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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AGED CARE QUALITY AND SAFETY COMMISSION BILL 2018

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Senior Australians and Aged Care, and
Minister for Indigenous Health, the Hon Ken Wyatt AM, MP)

AGED CARE QUALITY AND SAFETY COMMISSION BILL 2018

OUTLINE

The purpose of the Aged Care Quality and Safety Commission Bill 2018 (the Bill) is to establish a new Aged Care Quality and Safety Commission (the Commission). The establishment of the Commission marks a significant reform in the regulation of aged care providers. This reform is part of a two-year agenda to strengthen and enhance aged care regulation to protect and assure the quality of care provided to aged care consumers. Consumers are at the heart of the reforms and the Commission's objects are to: protect and enhance the safety, health, well-being and quality of life of aged care consumers; promote confidence and trust in the provision of aged care; and promote engagement with aged care consumers about the quality of care and services.

The Commission will be a single point of contact for aged care consumers and providers of aged care in relation to quality of care and regulation. The Commission will regulate residential aged care services, home care services, flexible care services and Commonwealth-funded aged care services namely the Commonwealth Home Support Programme and the National Aboriginal and Torres Strait Islander Flexible Aged Care Program.

The Commission replaces the existing Australian Aged Care Quality Agency (Quality Agency) and Aged Care Complaints Commissioner (Complaints Commissioner) on 1 January 2019 by bringing together these functions into the Commission. This will result in the Commission being responsible for the accreditation, assessment and monitoring of, and complaints handling of aged care services and Commonwealth-funded aged care services. As part of the reform agenda, it is intended that the Commission will be responsible for the approval of providers of aged care, compliance and compulsory reporting of assaults from 1 January 2020.

The Commission will be led by a statutory appointed Aged Care Quality and Safety Commissioner who will be supported by an advisory body (the Aged Care Quality and Safety Advisory Council). The Bill establishes that the Commissioner may seek and consider clinical advice that is relevant to the performance of its functions. To support this, it is envisaged that a clinical advisor will be engaged by the Commissioner to support the work of the Commission and this role would be supported by an expert clinical panel.

This Bill:

- establishes the Commission as a prescribed agency under the *Public Governance, Performance and Accountability Act 2013*,
- describes the functions of the Commission, Commissioner and Advisory Council,
- describes the appointment process for the Commissioner and Advisory Council members,
- describes the sharing of information obtained by the Commission for the purposes of its functions including the protection, use and disclosure of such information,

- describes operational matters relating to the Commission including entry and search powers, reporting requirements and delegations.

Consultation

As part of the *Review of National Aged Care Quality Regulatory Processes* (Carnell-Paterson Review) extensive public consultation took place with a range of stakeholders including aged care regulators, consumers, carers and approved providers to inform the recommendations of the Carnell–Paterson Review. Targeted sector meetings were held.

The Department of Health has met with the Aged Care Quality Advisory Council - established under section 29 of the *Australian Aged Care Quality Agency Act 2013* and the Aged Care Sector Committee Quality Subgroup. A targeted sector meeting was also held in early August 2018 to discuss the establishment of the Commission. Information from these meetings has helped to inform the development of this Bill.

This Bill has been developed in partnership with the Quality Agency and Complaints Commissioner.

Financial Impact Statement

This Bill forms part of a broader government response to the Carnell–Paterson Review.

The Aged Care Quality and Safety Commission will be partially budget funded combining existing Government allocations for the functions of the Quality Agency and Complaints Commissioner; and partially funded through the Commission charging fees for services. This is consistent with the current funding arrangements for the Quality Agency. Accordingly this Bill will have no financial impact.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Statement of Compatibility with Human Rights

This statement has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

AGED CARE QUALITY AND SAFETY COMMISSION BILL 2018

The Bill is compatible with the human rights and freedoms recognised or declared in the international Instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The purpose of the *Aged Care Quality and Safety Commission Bill 2018* (the Bill) is to establish a new Aged Care Quality and Safety Commission (the Commission). This body will replace the existing Australian Aged Care Quality Agency and Aged Care Complaints Commissioner from 1 January 2019.

The Commission will be responsible for the accreditation, assessment and monitoring of, and complaints handling of aged care services and Commonwealth-funded aged care services.

The role of the Commission is to: protect and enhance the safety, health, well-being and quality of life of aged care consumers; promote confidence and trust in the provision of aged care; and promote engagement with aged care consumers about the quality of care and services.

Human rights implications

The Bill is compatible with the right to an adequate standard of living and the right to health as contained in article 11 and article 12(1) of the *International Convention on Economic, Social and Cultural Rights* and articles 25 and 28 of the *Convention of the Rights of Persons with Disabilities*.

The Bill engages the right to protection from exploitation, violence and abuse as contained in article 20(2) of the *International Covenant on Civil and Political Rights* and article 16 of the *Convention of the Rights of Persons with Disabilities*. Part 7 of the Bill contains protections for personal information about individuals that is collected by staff of the Commission in the performance of functions or the exercise of powers under the *Aged Care Quality and Safety Commission Act 2018* (once enacted). These provisions include a penalty of imprisonment for two years for the offence of making a record of, disclosing or otherwise using protected information except for permitted uses. The Commissioner of the Commission is permitted to disclose personal information in a limited range of circumstances in which it may be necessary to do so, for example to prevent or lessen a serious risk to the safety, health or well-being of a care recipient.

The Bill engages the right to not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation contained in article 17 of the *International Covenant on Civil and Political Rights*. The Bill supports the right to privacy by providing for how information will be gathered and the conduct of persons gathering information when on a premises.

Conclusion

The *Aged Care Quality and Safety Commission Bill 2018* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This Bill is compatible with human rights because it promotes the human right to the enjoyment of the highest attainable standard of physical and mental health and, to the extent that it limits the human right to protection against arbitrary interference with privacy, those limitations are reasonable, necessary and proportionate.

**The Hon Ken Wyatt AM, MP, Minister for Senior Australians and Aged Care,
and the Minister for Indigenous Health**

AGED CARE QUALITY AND SAFETY COMMISSION BILL 2018

NOTES ON CLAUSES

Part 1 – Preliminary

Division 1 – Preliminary

Clause 1 – Short title

This is a formal provision which provides that the Bill, once enacted, may be referred to as the *Aged Care Quality and Safety Commission Act 2018*.

Clause 2 – Commencement

This clause provides that the Act will commence on 1 January 2019.

Clause 3 – Act binds the Crown

This clause provides that the Bill binds the Crown in each of its capacities.

Clause 4 – Extension to external Territories

This clause provides that the Bill will not have application to the external Territory of Ashmore Island and Cartier Island.

