’s (PC) Inquiry *Caring for Older Australians*.\(^2\)

There are five interrelated Bills:

- Aged Care (Living Longer Living Better) Bill 2013\(^3\)
- Australian Aged Care Quality Agency Bill 2013
- Australian Aged Care Quality Agency Bill (Transitional Provisions) Bill 2013
- Aged Care (Bond Security) Amendment Bill 2013\(^4\)
- Aged Care (Bond Security) Levy Amendment Bill 2013\(^5\)

Further information about each of these bills can be found in the respective Bills Digest or the Bills homepage. The principle bill is the Aged Care (Living Longer Living Better) Bill 2013. Amendments to this bill give effect to the other bills. For example, substitution of community care to ‘home care’ in the Living Longer Living Better Bill enables the Quality Agency to quality review home care providers.\(^6\)

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6. Note that the definition is unchanged.

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There are three commencement dates for the legislative package: 1 July 2013, 1 January 2014 and 1 July 2014.7

Background

To qualify for Australian Government subsidies, residential aged care providers are required to meet accreditation standards. The Aged Care Standards Accreditation Agency (ACSAA) is the sole accreditation agency for residential aged care providers in Australia.

The ACSAA assesses whether aged care providers meet legislated standards (such as the Accreditation Grant Principles 2011, Quality of Care Principles 1997 and the Accountability Principles 1998). The Accreditation Standards, as outlined in the Quality of Care Principles, set out the four standards and 44 outcomes that must be met by residential aged care providers.8 The standards are not prescriptive and are underpinned by principles. For example, the standards do not specify patient to staff ratios, see example below:

**Standard 1:** Management systems, staffing and organisational development

**Principle:** Within the philosophy and level of care offered in the residential care service, management systems are responsive to the needs of residents, their representatives, staff and stakeholders, and the changing environment in which the service operates

The flexible nature of the standards is in recognition that not all providers apply the standards in the same way.9 This reflects the diversity of aged care providers, their philosophy and approach and client profiles. As part of the accreditation process, there is a range of resources to assist aged care providers to determine if accreditation standards have been met prior to the formal accreditation process.10 It is important to note that aged care providers are assessed as to whether the standard is met – not the degree to which they meet the standard.

Under current arrangements, accreditation is a condition of funding for residential aged care providers only. The Bill will enable the Quality Agency to ‘quality review’ community care providers (to be known as ‘Home Care’ providers).11 The existing standards, Community Care Common

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11. The term ‘home care’ and ‘community care’ providers has been used interchangeably throughout this Digest as the arrangements for community care providers do not materially change as a result of this Bill.
Standards, will continue to apply but will be assessed by the Quality Agency instead of by quality reviewers from the Department of Health and Ageing (DoHA) and state/territory government staff.\textsuperscript{12}

The main difference between the quality review and accreditation process is that funding for home care providers will not be directly affected by the quality review process, except, possibly, where there are ‘significant concerns’.\textsuperscript{13} Residential aged care providers who fail to meet one of the expected outcomes are considered not to meet the Accreditation Standard. In this instance, residential aged care providers are required to adhere to a ‘timetable for improvement’ as prescribed by the ACSAA. If this is not met, the ACSSA may revoke accreditation status and/or DoHA may impose sanctions.\textsuperscript{14}

The Government does not propose to change the existing accreditation standards, the process for accreditation for residential aged care or quality review of community care providers. It is not clear if information about the quality reviews of Home Care providers will be publicly available in the future. This is not currently available and only aggregate information is published (information about individual community care providers can be requested through Freedom on Information processes).\textsuperscript{15}

This is in contrast to residential aged care providers. There is a search function on the ACSAA website which allows consumers to obtain the most recent accreditation report for residential aged care providers.\textsuperscript{16} The front page of the report notes if any sanctions are currently in place but information about previous sanctions is not included.\textsuperscript{17} Presumably clause 52 of the Bill would facilitate the publication of this information about Home Care providers as it empowers the CEO to disclose information about aged care services.

