QUALITY AGED CARE ACTION GROUP INC

Response to the capability review of the Aged Care Quality and Safety Commission

November 2022

Quality Aged Care Action Group Incorporated (QACAG Inc.)
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Introduction

Quality Aged Care Action Group Incorporated (QACAG) is a community group in NSW that aims to improve the quality of life for people in residential and community aged care settings. QACAG is made up of people from many interests and backgrounds brought together by common concerns about the quality of care for people receiving aged care services.

QACAG Inc. was established in 2005 and became incorporated in 2007. Membership includes: older people, some of whom are receiving aged care in NSW nursing homes or the community; relatives and friends of care recipients; carers; people with aged care experience including current and retired nurses; aged care workers and community members concerned with improving aged care. Membership also includes representatives from: Older Women's Network; Public Service Association; Combined Pensioners & Superannuants Association of NSW Inc.; Kings Cross Community Centre; Senior Rights Service; NSW Nurses and Midwives' Association and the Retired Teachers' Association.

Margaret Zanghi

President
QACAG Inc.

Terms of Reference

1. The performance of the Commission against its prescribed objectives, functions, and priorities, focusing on:

a) the Commission's approach to the use of regulatory powers, mechanisms in place to address providers' non-compliance (or potential non-compliance) with their legal obligations, including the Aged Care Quality Standards, and responses to quality, safety, financial and prudential risks.

b) outputs, impacts, effectiveness, and barriers (legislative or otherwise) to deliver its functions and services effectively and efficiently for aged care consumers and opportunities to improve its regulatory functions.

c) whether the Aged Care Quality and Safety Commissioner and the Commission have sufficient legislative powers, regulatory frameworks and access to data to appropriately investigate and resolve complaints in a timely manner and to undertake compliance monitoring and enforcement activities.

2. The Commission's organisational values, structure, leadership, and culture, including strengths, opportunities and weaknesses that inhibit or enable a high performing, contemporary, best practice, human services regulator.

3. The Commission's ongoing governance, skills, and capabilities (strategic and operational), paying particular attention to:

a) the Commission's risk management approach and decision making, including: the appropriate use, timing, and delegation of powers to best protect the safety and wellbeing of aged care residents and care recipients, the balance of the Commission's effort and focus directed towards poor/high risk performers while still maintaining whole of system safety and quality, and the balance of education and best practice promotion vs. enforcement.

b) adaptability of the Commission to meet emerging challenges/issues/risks/concerns within the aged care sector (e.g., the ongoing response to the COVID-19 pandemic).

c) efficient allocation of resourcing for the Commission, including workforce, executive management structures, remuneration structures, infrastructure (including IT) and identification of service duplication and gaps.

d) the role of Statutory Office Holders or key executive officers, including the Commissioner, Assistant Commissioner of Sector Capability, Senior Practitioner of Restrictive Practices and the to-be appointed Aged Care Complaints Commissioner.

e) capability of the workforce to perform the functions of a regulator including

workforce size and the adequacy of clinical, assessment, monitoring, compliance and enforcement knowledge and skills.

f) capability to undertake monitoring and enforcement activities in rural and remote areas, and to ensure nationally consistent but locally relevant application of the standards, reviews, enforcement action, and outcomes.

g) capability to undertake monitoring and enforcement activities for aged care services providing care for older people with dementia, culturally and linguistically diverse consumers and specific diversity groups including Aboriginal and Torres Strait Islander people, veterans and the LGBTIQ communities.

4. Transparency and engagement/communications with, and education of, older Australians, their families, and carers, and the community more broadly (e.g., through public reporting and messaging).

5. Provide options for the design, form, structure, governance, powers, workforce, resourcing, and proposed timing of establishment of a culturally sensitive and capable new aged care regulatory Authority, to ensure effective performance of the new Authority for its existing and additional roles and responsibilities.

Performance of the Aged Care Quality and Safety Commission (ACQSC)

General comment

As a consumer-focused organisation, we are only able to provide a perspective on the capability of the ACQSC from our own knowledge and experiences, and from what information is publicly available. We are unable to provide detailed comment on questions regarding internal structures and processes.

The Royal Commission into Aged Care Quality and Safety shone a spotlight on the widespread abuse and neglect of older people in our society. The many instances of neglect reported through the Royal Commission were not new to QACAG members, many of whom have experience of aged care as recipients, relatives, or workers.

For many years we have called for this review, recognising that years of neglect of our older people has occurred under the watch of the ACQSC and its predecessor organisation, the Australian Aged Care Quality Agency.

We must not lose sight of the risk to residents and those receiving aged services in their homes if we do not get regulation right. We believe the ACQSC has shown its hand and its game is up. It has proven it is not fit for purpose, nor able to offer the level of public safety expected.

We believe this is the right time for a complete overhaul of the regulator and associated legislation to future-proof regulation with a new Aged Care Act that provides measurable, enforceable standards and compliance frameworks that enable a new, competent and well-resourced regulator to take timely action where risk is identified.