Clause 5 – Object of this Act

This clause sets out the Commission's regulatory framework that will protect and enhance the safety, health well-being and quality of life of aged care consumers. The Commission is to be responsible for promoting the confidence and trust of aged care consumers in the provision of aged care services including Commonwealth-funded aged care services. The Commission will also promote engagement with aged care consumers and representatives within the aged care sector about the quality of care and services provided by approved providers of aged care services and Commonwealth-funded aged care services.

It also indicates the future intention to confer additional functions on the Commissioner in relation to the approval of providers of aged care services and compliance functions that will be transitioned from 1 January 2020.

Clause 6 – Simplified outline of this Act

This clause provides a general overview of functions of this Bill.

Division 2 – Definitions

Clause 7 – Definitions

This clause sets out definitions of terms that are relied on in other provisions throughout the Bill. Some important definitions that warrant detailed explanation include the following:

Aged care consumer – means a care recipient as defined in Part 2.3 of the *Aged Care Act 1997* or as a person who is in receipt of a Commonwealth-funded aged care service. This term has been included in the Bill to ensure that people receiving care and services under a Commonwealth-funded program, such as the

Commonwealth Home Support Programme, are also included under this Bill. The Commissioner will have a broader role in interacting with people receiving aged care than as defined in the *Aged Care Act 1997*.

The term ‘consumer’ is also used in the draft Aged Care Quality Standards, which are expected to come into effect on 1 July 2019 under the amendments contained in the *Aged Care (Single Quality Framework) Reform Bill 2018*. The definition proposed in the Standards is intended to be broader than the definition used in this Bill as it refers to the representatives of consumers where this is appropriate. In this Bill, the representatives of consumers are explicitly referred to in the education functions of the Commissioner, and can otherwise be engaged by the Commissioner in the performance of its functions.

Personal information – means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Clause 8 – Meaning of *Commonwealth-funded aged care service etc.*

This clause sets out the meaning of Commonwealth-funded aged care services as a service provided under an aged care program funded by the Commonwealth as provided for in the rules. These services provided for in the rules will include the Commonwealth Home Support Programme and the National Aboriginal and Torres Strait Islander Flexible Aged Care Program. The clause also specifies that a funding agreement is an agreement between a Commonwealth-funded aged care service and the Commonwealth and that a service provider is a person or body that is a party to that agreement as it relates to the services being provided under the funded program.

Clause 9 – Vacancy in the office of an Advisory Council member

This clause provides that, for the purposes of determining whether there is a vacancy on the Aged Care Quality and Safety Advisory Council (Advisory Council) (for either this Bill or the *Acts Interpretation Act 1901*), there are taken to be up to 10 Advisory Council members in addition to the Chair of the Advisory Council. The establishment and membership of the Advisory Council is detailed in Part 5 of the Bill.

Part 2 – Aged Care Quality and Safety Commission

Division 1 – Introduction

Clause 10 – Simplified outline of this Part

This clause provides a general overview of the composition of the Commission.

Division 2 – Establishment etc. of the Commission

Clause 11 – Establishment of the Aged Care Quality and Safety Commission

This clause establishes the Commission. It is intended that the Commission will be a listed entity under the *Public Governance, Performance and Accountability Act 2013* so that it will be a non-corporate Commonwealth entity to which the provisions of the *Public Governance, Performance and Accountability Act 2013* will apply.

Clause 12 – Constitution of the Commission

This clause provides that the Commission will comprise the Commissioner and the staff of the Commission. The Advisory Council will not form part of the Commission but instead will be established to provide advice to the Commissioner of the Commission and to the Minister responsible for the *Aged Care Quality and Safety Commission Act 2018*.

The Commission will not have a legal identity separate from the Commonwealth.

Clause 13 – Function of the Commission

This clause provides that the function of the Commission is to assist the Commissioner in the performance of the Commissioner's functions (refer to clause 16 for further information about the Commissioner's functions).

Part 3 – Commissioner

Division 1 – Introduction

Clause 14 – Simplified outline of this Part

This clause provides a general overview of the Commissioner's functions.

Division 2 – Functions and powers of the Commissioner

Clause 15 – Commissioner

This clause provides that there is to be a Commissioner of the Commission. The Commissioner will lead the work of the Commission and will report directly to the Minister responsible for the Act, currently the Commonwealth Minister for Aged Care.

Clause 16 – Functions of the Commissioner

The Commissioner will be responsible for the leadership and management of the Commission and for implementing the Commission's overall strategic direction to protect and enhance the health, safety, well-being and quality of life for aged care consumers, and to promote high quality care and provision of services by approved providers of aged care services and service providers of Commonwealth-funded aged care services.

The Commissioner will have the ability to seek and consider clinical advice, including from the Chief Clinical Advisor and expert clinical panel, that is relevant to the performance of any of their functions.

Consistent with this broad objective, clauses 17, 18, 19 and 20 describe the specific consumer, complaints, regulatory and education functions of the Commissioner:

- such other functions that are conferred on them by this Bill or any other law, such as the *Public Service Act 1999* or the *Public Governance, Performance and Accountability Act 2013*
- additional functions conferred by the Minister in writing. This ensures that the functions of the Commission can be updated over time so that they remain appropriate and in line with the requirement of the position

- anything incidental to, or conducive to, the performance of any of the prescribed functions. This could include, for example, the publication of policies and protocols. This is an activity that is incidental to the general functions of the Commissioner.

Clause 17 – Consumer engagement functions of the Commissioner

This clause provides for the consumer engagement functions of the Commissioner. In performing this function the Commissioner will advance ways and means to enhance and protect the safety, health, well-being and quality of life of aged care consumers. This will be achieved by developing and promoting best practice models that are made in consultation with consumer and industry leaders of aged care. Once developed, the models will then be promoted for use by approved providers and service providers of aged care.

Clause 18 – Complaints functions of the Commissioner

This clause provides for the complaints functions of the Commissioner.

Responsibility for management of complaints about aged care services currently rests with the Aged Care Complaints Commissioner (Complaints Commissioner). This position will no longer exist from the commencement of this Act and the Complaints Commissioner's current functions will transfer to the new Aged Care Quality and Safety Commissioner.

This includes the functions currently described in the Complaints Principles made under section 96-1 of the *Aged Care Act 1997* which will transfer to rules made under this Act. Consistent with current Complaints Commissioner arrangements, the rules will detail the powers of the Commissioner to manage and resolve complaints and deal with other information about providers of aged care services.

The existing education function of the Complaints Commissioner will be captured under the broad education functions of the Commissioner in clause 20. This will allow continuation of education to people (including providers) about best practice complaints handling and matters arising from complaints.