The ACSAA is considered to be at arm’s-length from Government.\textsuperscript{18} It is currently a public company limited by guarantee and subject to the Commonwealth Authorities and Companies Act 1997.\textsuperscript{19} The Commonwealth is the sole member of the company, as represented by the Minister for Mental Health and Ageing.\textsuperscript{20}

The Transitional Provisions Bill facilitates the Quality Agency becoming subject to the Financial Management and Accountability Act 1997 (FMA Act), which is considered more appropriate than the

13. Ibid., Question 33.
16. See the ‘Report on homes’ search on the ACSAA website. Earlier reports are available upon request.
Commonwealth Authorities and Companies Act 1997 (the CAC Act) for a body with regulatory functions.  

PC recommendations

The Productivity Commission (PC) examined the regulation of quality in aged care as part of the Caring for Older Australians Inquiry during 2010-2011. It concluded that the historical development of aged care regulation bore little resemblance, or adherence, to the Australian Government Principles of Best Practice Regulation. The PC did not consider the lack of separation of policy advice from regulation and interactions with individual recipients to be good practice. Although the ACSAA does not consider itself the regulatory body (this was considered the role of DoHA), the PC noted that it had the capacity to revoke or vary accreditation status. This has a subsequent impact on whether an aged care facility received funding from the Australian Government and was regarded by the PC as a quasi-enforcement power. ACSAA also provides advice to DoHA about whether to impose sanctions on an aged care provider.

One of the recommendations of the PC’s Inquiry was the establishment of a new independent regulatory agency - the Australian Aged Care Commission (ACCC) (recommendation 15.1). As part of this proposal, the ACCC would be independent of DoHA. Furthermore, DoHA would cease involvement in all aged care regulatory activities except for the provision of policy advice to the Australian Government on regulatory matters and the setting of quality standards.

The PC recommended that the existing ACSAA would be established as a statutory office within the ACCC and a full time statutory Commission for Care Quality would be appointed. With respect to quality, key functions of the ACCC would include:

- Administering the regulation of the quality of community and residential aged care, including compliance and enforcement
- Promoting quality of care through educating providers and assisting them with compliance and continuous improvement


22. PC, Caring for older Australians, Inquiry home page, viewed 12 April 2013,  


26. Some sanctions have financial implications, for example, the Commonwealth has the discretion to withhold payment for new residents for a period of time.

Approving community and residential aged care providers for the provision of government subsidised approved aged care services.  

In its response to the PC’s recommendations, DoHA did not support this recommendation, arguing that the start-up costs associated with an independent regulatory agency are likely to outweigh the benefits. Instead, the ACSAA would be established as a statutory authority under the Financial Management and Accountability Act 1997 by 1 January 2014 and extended to home care services. In addition, it would be renamed the Australian Aged Care Quality Agency. This is reflected in the Bill. In its response to recommendation 15.1, DoHA did not address the governance issues raised by the PC.

Committee consideration

Senate Standing Committee for the Selection of Bills

At its meeting of 13 March 2013, the Selection of Bills Committee immediately referred the Living Longer Living Better legislative package introduced into the House of Representatives on 13 March to the Senate Community Affairs Legislation Committee for inquiry and report by 17 June 2013. Assuming the election is held on 14 September 2013, the Committee will report in the final Parliamentary sitting period for this Parliament. The timetable for debate on the bills has not yet been released.

The principle issue for consideration by the Committee is the ‘full impact on how these changes will affect providers, older Australians and their families and carers’. Details of the inquiry are the inquiry webpage. The five bills will be considered concurrently by the Committee.

Policy position of non-government parties/independents

At the time of writing, the policy position of non-government parties and the independents on the establishment of the Quality Agency was not known.

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28. Ibid., p. lxxvi.
30. Ibid., p. 33.
31. For further detail see PC, Caring for older Australians, Final Inquiry Report, pp. 392-402.
33. Ibid., appendix 1.
Position of major interest groups

In its launch of its Blueprint for reform, the *age well* campaign (an alliance of aged care organisations committed to aged care reform) advocated for the establishment of a separate Australian Aged Care Commission (AACC) dedicated aged care quality regulation. This organisation would be separate to DoHA. One of the tasks of the AACC would be the management of accreditation across residential and community aged care as well as deal with any complaints. New quality indicators with public reporting would also be established. This recommendation is not materially different to what was by the PC. As has been discussed previously, this was not supported by DoHA.

