Aged Care Amendment (Independent Complaints Arrangements) Bill 2015

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House: Senate
Portfolio: Social Services
Commencement: On a day to be fixed by proclamation, or six months after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Purpose of the Bill

The purpose of the Aged Care Amendment (Independent Complaints Arrangements) Bill 2015 (the Bill) is to amend the Aged Care Act 1997 (the Act) to transfer responsibility for aged care complaints from the Secretary of the Department of Social Services (the Secretary) to the Aged Care Commissioner (the Commissioner). This is intended to occur from 1 January 2016.

The Bill also amends the Act and the Australian Aged Care Quality Agency Act 2013 to change the name of the Aged Care Commissioner to the Aged Care Complaints Commissioner.

Background

The Australian Government subsidises aged care services for older people who are no longer able to live independently in their own homes. The Aged Care Act 1997 (the Act) and the associated Principles provide the regulatory, funding and quality framework for services including residential aged care, home care packages and flexible care programmes. In 2013–14 the Australian Government spent $9.8 billion on residential care subsidies and supplements and $1.3 billion on home care packages. In this period, around 232,000 people received permanent residential care, around 48,000 received residential respite care and around 83,000 people received a home care package (some may have received more than one type of care).

The objects of the Act include promoting a high quality of care and accommodation and protecting the health and well-being of those people receiving aged care. To this end, the Australian Aged Care Quality Agency (AACQA) accredits and performs quality reviews of aged care services while the Department of Social Services (DSS) is responsible for aged care ‘regulatory policy, compliance and enforcement’, as well as funding. Currently, DSS also operates the Aged Care Complaints Scheme (the Scheme).

Aged Care Complaints Scheme

The Scheme responds to complaints about Australian Government subsidised aged care services, including:

- residential care
- Home Care Packages
- the Commonwealth HACC (Home and Community Care) Program (which is in the process of being consolidated into the Commonwealth Home Support Programme) and
- National Aboriginal and Torres Strait Islander Flexible Aged Care.

The Scheme received 3,903 complaints in 2013–14. The majority of these (89 per cent) related to residential aged care. The issues most frequently complained about were health and personal care, consultation and communication, the physical environment, personnel and medication management.

Complaints to the Scheme may be resolved in a number of ways including provider resolution, conciliation, mediation, investigation or referral to another organisation. In 2013–14:

6. The associated Principles are made under section 96 of the Act and include the Complaints Principles 2014, accessed 3 September 2015.
8. Ibid., pp. 34, 42.
11. DSS, ‘Aged Care Complaints Scheme now part of Department of Social Services’, Aged Care Complaints Scheme website, 2 October 2013, accessed 24 August 2015.
• 79 per cent of complaints were finalised in early resolution
• Scheme officers conducted 355 site visits
• 28 Directions were issued to providers requiring them to take action to comply with their responsibilities under the Act and
• 976 referrals were made to external agencies (97 per cent of these were to AACQA).

In terms of performance, 84 per cent of complaints were finalised by the Scheme within 90 days, and 82 per cent of complainants and providers surveyed were satisfied with the operation of the Scheme.

**Aged Care Commissioner**

If a complainant or service provider is not satisfied with a decision or process of the Scheme, they can ask the Aged Care Commissioner to review that decision or process.

The Aged Care Commissioner is a statutory office created under the Act. Currently, the Commissioner acts as an independent office of review that can examine complaints about:

• the decisions of the Scheme
• the processes of the Scheme and
• the processes of AACQA.

After a complaint has been examined, the Commissioner may direct or make recommendations to the Scheme, or make recommendations to AACQA. The Commissioner can also examine the processes of the Scheme or AACQA without receiving a complaint.

In 2013–14 the Commissioner had ten staff, a budget of $1.4 million, and received 96 complaints. Most complaints were about Scheme decisions (56 per cent) or Scheme processes (41 per cent).

People who have complaints about the Commissioner’s administrative actions can complain to the Commonwealth Ombudsman. Two such complaints were made in 2013–14.

**Recommendations regarding the independence of the Scheme**

The Bill transfers the complaints powers of the Secretary of DSS to the Aged Care Commissioner. This separation of complaints management from the funder and regulator is described by the Government as ‘best practice in complaints handling’. In making these changes, the Government has ‘recognised the recommendations of the 2009 review of the former Aged Care Complaints Investigation Scheme by Associate Professor Merrilyn Walton, and the Productivity Commission’s 2011 Report, Caring for Older Australians. The relevant recommendations are briefly described below.