Clause 19 – Regulatory functions of the Commissioner

This clause provides for the regulatory functions of the Commissioner. The Quality Agency currently has the power to accredit, review and monitor aged care services under the *Australian Aged Care Quality Agency Act 2013*.

With the transfer of responsibility for regulatory functions from the Quality Agency to the Commissioner, the regulatory functions as set out in the *Australian Aged Care Quality Agency Act 2013* will act in the same way in this Act. These functions include to accredit residential aged care services and any other kind of service in accordance with the rules. Currently accreditation is made in accordance with the Accreditation Standards, which describe four standards that must be met by all providers of residential aged care. Each standard consists of a principle and a number of expected outcomes. There are 44 expected outcomes across the four standards. Residential care services must comply with all 44 expected outcomes at all times.

It is important for the reader to note that the *Aged Care (Single Quality Framework) Reform Bill 2018* proposes to amend the *Aged Care Act 1997* so that the Accreditation Standards (as well as the Home Care Standards and Flexible Care Standards) are replaced by a single set of quality standards, to be called the Aged Care Quality Standards. This Bill is proposed to commence on 1 July 2019 and, following its commencement, the Commission would become responsible for accrediting, reviewing and monitoring services under the new Aged Care Quality Standards.

The regulatory function of the Commissioner will also be to conduct quality reviews of home care services, Commonwealth-funded aged care services and any other kind of service specified in the rules.

In addition to performing functions in relation to accreditation and the conduct of quality reviews, the Commissioner will be responsible for monitoring the services that have been accredited or have undergone a quality review. This function was previously detailed under accreditation, however in this Bill it has been explicitly detailed for the ease of aged care consumers, providers and the public.

The Commissioner will be responsible for registering quality assessors of aged care services in accordance with the rules. Quality assessors are those individuals who will assess approved providers against the rules.

Clause 20 – Education functions of the Commissioner

This clause provides for the education functions of the Commissioner. It is an important part of the Commissioner's role to promote and build aged care consumers' and the broader public's confidence and trust in the provision of aged care services. The Complaints Commissioner and Quality Agency currently have education functions; this Bill brings these functions together.

The education functions of the Commissioner include providing information and education about matters relating to aged care services as they relate to the broader functions of the Commissioner. This may include education on areas such as, but not limited to:

- consumer engagement
- best practice in the handling of complaints and matters arising from complaints
- delivery of quality care and services

Under this function, information and education may be provided to approved providers of aged care services, service providers of Commonwealth-funded aged care services, aged care consumers, representatives of aged care consumers and the public more broadly.

Clause 21 – Rules may make provision for, or in relation to, the performance of a function of the Commissioner

The rules, as provided for in clause 77, may make provisions that allow for the Commissioner to do what may be required in order to perform their functions. This is a broad provision to ensure that there is flexibility built in to allow the Commissioner to ensure the safety needs of aged care consumers are met.

Such provisions may include formation of a system for complaints and detail how they are received, managed and resolved, what can be done to achieve this, and the actions that may be taken by the Commissioner, including referral of complaints to more appropriate bodies. The Commissioner also retains the capacity to issue directions requiring action by providers where necessary. The rules will maintain a process of review where a complainant or provider does not agree with the decision made by the Commissioner in relation to their complaints functions.

The clause also provides for rules to make provisions that include or relate to the Commissioners regulatory functions, including:

- the accreditation of a service or when a service is considered to be accredited in accordance with the rules
- the registration of quality assessors including the functions they perform
- establishing the requirement for approved providers of aged care services and Commonwealth-funded aged care services to have:
 - written plans for continuous improvement for the services they provide
 - a form of contact between the service provider and the Commissioner or quality assessor.

Clause 22 – Minister may give directions to the Commissioner

Consistent with like provisions in Commonwealth legislation establishing Agencies that are prescribed under the *Public Governance, Performance and Accountability Act 2013*, this clause provides for the Minister to give directions to the Commissioner about the performance of the Commissioner’s functions that the Commissioner must comply with.

Subclause (2) provides that the direction must be of a general nature only and cannot relate to an action or decision of the Commissioner in respect to an individual care recipient, aged care service or approved provider or service provider. For example, the Minister cannot direct the Commissioner to take a certain action or make a certain decision in relation to an individual complaint or the accreditation of an individual service.

All directions made under clause 22 are legislative instruments within the meaning of the *Legislation Act 2003* which means that they are subject to Parliamentary and public scrutiny. However they are not subject to disallowance by the Parliament. This is because of the operation of regulations made for the purpose of paragraph 44(2)(b) of the *Legislation Act 2003* which expressly provide that a direction by a Minister to any person or body is a class of instrument that is not subject to disallowance. Regulations have also been made for the purpose of paragraph 54(2)(b) of that Act that provide that such directions are in a class of instrument that is not subject to sun setting under the *Legislation Act 2003*.

Clause 23 – Fees

This clause provides that the Commissioner may charge fees for services provided by the Commission. Fees may, for example be charged in relation to the accreditation of residential care providers and the registering of quality assessors.

Division 3 – Appointment of the Commissioner

Clause 24 – Appointment

This clause provides that the Commissioner is appointed by the Minister by written instrument and they will hold office on a full-time basis.

Subclause (2) provides that the Commissioner holds office for the period specified in the instrument of appointment but the period must not exceed five years. This term is in keeping with Australian Government policy on the selection of statutory office holders working in, or in conjunction with, Australian Public Service agencies.

The Commissioner may, however, be re-appointed for further terms. This is permitted under subsection 33AA of the *Acts Interpretation Act 1901* that provides that in any Act, a reference to appointment includes re-appointment. This, again, will be done in line with Australian Government policy on the selection of statutory office holders.

Clause 25 – Acting Commissioner

Clause 25 provides details about how the Minister may appoint a person to act as the Commissioner during a vacancy in the office of Commissioner or when the Commissioner is absent from duty, overseas or unable to perform the duties of the office (for whatever reason).

Division 4 – Terms and conditions of appointment

Clause 26 – Remuneration and allowances

Subclause 26(1) provides that the Commissioner's remuneration is determined by the Remuneration Tribunal. The Remuneration Tribunal is an independent statutory body responsible for the setting of remuneration of appointees to key Commonwealth offices. If no such determination is in operation, the Commissioners' remuneration is prescribed by the rules made in accordance with this Bill (refer Part 9).

Subclause 26(2) provides that the Commissioner is also to be paid the allowances that are prescribed by the rules, other than those allowances set by the Remuneration Tribunal.

Subclause 26(3) clarifies that the clause has effect subject to the *Remuneration Tribunal Act 1973* (meaning that it should be read in the context of that Act and the means by which the Remuneration Tribunal sets remuneration). This is a standard provision included in similar clauses in other legislation.