Since the introduction of the legislation, there has been very little specific comment by aged care peak lobby groups about the establishment of the Agency. In an analysis of the Bills, Catholic Health Australia (CHA) noted that providers would notice ‘very little difference as a result of the new Agency’.

In their submission to the Senate Inquiry, the Queensland Nurses’ Union (QNU) indicated their support for the expanded role of the Quality Agency to community care. Despite this support, concern was expressed about whether the existing accreditation framework was sufficient to ensure quality of care in both sectors. They recommended a ‘wholesale review’ of the Accreditation Principles and Residential Aged Care Principles be undertaken with a focus on the appropriate staffing and skill mix, including an assessment of professional nursing standards, required to achieve quality care. QNU also supported the implementation of an Aged Care Quality Advisory Council and recommended that Councils be established in each state and territory.

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34. The complete list of organisations can be found on the *age well* website. It includes the majority of aged care peak organisations, for example, Aged and Community Care Australia, Baptist Care Australia, Catholic Health Australia, Council on the Ageing (COTA) Australia, Uniting Care. See the ‘Who is age well?’ section on the *agemwell* website, viewed 18 April 2013, [http://agemwellcampaign.com.au/about/who-is-age-well/](http://agemwellcampaign.com.au/about/who-is-age-well/)


36. Ibid.

37. Ibid.


40. Ibid., pp. 5-6.

41. Ibid., p. 6.

42. Ibid., p. 6.
Financial implications

The Agency will be funded through the budget and through the Quality Agency charging fees.\textsuperscript{43} This is consistent with the current funding arrangements for ACSAA Limited.\textsuperscript{44} There are no financial implications associated with the Transitional Provisions Bill.

Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.\textsuperscript{45} The Government considers that the Bill is compatible.

The Parliamentary Joint Committee on Human Rights has considered the Australian Aged Care Quality Agency Bill 2013 and the Australian Aged Care Quality Agency (Transitional Provisions) Bill 2013. It considers that the bills do not ‘give rise to issues of incompatibility with human rights’.\textsuperscript{46}

Key issues and provisions

Structure, function and operations of the Australian Aged Care Quality Agency

Part 2 of the Bill establishes the Agency. The Agency will have a Chief Executive Officer (CEO) and staff, whose function is to assist the CEO in the performance of their functions. Part 4 of the Bill establishes the Aged Care Quality Advisory Council (the Council) who will provide advice to the Minister for Health and Ageing and the CEO about various matters relating to the Agency.

Chief Executive Officer

The functions of the CEO are set out in clause 12, as follows:

- accredit residential care services in accordance with Quality Agency Principles and the Accreditation Standards under the Aged Care Act 1997

\textsuperscript{43} Explanatory Memorandum, Australian Aged Care Quality Agency Bill 2013, p. 1. For example, the Agency may charge fees payable by quality assessors for registration, professional development fees for education, training services and publications.

\textsuperscript{44} Ibid., p. 1.

\textsuperscript{45} The Statement of Compatibility with Human Rights can be found at page 1 of the Explanatory Memorandum to the Bill and page 3 of the Transitional Provisions Bill.


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• from 1 July 2014, conduct quality reviews of home care services in accordance with the Quality Agency Principles and the Home Care Standards made under the Aged Care Act 1997
• register quality assessors of residential and home care services in accordance with the Quality Agency Principles
• advise the Secretary of DoHA about aged care services that do not meet the Accreditation Standards or the Home Care Standards
• promote high quality care, innovation in quality management and continuous improvement among approved providers of aged care
• provide information, education and training to approved providers of aged care in accordance with the Quality Agency Principles
• other functions that are conferred on the CEO by this Act, the Aged Care Act 1997 or any other Commonwealth law
• other functions (if any) as specified by the Minister by legislative instrument
• to do anything incidental or conducive to the performance of any of the above functions.

Thus, the Quality Agency will retain essentially the same functions and objectives as the Accreditation Agency as set out in the Accreditation Grant Principles 2011, with additional responsibility for quality assurance of home care from 1 July 2014.

The CEO is empowered to do ‘all thing necessary or convenient’ to perform these functions (clause 13). The Minister can give directions to the CEO by legislative instrument and these must be complied with (clause 14). However, these directions must be of general nature only. All directions are legislative instruments and these are not disallowable under section 44 of the Legislative Instruments Act 2003.