**Walton review**

In 2009 the Government commissioned an external review (the Walton Review) in response to concerns about the administration and effectiveness of the then Aged Care Complaints Investigation Scheme (the CIS). The review report made a number of recommendations regarding ‘incorporating a broader range of resolution processes, in addition to investigation, to support the resolution of complaints in a timely and effective manner; using a risk assessment framework to assess and prioritise complaints; and improving training for staff and..."
communications with stakeholders.\textsuperscript{25} The Government responded to the Walton Review in April 2010 by committing $50.6 million over four years to reform the CIS.\textsuperscript{26} The Aged Care Complaints Scheme replaced the CIS on 1 September 2011.\textsuperscript{27}

One recommendation of the Walton review that the Government did not implement related to the replacement of the CIS with an independent Aged Care Complaints Commission. Associate Professor Walton’s stated reasons for this recommendation included:

\begin{itemize}
  \item when an organisation is responsible for regulation as well as complaints, it limits the ability to admit failures and commit to improvements
  \item a separate Aged Care Complaints Commission could dedicate itself to the resolution of aged care complaints without the competing demands and potential conflicts existing within the Department (of Health and Ageing)
  \item it would remove any concerns about ‘partiality’ and improve trust and
  \item there is evidence to support the independence of complaints handling.\textsuperscript{28}
\end{itemize}

\textbf{Productivity Commission}

At the request of the Australian Government, in June 2011 the Productivity Commission released a report recommending significant changes to the operation and delivery of aged care in Australia.\textsuperscript{29} One recommendation, which was broadly similar to the recommendation of the Walton review, was to establish an independent regulatory agency including a Commissioner for Complaints and Reviews to handle consumer and aged care provider complaints about aged care services.\textsuperscript{30} The Government did not adopt this recommendation in its 2012 response to the Productivity Commission’s report.\textsuperscript{31}

\textbf{2015–16 Budget}

The 2015–16 Budget contained a number of aged care measures including increasing consumer choice in home care, policy measures delivering small savings, and cuts to program funds.\textsuperscript{32} One such policy measure announced in the Budget was to move the Aged Care Complaints Scheme from DSS to the Aged Care Commissioner from 1 January 2016 to ‘strengthen the independence of aged care complaints handling arrangements’. This measure will deliver projected ‘savings of $2.8 million over four years by simplifying the aged care complaints handling process.’\textsuperscript{33}

\textbf{Committee consideration}

\textbf{Senate Standing Committee for the Scrutiny of Bills}

The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.\textsuperscript{34}

\textbf{Parliamentary Joint Committee on Human Rights}

The Parliamentary Joint Committee on Human Rights concluded that the Bill does not raise human rights concerns and does not require additional comment.\textsuperscript{35}

\textsuperscript{27} Ibid, pp. 33–35.
\textsuperscript{29} R de Boer, ‘\textit{Caring for Older Australians report: a sector in need of reform}’, FlagPost, Parliamentary Library blog, 16 August 2011, accessed 25 August 2015.
\textsuperscript{34} Senate Standing Committee for the Scrutiny of Bills, \textit{Alert digest}, 8, 2015, The Senate, 19 August 2015, p. 1, accessed 31 August 2015.
\textsuperscript{35} Parliamentary Joint Committee on Human Rights, \textit{Twenty-sixth report of the 44th Parliament}, 18 August 2015, p. 1, accessed 31 August 2015.
**Policy position of non-government parties/independents**

No statements by non-government parties specifically relating to the Bill have been identified.

In general terms, prior to the last election in 2013, the Australian Labor Party gave greater powers to the Commissioner ‘to independently examine decisions of the Aged Care Complaints Scheme, and to order a new resolution process’, while the Australian Greens also had a stated policy of ‘strengthening the powers of the Aged Care Commissioner’.  

**Position of major interest groups**

The decision to separate complaints handling from DSS has generally been well received by stakeholders and experts.

The Combined Pensioners and Superannuants Association (CPSA) has reported ‘many complaints’ from families who believe that the existing Scheme favours providers and is not behaving as a neutral body.  

Ian Yates, CEO of COTA Australia (formerly Council on the Ageing) has welcomed the decision, which COTA has long called for. Mr Yates believes that having an ‘independent umpire’ for complaints will ‘give older people greater confidence in how complaints are handled.’  

Merrilyn Walton, who conducted the Walton review in 2009 and is now Professor of Medical Education (Patient Safety) at the University of Sydney, has welcomed the decision, stating that it ‘reflected best practice and would help restore public and industry confidence in the [S]cheme.’ However she has also cautioned that the Commissioner must be adequately funded:

> [Professor Walton] hoped the government's decision was not simply about cost savings and the Aged Care Commissioner would have the resources to undertake “appropriate resolution processes as well as the deep dive investigations that are required.”

> “Complaints tend to keep increasing with time, so complaints bodies need to be properly resourced.”

