

## Aged Care Quality and Safety Commission Rules 2018

<b>FRL No.</b>	F2018L01837 <sup>7</sup>
<b>Purpose</b>	Provides for the performance of the complaints and regulatory functions of the Aged Care Quality and Safety Commissioner.
<b>Authorising legislation</b>	<i>Aged Care Quality and Safety Commission Act 2018</i>
<b>Portfolio</b>	Health
<b>Disallowance</b>	15 sitting days after tabling (tabled in the Senate on 12 February 2019). Notice of motion to disallow must be given by 6 June 2019. <sup>8</sup>

### Consultation<sup>9</sup>

1.14 Section 17 of the *Legislation Act 2003* (Legislation Act) provides that, before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation in relation to the instrument that is considered by the rule-maker to be appropriate and reasonably practicable to undertake.

1.15 Under paragraphs 15J(2)(d) and (e) of the Legislation Act, the explanatory statement to an instrument must either contain a description of the nature of any consultation that has been carried out in accordance with section 17 or, if there has been no consultation, explain why no such consultation was undertaken. The committee's expectations in this regard are set out in its *Guideline on consultation*.<sup>10</sup>

1.16 With reference to these requirements, the committee notes that, under the heading of consultation, the explanatory statement provides that extensive consultation was undertaken as part of a Review of National Aged Care Quality Regulatory Processes, and during the process to establish the Aged Care Quality and Safety Commission (the ACQS Commission).<sup>11</sup> It also states that:

As the Rules replace the existing applicable subordinate legislation these rules reflect the outcome of previous consultation that was undertaken

7 Accessible on the Federal Register of Legislation at <https://www.legislation.gov.au/>.

8 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

9 Scrutiny principle: Senate Standing Order 23(3)(a).

10 Regulations and Ordinances Committee, *Guideline on consultation*, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/Guidelines/consultation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Guidelines/consultation).

11 Explanatory statement, p. 2.

with the existing legislation. Where significant changes to processes in stage two are identified, consultation with appropriate parties will occur.<sup>12</sup>

1.17 The committee appreciates that public consultation occurred on relevant matters, and that this consultation may have informed the development of the instrument. However, it remains unclear whether consultation was undertaken in relation to the instrument as presently drafted. In this respect, the description of consultation may not satisfy the requirements of the Legislation Act, which requires the explanatory statement to describe the nature of any consultation undertaken in relation to the instrument or explain why no such consultation was undertaken.

**1.18 The committee requests the minister's advice as to:**

- **whether any consultation was undertaken in relation to the instrument and, if so, the nature of that consultation; or**
- **whether no consultation was undertaken and, if not, why not.**

**1.19 The committee also requests that the explanatory statement be amended to include this information.**

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### **Retrospective effect<sup>13</sup>**

1.20 The instrument gives operational effect to the processes of the ACQS Commission in relation to complaints management and resolution, and the accreditation, assessment and monitoring of aged care services. It also provides for independent review of decisions. In this respect, the instrument consolidates a number of matters that were previously dealt with under separate pieces of delegated legislation.<sup>14</sup>

1.21 Part 9 of the instrument includes a number of transitional provisions, which give effect to the transition from the previous regime to the regime administered in accordance with the present instrument. In this regard:

- Division 1 (sections 113 to 116) includes that the Aged Care Quality and Safety Commissioner (the Commissioner) may deal with a complaint made

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12 Explanatory statement, p. 2.

13 Scrutiny principle: Senate Standing Order 23(3)(b).

14 For example, complaints were previously dealt with in accordance with the Complaints Principles 2014 [F2014L00802] and the Complaints Principles 2015 [F2018C00377]. Accreditation and quality assurance were previously dealt with in accordance with the Quality Agency Principles 2013 [F2018C00175].

under the Complaints Principles 2014<sup>15</sup> as if it were made under the present instrument;

- Division 3 (sections 117 to 121) includes that the Commissioner may deal with an application for the accreditation of an aged care service made under the Quality Agency Principles 2013 (Quality Agency Principles)<sup>16</sup> as if it were made under the present instrument; and
- Division 7 (sections 131 to 137) includes that a request for reconsideration or review of a decision under the Quality Agency Principles is to be dealt with in accordance with the present instrument.

1.22 While these transitional provisions commence prospectively, the committee is concerned that they may result in the instrument having a retrospective effect, to the potential detriment of a person who has made a complaint, an application, or a request for reconsideration of a decision. In this respect, the committee notes that while the instrument re-enacts a number of provisions in the Complaints Principles and Quality Agency Principles, it also appears to alter relevant application and complaints processes.