Terms of Appointment

Proposed Divisions 2 and 3 outline the appointment of the CEO by the Minister and the terms and conditions of the appointment. The appointment is on a full-time basis by written instrument and for no longer than five years (clauses 16 and 17). An acting CEO may also be appointed.

The remuneration and allowances will be set by the Remuneration Tribunal (clause 19). This reflects the current arrangements for the chair of the ACSAA. Other terms and conditions not prescribed.

47. Currently, in order to receive Commonwealth subsidies, aged care providers must be approved and accredited by the ACSAA. They are referred to as ‘approved providers’ in the legislation and documentation produced by DoHA. The bill proposes that this function will be performed by the Quality Agency.
48. For example, these directions cannot be in relation to the functions or performance of the CEO (as outlined clause 12) or exercise of powers under the Public Service Act 1999 (clause 14). The Explanatory Memorandum (Australian Aged Care Quality Agency Bill) notes that the Minister cannot direct the CEO to accredit an aged care provider (see p. 7 of the Explanatory Memorandum).
legislation will be agreed in writing between the Minister and the CEO (clause 23). The grounds for termination of appointment by the Minister are set out at clause 25.50

**Staff and consultants**

The current functions and objectives of the Accreditation Agency will continue under the Quality Agency but the staff of the Quality Agency will be engaged as public servants under the *Public Service Act 1999*. Arrangements about the transfer of staff from the ACSAA to the Agency are set out in the Transitional Provisions and are considered in the ‘Other Provisions’ section of the Digest.

The CEO is also able to engage other public servants (including those from state and territory governments) to assist with performance of their functions (clause 27). They are also able to engage consultants (clause 28).

**Aged Care Quality Advisory Council**

The purpose of the Council is to provide advice to the CEO and the Minister in relation to the functions of the CEO. In addition, the Council will provide advice to the Minister about the performance of the CEO’s functions (clause 30). The legislation is silent as to whether any of the advice provided by the Council will be publicly available.

The Council will be comprised of a Chair and at least six members but no more than 10 (clause 31). Members of the Council will be appointed by the Minister for no more than three years. The duration of appointment would presumably balance the need for stability in membership and retention of corporate knowledge but also organisational renewal. Substantial expertise or knowledge is one or more of the following fields are a prerequisite for appointment (clause 32):

- evaluation of quality management systems
- provision of aged care (including to those with special needs)
- aged care consumer issues
- geriatrics
- gerontology
- aged care nursing
- psychiatry of the older person
- adult education
- public administration
- management
- law

50. The Minister must terminate the appointment of the CEO if they become bankrupt or act improperly with respect to financial management (for example, compounds with his or her creditors), refer to clause 25 (2).
• health consumer issues
• any other appropriate field of expertise.

Remuneration of the Council will be determined by the Remuneration Tribunal (clause 36). Remuneration will not be paid to a Member who holds an office or appointment or are employed on a full time basis either by the state, a public statutory corporation (not a tertiary education institution), a company limited by guarantee owned by the state or a company where the stock or share are beneficially owned by a state or public statutory corporation (clause 36).

Disclosure of interest requirements to the Minister and to other members of the Advisory Council are set out at clauses 39 and 40, respectively. The Minister is able to terminate the appointment of a Council member under the grounds specified in clause 41, including for failure to disclose an interest and/or bankruptcy or inability to perform duties as a result of physical or mental incapacity.

Strategic and annual operational plans

The CEO must provide three year written strategic plans to the Minister. There is an exception; the first plan applies from 1 January 2014 to 30 June 2016 (subclause 43). The plan must define the CEO’s objectives and how they will be achieved (subclause 43 (2)). The CEO must consult with the Minister and the Advisory Council when drafting the plan (subclause 43 (3)). The plan is not a legislative instrument (subclause 43(4)).

In addition to the strategic plan, annual operational plans must be provided to the Minister as set out in clause 44. With the exception of the first plan, they are for 12 month periods, commencing on 1 July of each year. The plan must set out the actions the CEO will undertake to achieve their objectives, the priorities for work, how the resources of the Agency will applied to achieve these objectives, a risk assessment and performance indicators (subclause 44(2)). Once again, consultation with Minister and the Advisory Council as part of the drafting process is required (subclause 44(3)). The plan is not a legislative instrument (subclause 44(4)).