Angela Wood, a partner with law firm Maddocks, specialising in aged care law, has noted that handling complaints in a single body could limit delays and duplication, but that ‘processes will be required to keep the initial investigation and any appeal process separate, including ensuring that reviews or appeals are managed by different personnel’.

**Financial implications**

Funding for the Scheme will be transferred to the Commissioner with the complaints function. The Explanatory Memorandum states that the Bill will result in $2.8 million in savings over four years. These savings are expected to come from ceasing the Commissioner’s existing review functions as they relate to the Scheme.

**Statement of 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. The Government considers that the Bill is compatible.
Key issues and provisions

Transfer of complaints powers to the Commissioner

The main purpose of the Bill is to transfer responsibility for aged care complaints from the Secretary of the Department of Social Services (the Secretary) to the Aged Care Commissioner (the Commissioner).

Currently the Secretary is empowered under the Act and the Complaints Principles 2014\(^{45}\) to investigate, manage and resolve complaints about aged care services.

In relation to complaints, the Act empowers the Secretary to:

- disclose protected information to certain people for certain purposes\(^{46}\)
- appoint authorised officers who can exercise monitoring powers\(^{47}\) and
- enter premises with the occupier’s consent and ask people at the premises to answer questions and produce documents.\(^{48}\)

The Secretary has a range of other responsibilities relating to regulatory policy, compliance and enforcement.\(^{49}\)

As such, the Bill does not remove the powers listed above from the Secretary, but rather replicates a subset of these powers relating to complaints handling and confers them on the Commissioner.

Item 6 in Schedule 1 inserts new subsection 86-3(2) into the Act, which allows the Commissioner to disclose protected information such as personal information to specified persons in situations where:

- it is in the public interest
- the person is authorised to act on behalf of the care recipient or complainant
- there is serious risk to the safety, health or well-being of a care recipient
- standards of professional conduct are breached
- criminal law or fines should be enforced or
- in accordance with the Information Principles made under section 96-1 of the Act.\(^{50}\)

Item 11 in Schedule 1 inserts new division 94B—Authorised complaints officers into the Act, which:

- creates the role of authorised complaints officer, who is an officer of the Department appointed by the Commissioner to investigate complaints (proposed section 94B-1)
- details the complaints powers that can be exercised by authorised complaints officers (proposed section 94B-2), including:
  - searching premises
  - taking photographs and making records
  - inspecting and copying documents
  - securing items pending the obtaining of a warrant to seize them and
  - operating information technology such as computers and copying relevant information
- empowers an authorised complaints officer to enter premises with the occupier’s consent to exercise the above complaints powers (proposed section 94B-3) and
- empowers the authorised complaints officer to ask a person at the premises to answer questions and produce documents (proposed section 94B-4).


\(^{46}\) Aged Care Act 1997, section 86-3.

\(^{47}\) Aged Care Act 1997, sections 90-3 and 90-4.

\(^{48}\) Aged Care Act 1997, sections 91-1 and 91-2.


\(^{50}\) Explanatory Memorandum, Aged Care Amendment (Independent Complaints Arrangements) Bill 2015, op. cit., pp. 3-4; Information Principles 2014, accessed 3 September 2015.
As noted above, these are not new powers, but rather a subset of the monitoring powers that are currently exercised by authorised officers of the Department.\textsuperscript{51} The stated aim of moving the complaints officers and powers to the Commissioner is to ‘increase the independence of aged care complaints handling by separating responsibility for the management of aged care complaints from the Department of Social Services’ aged care policy and regulatory functions.’\textsuperscript{52}

However, the complaints officers will still be officers of DSS (although appointed by the Commissioner). Around 130 full-time equivalent staff of DSS are currently involved in the Aged Care Complaints Scheme, and they will continue to be employed by the DSS, but will report to the Commissioner.\textsuperscript{53} Further information on the physical and reporting arrangements to maintain the independence of the Commissioner has been provided by the Department:

The Aged Care Commissioner’s primary office is located separately to the Department of Social Services. The independence of the Office of the Aged Care Commissioner will be maintained as staff will take direction from and report to the Aged Care Commissioner. Arrangements will be made to separate staff from broader aged care functions in offices where the Aged Care Complaints Scheme’s staff and staff of the Department of Social Services are co-located.\textsuperscript{54}

**Changes in functions of the Commissioner**

In order to transfer the complaints function to the Commissioner, the Commissioner’s functions also need to be amended.

The Commissioner’s current functions, as listed in subsection 95A-1(2) of the Act, are to:

- examine decisions of the Aged Care Complaints Scheme (upon application by a complainant or approved provider under the Complaints Principles)
- examine the processes of the Scheme (whether as the result of a complaint or on the Commissioner’s own initiative)
- examine the accreditation and review processes of AACQA (whether as the result of a complaint or on the Commissioner’s own initiative)
- make recommendations to the Secretary of the Department or the CEO of AACQA arising from an examination and
- advise the Minister about any of the above matters.