Consumer engagement

One of our main concerns about the ACQSC is their intentional move towards proportionate and risk-based regulation without due consideration of aligning process and structures to inform risk. Whilst this is a system that can work well, our members are yet to be convinced the ACQSC has the necessary systems to seek localised intelligence about services.

Consumers of aged services should be one of the main sources of intelligence about how services are performing, but our experience is there are gaping holes in information gathering that should signal an immediate halt to the implementation of proportionate regulation. Despite these obvious weaknesses, we have not seen a cautious approach being taken and are alarmed that the ACQSC is pressing ahead regardless of the potential risk to older people by not getting this right.

Until 2019 QACAG regularly attended Department of Health quarterly stakeholder engagement meetings and found these beneficial. Many of our members are frequent visitors to, or work in aged care so we found these useful opportunities to feedback local issues of concern to the Department. We hope the Department found them mutually beneficial.

However, under the stewardship of the ACQSC, these meetings have ceased and using COVID-19 as rationale, did not occur again until late this year. However, QACAG did not receive an invitation, without explanation. As a further example, we note that recently, community members have been invited to the ACQSC consumer and family's panel. QACAG representatives had difficulty accessing the platform and were therefore unable to meaningfully engage or participate. Even without accessibility issues, webinars are no place for people to share intelligence and feedback about services and can only seek to provide a conduit for general information giving and high-level discussion.

In our experience, many of the consultations with the Commission and the Department for Health and Aged Care have been uncoordinated, using multiple online platforms such as Webex and Eventbrite which has been extremely difficult for some of our members who are not technologically experienced. A single point of entry to online consultations would have been much more consumer-focused and again, talks to poor consumer engagement.

Indeed, there can be no substitute for local engagement with consumers, including face to face opportunities. We believe local intelligence is fundamental to the success of any risk-based system of regulation and a multi-faceted approach must be used given the diversity, and range of physical and cognitive barriers to acquiring feedback from aged care recipients and their representatives.

A further example of poor consumer focus was provided in a case study by one of our members who lives in aged care.

David, aged care resident, not for profit facility, Country NSW*

David had been sent a questionnaire to complete ahead of the ACQSC site audit at his home. Due to his health needs David was unable to complete the paper questionnaire but wanted to provide feedback to the ACQSC. As he would be in hospital on the days of the site visit, David had tried unsuccessfully to contact the ACQSC to provide feedback.

As a member, David contacted QACAG to ask us to contact the ACQSC on his behalf to let them know his circumstances and facilitate his feedback. Our representative was on hold for over 40 minutes then opted for the call back which was a 'next in line' system. It took until midday the following day to receive a call back from the Commission.

Despite our representative being assured David would be given a call and supported to complete the questionnaire, they were never called. This was a missed opportunity for him to participate in a process which directly impacts him. Had an assessor made contact, David would have provided insightful comments about the poor state of care he receives.

*Name changed to protect identity

It is also a matter of public concern that the ACQSC call-back system can take almost 24 hours.

The new star ratings system to assist the public to determine the quality of a service, relies heavily on consumer feedback to inform the rating. We question how much weight consumers will be able to give to the information being presented. On a superficial level the ACQSC say they have upped their game when it comes to consumer engagement, beneath the surface, the door to participate is closed.

Proportionate regulation

During the COVID-19 pandemic we noted that regulatory visits reported on the ACQSC website decreased, despite the high death rate and workforce crisis widely reported by the media in many aged care facilities. Using public information, we saw that some facilities had been risk assessed as being safe to have a visit deferred for up to a year, despite having high numbers of COVID-19 cases.

In some circumstances, the data being used to make these decisions was at that point already two to three years old. This meant some facilities experiencing outbreaks were being left up to four years between site audits. Others were having their compliance assessed through phone calls to managers. Given people were dying in large numbers in aged care, and workforce severely depleted it is difficult to see how these decisions could have been justified.

A risk-based approach is the foundation of the ACQSC regulatory strategy going forward, we question how decisions about compliance can be confidently made without having visited a site and seen the care delivered first-hand for over three years. We were also disappointed the former coalition government did not seek to examine in detail the role of the ACQSC and make recommendations, in its subsequent inquires into the handling of the pandemic. This lack of transparency does not bode well for consumer confidence at a time when people are fearful at the mere mention of aged care.

The Royal Commission identified a culture of neglect. This does not occur in environments that are open and transparent where whistleblowing is encouraged. It does not take an expert in regulatory strategy to know that deferring a site visit for up to four years without an effective alternate strategy to gather widespread, reliable and informed intelligence about how a service is operating, will encourage neglectful practices to thrive.

We believe visits by the Commission need to occur at least annually but preferably six-monthly and when risk is identified, including one being out of hours owing to the high staff turnover experienced in many places. We also believe visits should be unannounced. Paperwork can be pursued after a visit; we can see no justification why process should hinder the establishment of unannounced visits.

With each change of management, residents experience different challenges in relation to their care outcomes and we know, any change in manager has the potential to influence the whole care environment. Any new system for regulation must ensure there is adequate intelligence and resourcing to interpret data about key staff movements, staffing and skills mix on which to base a proportionate approach.