Clause 27 – Leave of absence

This clause provides that the Remuneration Tribunal determines the Commissioner's recreation leave entitlements and that the Minister can grant the Commissioner other types of leave on the terms and conditions decided by the Minister.

Clause 28 – Other paid work

This clause prevents the Commissioner from engaging in paid employment outside the duties of their office without the Minister's approval. Reasons for such a provision are to minimise the risk of a conflict of interest and to ensure that the Commissioner focuses on their job in leading the Commission, noting that the position is full-time.

Clause 29 – Other terms and conditions

To the extent that terms and conditions for the Commissioner are not covered by the Act, this clause enables the Minister to decide any other terms and conditions.

Clause 30 – Resignation

This clause provides the details about how the Commissioner may resign their appointment and when the resignation takes effect. The Commissioner may resign by giving written notice to the Minister. The resignation takes effect on the day that the notice is received by the Minister or on a later date if the Commissioner has specified a later date in the notice of resignation.

Clause 31 – Termination of appointment

This clause provides the details about how, and for what reasons, the Minister may terminate the Commissioner's appointment. This may include, for example, physical or mental incapacity, absence without leave for extended periods, failure to comply with requirements relating to disclosure of interest and engaging in other employment without authorisation from the Minister.

Part 4 – Staff of the Commissioner etc.**Clause 32 – Simplified outline of this Part**

This clause provides a general overview of the staff of the Commission.

Clause 33 – Staff

This clause provides that the staff of the Commission are to be engaged under the *Public Service Act 1999*. For the purposes of that Act, the Commissioner and the staff of the Commission together constitute a statutory agency and the Commissioner is the head of that statutory agency.

Clause 34 – Persons assisting the Commissioner

This clause provides that the Commissioner may also be assisted by certain officers and employees of any of the following bodies:

- agencies (within the meaning of the *Public Service Act 1999*)
- authorities of the Commonwealth
- a State or Territory
- authorities of a State or Territory.

This allows, for example, State or Territory government employees to be seconded to work for the Commissioner of the Agency. In such circumstances the persons assisting the Commissioner would be subject to the directions of the Commissioner.

Clause 35 – Consultants

This clause, which is included for the avoidance of doubt, provides that the Commissioner may engage consultants to perform services for the Commissioner. Such consultants should have suitable qualifications and experience and are to be engaged on the terms and conditions that the Commissioner determines in writing. The Commissioner may wish to engage consultants to, for example, work on specific projects and matters which would require particular knowledge and experience.

Part 5 – Aged Care Quality and Safety Advisory Council

Division 1 – Introduction

Clause 36 – Simplified outline of this Part

This clause provides a general overview of the Advisory Council's functions.

Clause 37 – Establishment of the Aged Care Quality and Safety Advisory Council

This clause establishes the Advisory Council. The Advisory Council's role will be to advise the Commissioner (as described in clause 38).

Clause 38 – Functions of the Advisory Council

The role of the Advisory Council is to provide advice to the Commissioner on its own initiative, or at the request of the Commissioner, about those matters that relate to the functions of the Commissioner.

Subsection (2) provides that the Minister may also request advice from the Advisory Council about matters that relate to the performance of the Commissioner's functions.

Clause 39 – Minister may give directions about the Advisory Council's functions

This clause gives the Minister the ability to issue directions to the Advisory Council about the functions the Advisory Council will perform, and that the Advisory Council must comply with such a direction.

All directions made under clause 39 are legislative instruments (in accordance with the *Legislation Act 2003*), which means that they are subject to Parliamentary and public scrutiny. However, in accordance with sections 44 and 54 of the *Legislation Act 2003*, they are neither subject to disallowance nor sunseting (see the explanation in relation to directions made under clause 22 above).

Subclause (2) provides that the direction must be of a general nature only and cannot, for example, relate to decision of the Commissioner in respect to an individual complaint case, approved provider or individual service provider case or an individual.

Division 3 – Membership of the Advisory Council

Clause 40 – Membership of the Advisory Council

This clause provides that the Advisory Council will consist of a Chair and at least six, and no more than 10, other members.

While being a manageable size, the number of places on the Advisory Council will ensure appropriate expert and stakeholder representation, including from specialist fields identified in clause 41.

Clause 41 – Appointment of Advisory Council members

This clause provides for how Advisory Council members are to be appointed, for how long, and the skills and experience they need to possess.

Members will be appointed by the Minister by written instrument (subclause 44(1)). Advisory Council members hold office on a part-time basis for up to three years, as specified in the instrument of appointment (subclause 44(2)). As with the appointment of the Commissioner, Advisory Council members may be re-appointed for further terms (by virtue of the operation of subsection 33AA of the *Acts Interpretation Act 1901*).

To be eligible to be considered by the Minister for appointment to the Advisory Council, an individual must have substantial experience or knowledge in at least one of a number of specific fields that may assist in the effective performance of the Commissioner's functions. For example, members of the Council must have skills or experience in:

- evaluation of quality management systems
- provision of aged care, including provision of aged care to people with special needs
- aged care consumer issues
- geriatrics, gerontology, aged care nursing or psychiatry of the older person
- adult education
- public administration, management or law, or
- health consumer issues.

To allow the Minister to appoint members based on the expertise and skills required to support the Commissioner as the Commission develops over time, members may also be drawn from any other appropriate field of expertise.

The terms of the current members of the Aged Care Quality Advisory Council will continue and transition to the Aged Care Quality and Safety Advisory Council with their terms to be served as set. Vacancies will be filled under the terms set out in this Bill.

Clause 42 – Acting appointments

This clause provides that the Minister may appoint a person to act as the Chair of the Advisory Council during any vacancy in the office or during any period when the Chair of the Advisory Council is absent from duty, or from Australia, or is, for any reason, unable to perform the duties of the office.

A person is not eligible for appointment to act as the Chair of the Advisory Council unless the person is eligible for appointment as an Advisory Council member. In other words, before appointing the person the Minister must be satisfied that the person has substantial experience or knowledge in at least one of the fields listed in subclause 41(3).

A note to the clause draws the reader's attention to sections 33AB and 33A of the *Acts Interpretation Act 1901* which relate to people acting in various offices.

Sub-clause (2) provides that the Minister may appoint someone to act as an Advisory Council member.

A person is not eligible to act as an Advisory Council member unless the person is eligible for appointment as an Advisory Council member. That is, before appointing the person, the Minister must be satisfied that the person has the substantial experience or knowledge as set out in subclause 41(3).

Sections 33AB and 33A of the *Acts Interpretation Act 1901* provide further information about acting appointments.