1.23 The explanatory statement provides no information as to whether any person whose application, complaint or request for review was pending at the commencement of the instrument may be disadvantaged by the application of new criteria. It does not indicate, for example, how many such applications, complaints or requests will be subject to the present instrument, and whether affected persons will be given the opportunity to address any new criteria that may be relevant to their circumstances.

**1.24 The committee requests the minister's advice as to:**

- **whether any persons were, or could be, disadvantaged by the operation of the transitional provisions in Part 9 of the instrument (in particular Divisions 1, 3 and 7); and**
- **if so, what steps have been or will be taken to avoid such disadvantage and to ensure procedural fairness for any affected persons.**

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15 [F2014L00802]. The Complaints Principles 2014 were repealed by the Complaints Principles 2015 [F2018C00377], which are repealed by the present instrument.

16 [F2018C00175].

## Privacy<sup>17</sup>

### Significant matters in delegated legislation<sup>18</sup>

1.25 Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that instruments of delegated legislation do not trespass unduly on personal rights and liberties, including the right to privacy.

1.26 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation).

1.27 Section 111 of the instrument prescribes, for the purposes of paragraph 61(1)(j) of the *Aged Care Quality and Safety Commission Act 2018* (ACQSC Act), circumstances in which the Commissioner may disclose protected information to the approved provider of an aged care service or the service provider of a Commonwealth-funded aged care service. Under section 111, the Commissioner may disclose protected information if the Commissioner believes on reasonable grounds that not disclosing the information would place the health, safety or well-being of an aged care consumer of the relevant service at risk.

1.28 'Protected information' is defined in subsection 60(2) of the ACQSC Act as information acquired under, or for the purposes of, the Act or the rules that is:

- personal information; or
- information that relates to the affairs of an approved provider or a service provider of a Commonwealth-funded aged care service.

1.29 In relation to section 111 of the instrument, the explanatory statement provides that protected information 'may only be disclosed in limited, specified circumstances, with unauthorised disclosure of protected information attracting a criminal penalty under the Act'.<sup>19</sup> The statement of compatibility further explains that:

Requiring the Commissioner to exercise his or her discretion on a case by case basis ensures the burdens imposed by this measure on the right to information privacy is proportionate in its application, while also ensuring that there is sufficient flexibility to balance other competing considerations, which will depend on the circumstances.

While there are no specific requirements to consider the privacy of an individual in making a decision under section 111, it is unlikely a decision to disclose could be properly made on the grounds it protected the safety,

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17 Scrutiny principle: Senate Standing Order 23(3)(b).

18 Scrutiny principle: Senate Standing Order 23(3)(d).

19 Explanatory statement, p. 29.

health and well-being of consumers, without considering the privacy of consumers, to the extent possible.<sup>20</sup>

1.30 While it may be intended that protected information will only be disclosed under section 111 in limited circumstances, and while there appear to be some safeguards in the ACQSC Act against unauthorised disclosure, given the potentially significant impacts of improper disclosure of personal information for vulnerable aged care consumers, the committee would expect a more comprehensive explanation in the explanatory materials as to how individuals' privacy will be protected.

1.31 The committee notes that neither the explanatory statement nor the statement of compatibility explains why it is considered necessary and appropriate to prescribe additional circumstances in which protected information may be disclosed. In this regard, the committee notes that the ACQSC Act already sets out a number of circumstances in which information can be disclosed. These include where the Commissioner believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious risk to an aged care consumer.<sup>21</sup> The committee also notes that the explanatory materials do not appear to identify any *specific* safeguards against unauthorised disclosure.

1.32 Additionally, the committee's view is that significant matters, such as the circumstances in which protected information may be disclosed, are more appropriately enacted via primary rather than delegated legislation. Where significant matters are left to delegated legislation, the committee would expect a sound justification for this approach to be included in the explanatory materials. In this instance, no such justification is provided in the explanatory statement.

1.33 In this respect, the committee notes that the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills committee) considered paragraph 61(1)(j) of the ACQSC Act when the Aged Care Quality and Safety Commission Bill 2018 (ACQSC Bill) was before the Parliament. The Scrutiny of Bills committee raised concerns that the (then) proposed paragraph 61(1)(j) would leave a number of significant matters, including the persons to whom protected information may be disclosed and the circumstances in which disclosures may be made, to delegated legislation. It was unclear to the Scrutiny of Bills committee why it was necessary to take this approach, particularly given that a variety of circumstances in which protected information could be disclosed were already included in the primary legislation.<sup>22</sup>

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20 Statement of compatibility, p. 32.

21 Section 61(1)(e) of the *Aged Care Quality and Safety Commission Act 2018*.

22 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, pp. 4-6.