Transparency and accountability

We believe the ACQSC lacks accountability and transparency. This has been partly facilitated by: the close alignment of the ACQSC and go-to consumer representative groups

nominated by previous federal government; lack of transparent reporting on the activities of the ACQSC and lack of ability on the part of the ACQSC to articulate and respond to risk.

It is possible to examine years of annual reports on the ACQSC website and see recurring trends which show medications, clinical care and staffing as top areas of both complaints and regulatory failures. The fact that the same top areas of concern recur year after year must surely talk to the inability of the ACQSC to effectively drive quality improvements in these key areas.

Yet we have not seen evidence of representations from the ACQSC about how the system could improve at the many inquiries and consultations that have occurred over the past 10 or more years. From a consumer perspective we only see a regulator that is focused on continuing a pathway that lacks direction, fails to ensure public safety and is unfit for purpose.

Of note was the absence of representations from the Commission at the various workforce inquires that have occurred. It has been clear for many years there has been widespread and in our opinion, deliberate attempts by aged care providers, to reduce the number and skills of the workforce and to create a generic workforce who can be utilised for many different roles but are expert at none.

Again, it does not require an expert assessor to identify chronic workforce shortages in aged care. We would see the role of an effective regulator to be one which alerts Federal Government to these shortcomings and makes representations to immediately remedy them. Any new regulator must have the authority to input into government reform by identifying solutions rather than having a sole focus to report on the same problems, year-on-year.

Regulation

We see a lack of enforceable legislation as another fundamental flaw in the current regulatory strategy. Any capability review of the ACQSC cannot be undertaken without consideration of the tools it might have at its disposal to effectively regulate the sector. We are pleased that a new Aged Care Act is being developed, and question why it had taken a Royal Commission to recognise this has not been fit for purpose for several years. Neither the Act, nor subsequent regulations reflect contemporary aged care, are measurable or enforceable.

We have been concerned at the broad use of motherhood statements in the first draft of the new quality standards. What we need is more, not less clarity for providers, workers, care

recipients, their families, and regulators to determine compliance. There is no point giving consumers enhanced rights without evidence-based measurable and enforceable legislation to underpin them. We would want to see the new Aged Care Act and subsequent subordinate legislation and standards to leave no stone unturned when it comes to expectations about safe, quality care.

Whilst unable to comment on internal processes, it is evident the merger of the complaints, compliance and enforcement functions into the ACQSC have not effectively streamlined the enforcement process. From an outside perspective it appears these functions continue to operate separately, and we suspect this lack of alignment causes delays in communication, enforcement, and follow-up.

We believe this review provides a once in a generation opportunity to re-set the bar. Lessons can be taken from other regulatory models and we hope this review will result in the establishment of a completely new regulator with enhanced accountability measures to government and the public, rather than a further re-modelling of existing departments.

As a further foundational piece, we suggest there needs to be recognition of the high level of nursing care currently required by care home residents, and increasingly being required by those in their own homes. For this reason, we believe any new regulatory model must be aligned with regulatory models in force for other healthcare settings and any new regulator is equipped with a workforce who possess the right qualifications and skills to be able to make judgements about clinical outcomes.

We understand the UK merged its own health and aged care regulatory bodies some years ago, in recognition of the fact that aged care cannot be separated from health care. We concur that aged care is health care provided within the context of aged care environments such as residential care.

We also believe having at least one registered nurse on every audit team where high care is delivered is essential to make informed judgements about compliance. Having broader clinical expertise within operational position to provide direction, guidance and support are also needed.

We have heard in many consultations that we risk over-medicalising the aged care system and that clinical care is not well aligned to consumer directed care. We believe this is rationale for modelling proposed quality standards and worker code of conduct on the disability sector. We are concerned about the direction this is taking, given the disability

sector is itself, subject to a Royal Commission which is yet to report its findings. We suggest we should not be looking to another broken system as a model to fix the aged care system.

As consumers, having experienced clinical care delivered in aged care and at home, we argue that a health care model can absolutely ensure consumer-focused care, indeed we see the solution to effective regulation of the sector as being the transfer of all standards development and regulation to existing systems which work well in other settings in which health care is provided.

Recommendations:

1. **There must be a new regulator with enhanced powers and greater accountability**

2. **Aged care must be considered part of the broader health care provision in recognition of the high level of nursing care provided now, and required in the future**

3. **Regulation and standards must align with regulatory models in other settings where health care is delivered**

4. **The new Aged Care Act and regulatory model must provide for:**
    - **Fit for purpose consumer engagement models**
    - **Greater clinical expertise within the regulatory workforce**
    - **Enhanced, streamlined powers to take enforcement action**
    - **Evidence-based, measurable, enforceable legislation**
    - **Broad stakeholder engagement to inform risk-based strategy**
    - **Risk-based site audits, but not less than annually and unannounced**
    - **The authority to input into government reform by identifying solutions**