Clause 43 – Remuneration and allowances

This clause provides that an Advisory Council member will be paid the remuneration determined by the Remuneration Tribunal. The Remuneration Tribunal is an independent statutory body that is responsible for setting the remuneration of appointees to key Commonwealth offices. If no determination is in operation, the member is to be paid the remuneration that is prescribed by rules made in accordance with Part 9 of this Bill.

Subclause 43(2) provides that an Advisory Council member is not entitled to be paid if he or she is a full-time employee of, or holds an office or appointment in, for example, a State, a State government corporation established under State law (other than a tertiary education institution) or a state government company. This means that government employees or office holders will not be paid for their role on the Advisory Council, as it is considered part of their usual duties for which they are already remunerated.

The same rule applies to an Advisory Council member who has a similar relationship with the Commonwealth or a Territory (as per subsection 7(11) of the *Remuneration Tribunal Act 1973*).

Advisory Council members will also be paid the allowances that are prescribed by rules (if any) other than those allowances set by the Remuneration Tribunal.

This clause (other than subclause (2) which relates to those people not entitled to remuneration) has effect subject to the *Remuneration Tribunal Act 1973*. This is a standard provision included in similar clauses in other like legislation.

Clause 44 – Leave of absence

This clause sets out the arrangements for granting leave to Advisory Council members and the Chair. The clause provides that the Minister may grant leave of absence to the Advisory Council Chair on the terms and conditions that the Minister determines. The Advisory Council Chair may, in turn, grant leave of absence to any other Advisory Council member on the terms and conditions that the Chair determines.

Clause 45 – Disclosure of interests to the Minister

This clause requires Advisory Council members to give written notice to the Minister of all interests, financial or otherwise, that the member has or acquires and that conflict (or could conflict) with the proper performance of the member's functions. This is an important safeguard for ensuring that any advice provided by the Advisory Council to the Commissioner is not tainted by any conflict of interest or any perceived conflict of interest.

Clause 46 – Disclosure of interests to the Advisory Council

This clause recognises that an Advisory Council member may at times have a conflict that arises in respect of a particular matter being considered (or about to be considered) by the Advisory Council.

This clause therefore provides that an Advisory Council member who has an interest, financial or otherwise, in a matter being considered or about to be considered by the Advisory Council must disclose the nature of the interest to the meeting. The disclosure must be made as soon as possible after the relevant facts have come to the member's knowledge and must also be recorded in the minutes of the meeting.

Unless the Advisory Council otherwise decides, the Advisory Council member must not be present during any deliberation by the Advisory Council on the matter nor take part in any decision relating to the matter.

However, the Advisory Council may make an exception to this. If they do so, they must make a determination to this effect and the Advisory Council member must not be present during any deliberation of the Advisory Council in relation to the determination nor take part in making the determination. The determination must be recorded in the minutes of the meeting.

Clause 47 - Resignation

This clause enables an Advisory Council member to resign their appointment by giving the Minister a written resignation. The resignation takes effect on the day it is received by the Minister or, on a later day if specified in the resignation. This process for resignation is the same as applies to the Commissioner (refer to clause 30).

Clause 48 – Termination of appointment

This clause describes those circumstances in which the Minister may terminate the appointment of an Advisory Council member.

The Minister may terminate the appointment of an Advisory Council member for misbehavior, because of physical or mental incapacity, because of failure to comply with conflict of interest and disclosure provisions or because the Advisory Council member is absent, except on leave of absence, from three consecutive meetings of the Advisory Council.

Clause 49 – Other terms and conditions

This clause enables the Minister to decide any terms and conditions of the Advisory Council members that are not otherwise covered by the Bill. The Minister has a similar power in relation to the Commissioner (refer to clause 29).

Division 4 – Procedures of the Advisory Council

Clause 50 – Procedures of the Advisory Council

This clause gives the Minister the ability to issue written directions to the Advisory Council about the procedures are to be followed in relation to meetings of the Advisory Council.

Subclause 50(2) provides that directions made under clause 50 are not legislative instruments within the meaning of subsection 8(1) of the *Legislation Act 2003*. This is merely declaratory of the law rather than an express exemption from the *Legislation Act 2003* and has been simply included to assist readers.

Part 6 – Reporting and planning

Clause 51 – Simplified outline of this Part

This clause provides a general overview of the provisions for the Commission’s annual report, corporate plan and operational plan.

Clause 52 – Annual report

This clause provides that the Commissioner must develop an annual report in accordance with Section 46 of the *Public Governance, Performance and Accountability Act 2013* and provide it to the Minister. The annual report will be developed to provide a close link between annual reports and corporate plans (see clause 53) to allow a comparison of expected and actual performance.

The Commissioner must include in the annual report:

- an assessment of the extent to which the Commission’s operations during the year have contribute to the objectives set out in the corporate plan and the priorities set out in the annual operational plan
- particulars of variations (if any) of the corporate plan and the annual operational plan taking effect during the year
- an evaluation of the Commission’s overall performance during the year against the performance indicators set out in the annual operational plan, and
- the financial statements required by section 39 of the *Public Performance, Governance and Accountability Act 2013* and an audit report on those statements under section 43 of the *Public Performance, Governance and Accountability Act 2013*.

A note at the end of subsection 46(2) of the *Public Performance, Governance and Accountability Act 2013* draws the reader’s attention to section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about periodic reports. In summary, the effect of section 34C of the *Acts Interpretation Act 1901* is that:

- the annual report of the Commissioner must be provided to the Minister as soon as practicable after the end of the financial year and, in any event, within six months after the end of that particular period
- the Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days (of that House) after the day on which the Minister receives the report
- if the Commissioner believes that it will not be reasonably possible to comply with the requirement, the Commissioner may within the specified period, apply to the Minister for an extension of the period. The Commissioner will be required to give the Minister a statement in writing explaining why it will not be reasonably possible to lodge the report on time. The Minister may grant such extension as he or she considers reasonable in the circumstances. Where the Minister grants an extension, the Minister must table in each House of the Parliament, within three sitting days after the day on which he or she grants the extension, a copy of the Commissioner’s statement explaining why the report will be late and also a

statement specifying the extension granted and the Minister's reasons for granting the extension

- if the Commissioner fails to provide the report within the specified time (or if an extension has been granted, within that time) the Commissioner must, not later than 14 days after the end of the specified period or extension, give the Minister a statement in writing explaining why the report was not provided. The Minister must table the statement within three sitting days of receiving it.

Clause 53 – Consulting on corporate plans

This clause provides that the Commissioner must develop a corporate plan in accordance with section 35 of the *Public Governance, Performance and Accountability Act 2013* and provide it to the Minister and Finance Minister.