The Act also confers on the Commissioner any functions specified in the Complaints Principles 2014.\textsuperscript{55} These Principles do not currently confer any additional functions on the Commissioner, but the Principles do allow the Commissioner, after they have examined a decision, to direct the Secretary to undertake a new resolution process.\textsuperscript{56}

**Item 16 in Schedule 1** of the Bill repeals subsection 95A-1(2) of the Act and substitutes a new subsection 95A-1(2) which lists the functions of the Commissioner as follows:

- functions relating to complaints as conferred on the Commissioner by the Complaints Principles
- to educate and develop resources relating to best practice complaints handling in aged care
- any other functions conferred on the Commissioner by the Complaints Principles or the Act and
- to advise the Minister about any of the above matters.

While this has the effect of transferring functions relating to complaints to the Commissioner, it also removes most of the Commissioner’s functions from the Act and moves them to the Complaints Principles. Thus it is not

\textsuperscript{51}. See sections 90-4, 91-1, 91-2 and 91-3 of the Aged Care Act 1997.

\textsuperscript{52}. Explanatory Memorandum, Aged Care Amendment (Independent Complaints Arrangements) Bill 2015, op. cit., p. 1.

\textsuperscript{53}. Senate Community Affairs Committee, op. cit., Question SQ15-000390, accessed 26 August 2015.

\textsuperscript{54}. Ibid.; Question SQ15-000393, accessed 26 August 2015.

\textsuperscript{55}. Aged Care Act 1997, paragraph 95A-1(2)(g).

\textsuperscript{56}. Complaints Principles 2014, paragraph 26(2)(c).
clear exactly what the Commissioner’s functions will be (other than promoting best practice complaints handling) until the Complaints Principles are amended or remade. The explanatory memorandum provides the following information:

- It is proposed that the Complaints Principles will detail the powers of the Aged Care Complaints Commissioner to manage and resolve complaints and other concerns about Commonwealth subsidised aged care services through which aged care is provided by approved providers.\(^{57}\)

The item also removes the Commissioner’s functions to review complaints decisions and complaints and accreditation processes from the Act. While it seems clear that the Commissioner will no longer review processes of AACQA, it is not entirely clear whether the Commissioner will retain some mechanism to review their own complaints decisions, or whether the Commonwealth Ombudsman will be the only mechanism of review. The Explanatory Memorandum states:

- The Commissioner will no longer need functions to examine decisions or processes for handling complaints, because the Commissioner will now have primary responsibility over the management and resolution of those complaints under the Complaints Principles. It will also no longer be appropriate for the Commissioner to consider complaints about the processes of the Quality Agency. Concerns about those processes can be raised with the Commonwealth Ombudsman under existing arrangements.\(^ {58}\)

This appears somewhat at variance with the Assistant Minister’s statement that ‘[w]hen the Commissioner takes responsibility for the complaints arrangements, review of decisions will be integrated within those arrangements.’\(^ {59}\) DSS has given a slightly different characterisation again, stating that while the ‘Commissioner’s functions to examine the decisions and processes of the Scheme will cease when the Commissioner takes responsibility for the Scheme’, ‘consumers’ capacity to seek review by the Scheme will remain.’\(^ {60}\)

The exact nature of the proposed review process within the Scheme may not become clear until the Complaints Principles are amended or remade.

**Name change**

The Bill also changes the name of the Commissioner to the Aged Care Complaints Commissioner to reflect the proposed changes to the Commissioner’s functions.

The office of Aged Care Commissioner is created by subsection 95A-1(1) of the Act.

**Item 15** in Schedule 1 of the Bill changes the title of the Commissioner to the Aged Care Complaints Commissioner. Under section 25B of the Acts Interpretation Act 1901 the ‘office continues in existence under the new name so that its identity is not affected’.\(^ {61}\)

Other items make consequential amendments to both the Act and the Australian Aged Care Quality Agency Act 2013 to replace references to the Aged Care Commissioner with references to the Aged Care Complaints Commissioner.

**Concluding comments**

Moving complaints handling from DSS to an independent Aged Care Complaints Commissioner has been called for by a number of reports and stakeholders and is likely to be welcomed as best practice. Some questions remain, particularly around the independence of complaints officers who are also employees of DSS, and how the review process for complaints will operate when the Commissioner assumes primary responsibility for complaints handling. These questions may be answered when the subordinate legislation is made.

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58. Ibid.
60. Senate Community Affairs Committee, op. cit., Question SQ15-000388, accessed 27 August 2015.