1.34 Ultimately, the Scrutiny of Bills committee left to the Senate as a whole the appropriateness of allowing rules made under the ACQSC Act to specify additional persons and circumstances for the disclosure of protected information.<sup>23</sup>

**1.35 The committee requests the minister's more detailed advice as to:**

- **why it is considered necessary and appropriate to allow the Commissioner to disclose protected information about aged care consumers in the circumstances envisaged by section 111 of the instrument (noting the already broad powers of disclosure in recently enacted *Aged Care Quality and Safety Commission Act 2018*); and**
- **what specific safeguards are in place to protect individuals' privacy, including why there is no requirement for the Commissioner to consider the privacy of affected aged care consumers, to notify the affected person or give them a reasonable opportunity to make written comments on the proposed disclosure when appropriate.**

**1.36 The committee also requests the minister's advice as to why it is considered necessary and appropriate to leave the circumstances in which protected information may be disclosed to delegated legislation.**

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### **Merits review**<sup>24</sup>

1.37 Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to be satisfied that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

1.38 Part 7 of the instrument provides for the reconsideration and review of decisions made by the Commissioner. Under that Part, a person affected by a reviewable decision may apply to the Commissioner for reconsideration of the decision.<sup>25</sup> Where the person is not satisfied with the outcome of a reconsideration process, they may apply for the Administrative Appeals Tribunal (AAT) for review of the reconsideration decision.<sup>26</sup>

1.39 Section 98 of the instrument lists the decisions that are 'reviewable decisions' for the purposes of Part 7. These appear to include the majority of decisions made under the instrument. However, it appears that decisions under sections 90 and 92 (relating to the registration of quality assessors) would not be

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23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, pp. 70-74

24 Scrutiny principle: Senate Standing Order 23(3)(c).

25 Sections 99, 100 and 101.

26 Section 103.

reviewable. It is unclear to the committee why these decisions would not be reviewable, particularly given their similarity to certain reviewable decisions (for example, a decision to cancel a person's registration as a quality assessor).

1.40 Additionally, the committee notes that the instrument only permits applications to be made to the AAT in relation to the reconsideration of 'regulatory reviewable decisions'. By contrast, 'complaints reviewable decisions' (including decisions to take no further action in relation to a complaint, or to end a complaints process) would not be subject to independent merits review.

1.41 Where an instrument fails to provide for or excludes independent merits review, the committee would expect the explanatory statement to expressly identify established grounds for excluding merits review, by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*. In this instance, the explanatory statement states that complaints reviewable decisions are unsuitable for merits review.<sup>27</sup> However, it does not provide any further information about why such decisions have been excluded, nor does it provide any information regarding the omission of decisions under sections 90 and 92 from the list of reviewable decisions.

**1.42 The committee requests that the minister provide:**

- **a list of every decision in the instrument that has not been included in the list of reviewable decisions in section 98; and**
- **more detailed advice as to what are the characteristics of each decision that would justify excluding independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.**

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**Significant matters in delegated legislation<sup>28</sup>**

1.43 Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation).

1.44 The instrument was made for the purposes of section 21 of the ACQSC Act. It establishes schemes for dealing with complaints to the Commissioner, for accrediting residential aged care services, and for conducting quality reviews. It also provides for the reconsideration and review of certain decisions relating to those schemes.

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27 Explanatory statement, p. 28.

28 Scrutiny principle: Senate Standing Order 23(3)(d).

1.45 The committee notes that the Scrutiny of Bills committee considered section 21 of the ACQSC Act when the ACQSC Bill was before the Parliament. The Scrutiny of Bills committee expressed concern that (then) proposed section 21 would leave significant matters, such as complaints and regulatory functions, to delegated legislation. In this respect, the Scrutiny of Bills committee emphasised that these significant matters should generally be included in primary rather than delegated legislation. It also drew attention to the fact that these matters would be included in rules, which are subject to a lower level of executive scrutiny than regulations.<sup>29</sup>

1.46 The committee's views regarding the inclusion of complaints and regulatory functions, and associated review rights, in delegated legislation accords with those of the Scrutiny of Bills committee, which has consistently drawn attention to Acts that leave significant elements of a regulatory regime to delegated legislation. In the committee's view, these matters are more appropriate for parliamentary enactment.

**1.47 In light of the matters raised by the Scrutiny of Bills committee, the committee draws the Senate's attention to the inclusion of significant matters, such as complaints and regulatory functions relating to the provision of aged care services, and associated review rights, in delegated legislation.**

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29 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2018*, pp. 1-4; *Scrutiny Digest 12 of 2018*, pp. 67-70.