The corporate plan will be the primary planning document of the Commission, setting out the objectives and strategies the Commission is to pursue and the outcomes it hopes to achieve.

The Advisory Council will be consulted during the development of the corporate plan to inform the Commissioners preparation of the corporate plan.

Clause 54 – Annual operational plans

This clause provides that the Commissioner must give the Minister an annual operational plan. The operational plan must be developed in consultation with the Minister and the Advisory Council and must also:

- set out the Commissioner's priorities for work to be undertaken during the year
- set out particulars of the actions that the Commissioner intends to take to advance the objectives set out in the corporate plan
- set out how the Commissioner will apply the resources of the Commission to achieve the objectives in the strategic plan applicable to the period
- include an assessment of risks faced by the Commission and a risk management plan in relation to those risks, and
- include appropriate performance indicators against which the Commission's performance can be assessed.

As the Commission will be established on 1 January 2019, the first plan will be for a 6 month period from 1 January 2019 to 30 June 2020. All subsequent operational plans will relate to a standard financial year.

To assist readers, subclause 45(4) clarifies that annual operational plans are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*. This is because operational plans do not meet the definition of a legislative instrument in section 8(1) of that Act.

Part 7 – Information sharing and confidentiality etc.

Division 1 – Introduction

Clause 55 – Simplified outline of this part

This clause provides a general overview of the information that must be shared by the Commissioner and Secretary of the Department for the purposes of their functions or powers, the information the Commissioner may make publicly available, and the protection, use and disclosure of such information.

Division 2 – Information sharing

Clause 56 – Commissioner must give information to the Secretary in certain circumstances

This clause provides that if the Secretary makes a request to the Commissioner, in circumstances set out in the rules, for information that the Commissioner has acquired in the course of performing their functions or exercising their powers, then this information must be provided to the Secretary. This will allow for the Secretary to obtain all available and relevant information from the Commissioner to undertake their functions.

For example, the Secretary may require information about a complaint that the Commissioner may be handling. This may include information about whether any action had been taken or directions issued to the approved provider, in response to potential non-compliance.

These provisions ensure the Secretary is able to be adequately informed in determining how best to respond to non-compliance by an approved provider, including whether to impose sanctions and if so the nature of these sanctions under Part 4.4. of the *Aged Care Act 1997*.

Clause 57 – Secretary must give information to the Commissioner on request

This clause provides that if the Commissioner makes a request to the Secretary, in circumstances set out in the rules, for information that the Secretary has acquired in the course of performing their functions or exercising their powers, then this information must be provided to the Commissioner. This will allow for the Commissioner to obtain all available and relevant information from the Secretary to undertake their functions under this Bill.

For example, the Commissioner may require information about an approved provider's service status or information about the performance of an approved provider's responsibilities. The Commissioner may require this information in order to make the information publicly available pursuant to clause 59(g) and (h).

This information would not normally be available to the Commissioner since the Secretary is responsible for administering approvals and enforcing compliance with an approved provider's responsibilities. As such the Commissioner would need to request this information from the Secretary.

Clause 58 – Minister may require the Commissioner to prepare reports or give information

Subclauses 58(1) and 58(2) provide that the Minister may, by written notice given to the Commissioner, require the Commissioner to prepare a report about matters relating to the performance of the Commissioner’s functions (or prepare a document setting out specified information) and give a copy of the report or document to the Minister within a specified period. The Minister may choose to publish the report or document (subclause 58(4)).

Subclause 58(3) provides that if the Minister makes such a request the Commissioner must comply with the request.

Division 3 – Making information publicly available

Clause 59 – Information about an aged care service may be made publicly available

This clause sets out the type of information regarding aged care services the Commissioner may make public. For example the information in relation to an approved provider’s accreditation status, in addition to any failure by approved provider’s to meet the standards.

Division 4 – Protected information

Clause 60 – Prohibition on use or disclosure etc. of protected information

This clause sets out when it is an offence to use or disclose protected information. Protected information is information that was acquired under, or for the purposes of, this Bill and is either personal information or relates to the affairs of an approved provider or a service provider of a Commonwealth-funded aged care service. This definition of protected information is included in subclause 60(2).

The offence carries a penalty of two years imprisonment.

A person is prohibited from recording, disclosing or using protected information acquired in the course of performing functions or exercising powers under this Act, the *Aged Care Act 1997* or its Principles except in the following circumstances:

- where the protected information was recorded, disclosed or used while a person as performing a function or power under, or in relation to this Act, rules or the *Aged Care Act 1997* including its subordinate legislation
- where the information is disclosed to the person to whom it relates or where that person has authorised the recording, disclosure or use of the protected information, and
- where it is otherwise authorised under this or any other Act.

Clause 61 sets out when disclosure of protected information for other purposes is acceptable.

Clause 61 – Permitted disclosure of protected information by the Commissioner.

This clause sets out a number of situations where a disclosure of protected information by the Commissioner is authorised. There are a number of clauses under the permitted disclosures which are included to enable the Commissioner to ensure the safety of aged care consumers in certain circumstances. These provisions are in place so that action can be taken immediately when required and there are no delays to protect aged care consumers.

To hamper the ability of the Commissioner to disclose protected information goes against the very purpose of the existence of the Commission. The safety and welfare of aged care consumers is at the heart of the Commission, and the Commissioner must have the ability to disclose protected information swiftly when an aged care consumer's safety, health or well-being is or may be at risk.

To assist the reader an example of this is in the circumstances when an alleged assault is uncovered in the course of a complaint investigation. The organisation best placed to deal with this is the police force in the particular State or Territory. The Commissioner may disclose protected information to the police under Clause 61(1)(h).

The authorised situations include:

- if the Commissioner certifies, in writing, that it is necessary in the public interest to disclose to certain people
- disclosure to a person who is, in the opinion of the Commissioner, expressly or impliedly authorised by the person to whom the information relates to obtain it
- disclosure to the Secretary to assist in the performance of the Secretary's functions
- disclosure to the Chief Executive of Medicare for the purposes of payment of subsidies under the *Aged Care Act 1997*
- if the Commissioner believes, on reasonable grounds, that disclosure to certain people is necessary to prevent or lessen a serious risk to the safety, health or well-being of an recipient aged care consumer
- if the Commissioner believes, on reasonable grounds, that a person's conduct breaches the standards of professional conduct of a profession of which the person is a member and the person should be reported to the relevant professional standards body
- if a person has temporarily taken over the provision of care through a particular service to aged care consumer, disclosure to the person for the purposes of enabling the person properly to provide that care
- if the Commissioner reasonably believes, on reasonable grounds, that disclosure to a particular agency is reasonably necessary for enforcement of the criminal law or a law imposing a pecuniary penalty or protection of the public revenue
- to the Aged Care Pricing Commissioner, if the Commissioner believes, on reasonable grounds, that disclosure is reasonably necessary to assist the Commissioner to perform their functions under the *Aged Care Act 1997*
- to a person of a kind specified in the rules, for the purposes specified in those rules.

