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## **INDEPENDENT CAPABILITY REVIEW OF THE AGED CARE QUALITY AND SAFETY COMMISSION**

**Response by: AGED CARE REFORM NOW (ACRN) 2-12-2022**

### Context

For the 2022 April-June quarter the Aged Care Quality and Safety Commission (ACQSC) was notified of 10,119 serious reportable incidents in the residential aged care sector alone. Serious incidents encompass unreasonable use of force, neglect, psychological or emotional abuse, unlawful sexual conduct/inappropriate sexual contact, unexplained absence, unexpected death, stealing or financial coercion, inappropriate restrictive practices)

Of the more than 10,000 serious incidents reported, the ACQSC responded to 907, with 96% of the responses (874) being 'monitoring and engagement'. This means there was no requirement for anything material to change relating to the 874 serious reportable incidents that the ACQSC responded to.

In the April-June quarter, across the full suite of regulatory activities (site audits, remote audits, approximately 1,500 complaints, and the more than 10,000 serious incident reports) there were 71 enforceable actions taken by the ACQSC, of those 7 were actual sanctions.

From the perspective of the older Australians, the families and carers whom we engage with, the ACQSC is not acting in their interests, but serving the interests of providers some of whom consistently deliver unsafe, sub-standard care. Individuals, their carers, families, advocates, staff and practitioners are not able to engage with a complaints system or a regulator that exists to

investigate, resolve and remedy issues quickly and effectively. This means the aged care sector is not protecting the human rights of older Australians and remains a fundamentally unsafe environment for our loved ones.

ACRN believes the current model creates role conflict and a lack of capacity of the regulator to focus on the care of individuals. The promotion and provision of incentives for existing Providers to meet and improve on quality standards, audit and accreditation requires a different approach and conflicts with complaints management and community education. All these functions should not be delivered by one agency.

With respect to the role of the regulator, ACRN supports the following Aged Care Royal Commission recommendations:

1. *Providers should have a system for receiving and dealing with complaints. This should include regular reports to the governing body about complaints and their resolution and an analysis of the patterns of and underlying reasons for complaints.*
2. *The governance standard should include a requirement that a nominated member of the governing body must attest annually, on behalf of the members of the governing body, that they are satisfied that the provider has in place the structures, systems and processes to deliver safe and high-quality care.*
3. *System management includes the approval of providers, receiving and acting on feedback and complaints.*
4. *The role of the Complaints Commissioner should be a statutory appointment and should be operationally separate from other regulatory functions. It should be independent of Government and the DOH.*
5. *A failure to comply with this duty, where that failure exposes residents to a risk of harm, will expose a provider, and its key personnel, to a civil penalty at the suit of the Quality Regulator.*
6. *We recommend a broader range of enforcement powers including powers to accept an enforceable undertaking, impose an infringement notice, ban individuals from providing aged care services, limit the ability of a provider to expand its services, and appoint an external manager to a provider.*
7. *Where Quality Standards are breached, we consider that the regulator should have the option of commencing civil penalty proceedings against one or more key personnel, in addition to the approved provider, in appropriate cases. Remedies for people who have been harmed because of unsafe or poor-quality care are important. We recommend that where a provider or person has been found by a court to have contravened a civil penalty provision, the court should be able to award compensation to a person receiving aged care services who has suffered harm as a result of that contravention. The regulator should be able to make an application for such compensation at the request of the person harmed. An older person who has suffered harm, or someone acting on their behalf, should also be able to make such an application*
8. *Independent Aged Care Commission (truly independent of providers and government), appointed to be responsible for regulating the aged care system, with proactive wider powers, to investigate and be required to provide public information on care related spending; pricing; care and compliance issues and complaints. Complaints; wider*

*enforcement powers for complaints and mandatory reporting complaints by categories and on a timely basis.*

9. *Compensation: Change the Aged Care Act to allow for the Commission to seek personal compensation for civil breach or private right of action including for breach of high-quality care and to comply with standards when it results in harm.*

## Additional questions for the Review to consider

In addition to what is covered in the Terms of Reference, ACRN believes the Review should cover the following elements regarding the role of the regulator:

1. Can the ACQSC shift the focus of its role from enabling providers to operate to the protection and care of older Australians engaging with aged care services?
2. Why is the ACQSC not taking up the enforcement powers currently available to it to deal with serious breaches of the quality standards? What are the barriers to this?  
We are concerned that until this question is answered, outcomes for older Australians will not change even if the regulator's powers are expanded.
3. Can the regulator enable the provision of high-quality care to all Australians receiving aged care services, by actively enforcing quality standards and responding effectively and proportionally to complaints?
4. Will the regulator formally acknowledge that Aged Care is a unique service, which must protect people in real time, and be able to identify and rectify critical issues quickly to prevent suffering?
5. Will the regulator act on serious incidents and institutional abuse, with public disclosure on how risk and harm will be reduced and eliminated within a set timeframe?
6. Is it the regulator's role to balance education and best practice promotion with enforcement, or to remedy serious incidents, institutional abuse, minimize harm and compensate victims?
7. Is it feasible and appropriate for an aged care regulator to provide the functions of compliance, governance, complaint management as well as community education?
8. Does the regulator have the capacity to rigorously evaluate applications from an expanded pool of potential new providers, in addition to its other functions, and how will it do so?
9. The current complaint management process is rigid and adversarial and not fit for aged care. Is the regulator able to deliver a new complaints system that:
  - takes into account complicated family relationships, complex and changing health issues, an under-resourced and unskilled workforce, commercial interests, and the fact that unresolved complaints may cause continued suffering?
  - actively supports and encourages individuals, their families, Carers, advocates, as well as staff and practitioners to raise serious issues of concern without fear of retribution or harm?
  - draws on a broad range of intelligence to identify causation of complaints or issues that lead to measures that will in fact remedy the problem?
10. Is the regulator capable of engaging constructively and transparently with individuals, their families, carers, advocates at each stage of the investigation and resolution of issues and

complaints, and can it compel providers to do the same?