The legislation is silent on when these plans must be provided to the Minister and if they will be publicly available or tabled in Parliament. It also is not clear what the process for revision might be; for example, if consultation with Minister is required, as prescribed at clause 43. Revisions may be necessary if there was a significant change in the legislative framework or if an emerging policy issue required a response from the Agency. Any variations to the strategic or operational plans must be reported in the Annual Report. This is a legislative requirement (paragraph 47 (2) (b)).

Reporting requirements

Clause 45 enables the Minister to request reports and information from the CEO. It is at the Minister’s discretion whether these requests are made publicly available (subclause 45(4)).

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51 For example, the so-called ‘kerosene baths’ incident in 2000 prompted legislative change and accompanying changes to the accreditation framework. See here for a brief overview of the issue.
The CEO must keep the Minister informed about the operations of the Quality Agency (clause 46) and an annual report presented as soon as practicable after 30 June each year (clause 47). This report will be tabled in Parliament and must include an assessment of whether the Agency has met the objectives set out in the strategic plan and the priorities outlined in the annual plan, including an evaluation against performance indicators (clause 47).  

Protected information

Part 7 of the Bill sets out the parameters for use of protected information, including disclosure (clauses 48 and 49-52, respectively). There is provision in the Bill for the CEO to disclose information about aged care services (clause 52). This is of importance when reporting on the accreditation of aged care homes and whether these standards have been met. It also enables any information about the performance of an aged care provider to be published (clause 52 (g) (h) (i)).

Quality Agency Principles

The Minister is able make Quality Agency Principles to facilitate implementation of the Act (clause 53). These are to be consistent with the Aged Care Act 1997 or the Principles made under the Act (clause 53). The Quality Agency Principles will not replace the accreditation standards and sanctions framework as set out in the Quality of Care Principles 1997.  

It is not intended that the accreditation principles or the process governing accreditation and quality review will change as a result of this Bill. The Quality Agency Principles will be a disallowable instrument under the Legislative Instruments Act 2003.

Although outside the scope of this Digest, questions could be asked about the differences in approach between the regulation of residential and home care (community care) providers. As noted elsewhere in this Digest, residential aged care providers are required to meet all of the accreditation standards to maintain accreditation status. Penalties (including financial) apply if these standards are not met within a defined period of time. Information about accreditation status, and accreditation history, is publicly available. Community care providers are subject to ‘quality review’ and funding is not directly affected as a result of the quality review process. Information about the performance of an individual community care providers is not publicly available, except through Freedom of Information.

It is not clear why these differences exist. Presumably, the same standards and processes should apply to both residential and community aged care providers. Given the rapid expansion of community care (home care) as a result of increased home care packages and implementation of the Commonwealth Home Support program from 1 July 2015 as part of the Living Longer Living Better initiative, it would appear that appropriate oversight and transparency would be necessary pre-

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52. Financial statements and audit reports are also to be included.
53. For example, this could include information about accreditation, including history.
requisites to ensuring the provision of quality aged care and appropriate use of Government funding. Given the discretion of Minister to amend to the Quality Agency Principles, it is possible that this discrepancy may be addressed in the future.

Other provisions

The Transitional Provisions Bill makes certain changes with respect to ACSAA Limited that are necessary for the establishment of the new Australian Aged Care Quality Agency.

Parts 2 and 3 of the Bill contain technical sections that transfer various assets and liabilities, records from ACSAA Limited to the Commonwealth, and substitute the Commonwealth in place of ACSAA Limited in legal proceedings and legislative and non-legislative instruments. Part 2 also exempts any transfers from any state or territory tax liability that might otherwise arise.

Part 4 deals with the directors and staff of ACSAA Limited. The Minister may, but is not compelled to, terminate the appointment of any directors of ACSAA Limited. Further, if any employees of ACSAA Limited are made APS employees under the Public Service Act 1999, those employees are deemed to have been APS employees for the period that they were employees of ACSAA Limited for the purposes of leave and entitlements.

Part 5 deals with certain technical matters. In particular, it includes a standard provision that avoids the possibility that anything in the Bill could be construed as appropriating property on unjust terms, contrary to paragraph 51(xxxi) of the Constitution.
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.