To assist readers, subsection (2) has been included to clarify that a determination under paragraph (1)(a) or (e) is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*.

Clause 62 – Limits on use or disclosure etc. of protected information disclosed by the Commissioner

This clause is intended to prohibit a person who receives information under clause 61 from recording, disclosing or using information for any purpose other than that for which the information was disclosed. It is an offence to do otherwise with a penalty of 2 years imprisonment.

Clause 63 – Disclosure to court

This clause provides that there are limited circumstances in which a court, or other such body, may require someone to disclose protect information. A person can be required to disclose protected information only if:

- the disclosure is required for the purposes of this Bill or the *Aged Care Act 1997*;
- the information was originally disclosed under clause 61 and the disclosure is required for the purposes for which it was disclosed under that item; or
- the person or body to whom the information relates has consented in writing to the disclosure.

This clause mirrors the provision in section 86-8 of the *Aged Care Act 1997*. This provision ensures that the information held by the Commission that is personal information or relates to the affairs of an approved provider or service provider will be protected from disclosure where the disclosure does not relate to the purposes for which the Commission holds the information or the person or body has consented to their information being disclosed.

Part 8 – Entry and search powers

Division 1 – Introduction

Clause 64 – Simplified outline of this part

This clause provides a general overview of the powers of authorised complaints officers and regulatory officials, to enter premises with consent of the occupier and exercise their search powers in relation to premises.

It should be noted that the entry and search powers under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) has not been triggered in this Bill. It would not be appropriate to trigger the provisions under Part 2 of the Regulatory Powers Act since the Bill does not require all of its powers. For those provisions that would be triggered, some would require modification to ensure they are fit for purpose (see for example subsections 24(1) and 25(1) of the Regulatory Powers Act).

No other regulatory powers under the Regulatory Powers Act are required for performing the Commissioner's functions which commence from 1 January 2019. This will remain the case until the compliance related functions of the Secretary of the Department under the *Aged Care Act 1997* are transferred to the Commissioner in subsequent reforms, at which time it may be more appropriate to trigger the Regulatory Powers Act.

Division 2 – Powers of authorised complaints officers in relation to premises

Clause 65 – Power to enter premises and exercise search powers in relation to complaints etc.

This clause provides that the Commissioner may consider, for the purposes of resolving a complaint or dealing with information about an approved provider or Commonwealth-funded service provider, it is necessary for an authorised complaints officer to exercise powers under this Division.

As part of resolving a complaint or dealing with such information, an authorised complaints officer may enter any premises and conduct a search.

This search may be performed at any time during the day or night. To assist the reader it may be imperative that the authorised complaints officer visit the aged care service outside normal working hours. For example, an officer may need to visit a residential service at night to investigate a complaint that a resident is being woken from sleep several times a night by another resident wandering in to their room.

Entry and search powers can only be performed when the occupant of the premises has given explicit permission for the complaints officer to do so. Clause 66 outlines what consent is required for a search to take place.

Clause 66 – Consent

This clause provides that an occupant to which a search may be conducted at their premises may refuse consent, or limit their consent for the search to be conducted at a nominated time. Consent may be withdrawn at any time. However, in refusing consent, or withholding consent to enter and search premises, an approved provider who is the occupier of these premises may fail to comply with their responsibility to cooperate under paragraph 63-1(1)(ba) of the *Aged Care Act 1997*. This may result in a sanction being imposed on the approved provider under Part 4.4 of that Act.

Whether a refusal to consent amounts to a failure to comply with an approved provider's responsibility to cooperate, and results in sanctions being imposed, will depend on the circumstances and the reasonableness of a refusal.

Clause 67 – Asking questions and seeking production of documents

This clause provides that should an authorised complaints officer be granted access to premises in accordance with clause 65 and 66, the officer may ask that the responsible person at the premises produce any documents and answer any questions that may be pertinent to the collection of the required information.

Information gathered throughout this process is subject to the requirements of the *Australian Privacy Principles* 3 and 5. To assist the reader, Principle 3 relates to the collection of solicited personal and other sensitive information which provides that an official must not collect personal information (other than sensitive information) unless the information is reasonably necessary for, or directly related to, one or more of the functions or activities and must be done so with consent. Principle 5 deals with notification of the collection of personal information.

Division 3 – Powers of regulatory officials in relation to premises

Clause 68 – Power to enter premises and exercise search powers for regulatory purposes

This clause provides that a regulatory official may exercise powers for the purposes of accreditation of an aged care service, a quality review of an aged care service or a Commonwealth-funded aged care service, monitoring of the quality of care and services provided by approved providers of aged care services or by a service provider of a Commonwealth-funded aged care service.

The regulatory official may enter any premises and exercise the search powers in relation to the premise. This search may be performed at any time during the day or night, this may include weekends and public holidays where it is reasonable to consider that the aged care service or Commonwealth-funded aged care service would be conducting business. The search can only be performed when the occupant of the premises have given explicit permission for the regulatory official to do so, clause 69 outlines what consent is required for a search to take place.

To assist the reader a regulatory official may be required to visit a service if there is a concern raised that an aged care provider is not meeting their requirements under the *Aged Care Act 1997*.

Clause 69 – Consent

This clause provides that an occupant to which a search may be conducted at their premises may refuse consent, or limit their consent for the search to be conducted at a nominated time. Consent may be withdrawn at any time. However, in refusing consent, or withholding consent to enter and search premises, an approved provider who is the occupier of these premises may fail to comply with their responsibility to cooperate under paragraph 63-1(1)(ba) of the *Aged Care Act 1997*. This may result in a sanction being imposed on the approved provider under Part 4.4 of that Act.

Whether a refusal to consent amounts to a failure to comply with an approved provider's responsibility to cooperate, and results in sanctions being imposed, will depend on the circumstances and reasonableness of a refusal.

Clause 70 – Asking questions and seeking production of documents

This clause provides that should a regulatory official be granted access to a premises in accordance with clauses 68 and 69 above, the assessor may ask that the responsible person at the premises produce any documents and answer any questions that may be pertinent to the collection of the required information.

Information gathered throughout this process is subject to the requirements of the *Australian Privacy Principles* 3 and 5. To assist the reader, Principle 3 relates to the collection of solicited personal and other sensitive information which provides that an official must not collect personal information (other than sensitive information) unless the information is reasonably necessary for, or directly related to, one or more of the functions or activities and must be done so with consent. Principle 5 deals with notification of the collection of personal information.