### ACRN believes the Review could assist with identifying:

- the outcomes the ACQSC should be focussed on to drive better performance in the sector
- the appropriate performance measures and performance indicators needed to gauge if the ACQSC is effectively regulating and driving improvement of the system in ways that benefit older Australians
- whether the regulator has the capabilities to transform the sector in a timeframe that meets community expectations. Older people are being harmed in aged care and their families and carers are being traumatised by engaging with the aged care regulatory system
- whether the ACQSC can effectively implement change management strategies to transform the sector to a consistently safe, caring environment for older Australians
- if the ACQSC has identified the right regulatory activities and has the ability to measure the effectiveness of those activities to drive a significant improvement in care and reduction in harms currently being experienced by older Australians engaging with aged care services.

### Conclusion

ACRN welcomes the opportunity to contribute to the reform processes being undertaken in the aged care sector in Australia. As with all the activities we are participating in, we believe the voice of older Australians, their needs, safety and human rights need to be strengthened in the Independent Review of the Aged Care Quality and Safety Commission. This point was made as part of the findings of the Royal Commission into Aged Care Quality and Safety. Putting the needs and voices of older Australians at the centre of aged care reform will deliver better outcomes for the sector and individuals engaging with it.

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### Appendix – Complaint Examples received by ACRN

- ACRN have received numerous complaints about the Aged Care complaints management system.
- All the complaints progressed to the ACQSC, as the initial complaints direct to the provider, were unresolved and in some cases escalated. We note some of these complainants were upset by the time they complained to the ACQSC, as they were seeking to resolve a serious issue impacting a relative in care, and the complaint process direct with the Provider had been uncomfortable and/or adversarial. They were now seeking a resolution from the ACQSC.
- Many of the complainants felt the ACQSC, failed in dealing with their complaint in accordance with their expectations for the following reasons.
  - The complaint process took weeks, to months to years for the ACQSC to supply a final report. Often this did not resolve the matter for the complainant. There were many emails to the ACQSC saying “I was wondering if you could offer me an update on my review”.

- These complainants thought they would be aided with making a complaint. But in many cases halfway through the complaint investigation process, they were told they could not introduce ‘another’ issue as this involved a new complaint and they had to follow the process- that is, submitting a new complaint.
- The complainant was informed by the ACQSC, that discussions and agreements between the provider and the ACQSC were private and confidential, irrespective of the fact that all information provided by the complainant was shared with the Provider. This left many complainants angry and vulnerable.
- The investigation process by the ACQSC, also created issues with complainants. Often documents that may expediate the complaint resolution such as care plans, medication records, medical records, allied health visits appeared difficult to access or missing. This is significant, specifically in cases where the aged care resident has a cognitive decline diagnosis. Yet the ACQSC admitted the documents were unavailable or gave the Provider unusually long periods of time to provide the information, only to conclude the information was unavailable.
- The complainants also said the ACQSC does not substantiate Provider information. That ACQSC rely solely on the Providers verbal or written responses without asking for additional information when the Providers answers vary from the complainant’s version of events.
- Complainants feel the ACQSC is lenient on the providers – one complainant said the Provider admitted to supplying reduced standards of care due to staff shortages, and the ACQSC overlooked the breach in quality standards as the provider was seen as admitting to the problem and was ‘resolving their problem’. The complainant was confused as to the role of the ACQSC, and felt they were lenient on the Provider and overlooking the impact of the poor-quality care on the wellbeing of their dad.
- The ACQSC has wide powers, but the public is confused on when and how they use that power to prioritize the wellbeing of aged care recipients. The ACQSC stated that they “can” or “may” take certain actions but there is no indication of under what circumstances these actions are taken eg The ACQSC may refer a practitioner to Australian Health Practitioner Regulation Authority(AHPRA)
- The COVID pandemic showed many deficits in the complaint management system, specifically for family caregivers who were denied prolonged access to supply supportive care for family members. Such family Carers were prevented from supplying care at a time when many facilities, particularly regional facilities, were extremely short staffed. Family caregivers, who formerly were providing regular care, were prevented from assisting with feeding and supplying essential personal care to high needs people.
- Another example that highlights the limitations in the current complaints system, is when a family member is restricted from visiting their parent who is living in an aged care facility. The Provider restricts visits because they allege the family member is demanding and is aggressive with staff at the facility. This usually escalates after the family member makes a complaint about the quality of care. Regardless of who is at fault, a system that promotes and escalates conflict by asking the ACQSC to determine these issues is at risk of escalating conflict between the family member and the Provider, between family members, causing significant harm to the resident (including because they have no capacity), and impacting the family member who now feels like a victim of the system.