Division 4 – Search powers

Clause 71 – Search powers

This clause provides additional information regarding the search powers of authorised complaints officers as per clause 65 and regulatory officials as per clause 68. Search powers for authorised complaints officers and regulatory officials, once consent has been established (see clauses 66 and 69), includes the powers to search, observe or inspect anything on the premises. This includes but is not limited to taking measurements, conducting tests, taking photographs or video or reviewing documents – including taking copies of these documents. The authorised complaints officer or regulatory official may use any required equipment or materials to gather this information.

Clause 72 – Operating electronic equipment

As noted in the explanation of clause 71 above authorised complaints officers and regulatory official may use equipment to gather information. This includes electronic equipment which may be disc, tape, cameras for still and motion photography, electronic data storage such as a storage Universal Serial Bus (USB) or similar data storage device.

Division 5 – Appointment of authorised complaints officers etc.

Clause 73 – Appointment of authorised complaints officers

This clause provides that the Commissioner may appoint a person as an authorised complaints officer only if the Commissioner is satisfied that the person being appointed as a complaints officer has suitable training and experience. This suitability will be determined by the Commissioner. An authorised complaints officer appointed in this role must follow the Commissioner's instructions which may be in writing or otherwise. To assist readers, written directions are not considered legislative instruments within the meaning of subsection 8(1) if the *Legislation Act 2003*.

Clause 74 – Identity cards

This clause provides that authorised complaints officers and quality assessors must be issued with, and maintain the safekeeping of, an identity card which reflects the person's role and a modern photograph of the officer or assessor. This card must be carried at all times, and produced on request, when the officer or assessor is performing the duties for which they are authorised by this Bill or the rules.

An authorised complaints officer or quality assessor who has been issued with an identity card and retains the card after their duties have ended, and fails to return the identity card to the Commissioner within two weeks (14 days) after ceasing to be an authorised complaints officer or quality assessor will be subject to an offence that is punishable by one penalty unit. This is expressed to be an offence of strict liability.

The justification for applying strict liability in this case is that the consequences of an unauthorised person using an identity card to gain access to an aged care service are potentially serious in terms of the risk to the safety and well-being of aged care consumers. For example, an authorised complaints officer or quality assessor who does not return their identity card promptly after ceasing to hold their position may provide an opportunity for an unauthorised person to enter an aged care service in which vulnerable older people are residing. The application of strict liability for the offence provision serves as a deterrent to ensure that the authorised complaints officer or quality assessor complies with the requirement to return the identity card.

It should also be noted that the offence is punishable by a relatively low penalty of one penalty unit and is not subject to a term of imprisonment.

The ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ has been taken into account in considering the use of strict liability for the offence and it is considered that the circumstances are consistent with the principles in that Guide.

Part 9 – Miscellaneous

Clause 75 – Simplified outline of this Part

This clause provides a general overview of miscellaneous matters for the Commission such as delegations and making of rules.

Clause 76 – Delegation by the Commissioner

This clause allows the Commissioner to delegate all or some of the Commissioner’s functions and powers contained in this Bill or the rules, to staff of the Commission. A delegate must comply with any written directions of the Commissioner in relation to such a delegation.

The Commissioner requires a broad power of delegation since there will be certain functions where it may be appropriate for staff at different levels and skills to hold the same delegation, due to the wide range of matters that arise in the performance of these functions. Responding to these functions will require different actions to be taken, and persons with different skills and abilities to implement these actions.

This clause provides for the Commissioner to delegate their powers based on the functions required to be undertaken by individual staff members. For example, this ensures that decisions made by staff (with delegated functions and powers) will be reviewable by senior and executive staff including the Commissioner. Delegation of functions and powers does not preclude the Commissioner from exercising these functions and powers.

As the Commission is proposed to be a non-corporate Commonwealth entity for the purposes of the *Public Governance, Performance and Accountability Act 2013*, the Commissioner and their staff will also be expected to comply with the relevant provisions of that Act. That Act also allows the Commissioner to delegate certain responsibilities under that Act including, for example, financial delegations.

By virtue of subsection 33(3) of the *Acts Interpretation Act 1901*, the Commissioner will also have the power to repeal, rescind, revoke, amend or vary an instrument of delegation.

Clause 77 – Rules

This clause enables the Minister to make rules prescribing matters required or permitted to be prescribed by the Bill or necessary or convenient to be prescribed for carrying out or giving effect to the Bill.

Subclause (2) provides for what the rules will not do. This includes create and offence of civil penalty if the rules are contravened, allow for arrest or detention, entry, search or seizure or impose a tax. The rules may also not deal with appropriations from government budget or amend anything contained within this Bill.

For rules to adopt or incorporate matters contained in an instrument or other writing as in force from time to time subclause (3) provides that the rules may despite subclause 14(2) of the *Legislation Act 2003* the rules may make provisions in relation to matters by applying, adopting or incorporating, with or without modification any matter contained in any other instrument or writing in force or existing from time to time.

To assist the reader, while most providers of aged care services responsibilities are found in legislative instruments, those relating to the National Aboriginal and Torres Strait Islander Flexible Aged Care Program may be found within its funding agreements, and Quality Framework contained in its schedule. As mentioned above, the rules will specify that a service funded under this program is a Commonwealth-funded aged care service under clause 8(1).

This provision would enable the rules, which is a disallowable instrument, to incorporate by reference the Quality Framework, in making provision for the performance of the Commissioner's functions, made pursuant to subclauses 21(3)(c), (3)(e), (4)(c) and (4)(e) of this Bill. The Quality Framework will be made publicly available, on the Commission's website. This will make clear to readers the version of the Quality Framework applies, which may be amended from time to time.

To assist readers, it should be noted that dealing with these matters in rules rather than regulations accords with the Office of Parliamentary Counsel's Direction No. 3.8 – subordinate legislation. That Drafting Direction states that the Office of Parliamentary Counsel's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is a good reason to do so.

Consistent with the Drafting Direction, the approach of dealing with these matters in rules (rather than regulations) has a number of advantages including:

- it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for the Act
- it enables the number and content of the legislative instruments under the Act to be rationalised
- it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments, and
- it shortens the Act.

Due to these advantages, the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

The Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an Act, should be included in regulations unless there is a strong justification otherwise. The Bill does not enable the rules to provide for any of these matters. This is clarified by subclause 77 (2) that specifically prevent the rules from including these types of matters.

This clause also clarifies that the rules made under the clause are a legislative instrument for the purposes of the *Legislation Act 2003*. Under that Act, legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee on Regulations and Ordinances), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled.