

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

DAVID TUNE AO PSM

31 MARCH 2023

Letter of Transmittal

The Hon Anika Wells MP
Minister for Aged Care
Parliament House ACT 2600

Dear Minister

Following my appointment to conduct an independent capability review of the Aged Care Quality and Safety Commission (the Commission), I am pleased to provide you with my report and recommendations on how the Commission's capability can be improved to better support its regulation of the aged care sector.

In undertaking this review, I have consulted with stakeholders across the aged care sector, including aged care providers and consumers, peak bodies, advocacy groups, the Commission, the Department of Health and Aged Care, other relevant Australian Government agencies and state and territory governments.

The review concludes that the Commission has achieved a great deal in seeking to establish itself as one entity and deliver on its substantively expanded roles and responsibilities. It is clear from meetings and consultation with the Commission's senior leadership and staff that its people are passionate and committed to their work and the goals of the organisation.

The Commission is maturing and has been developing solid strategies across the range of its functions aimed at strengthening its capability in a period of significant change and major challenges. While the implementation and embedding of these strategies should stand it in good stead going forward, there remain some critical capability gaps in the organisation that require urgent attention.

While all review recommendations are complementary and important, I consider those recommendations that focus on the key enablers for strengthening the Commission's strategic, regulatory, leadership, structural, cultural, governance, digital, data and ICT, communications and engagement, and people capability as the most critical and enduring and matter most. These will ensure that the Commission is best placed to deliver the future regulatory framework that will apply when the new Aged Care Act commences on 1 July 2024.

Attached is my completed report.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'David Tune', is written over a light blue horizontal line.

David Tune AO PSM

31 March 2023

Acknowledgments

I would like to thank Commission staff, senior executive leaders and the Aged Care Quality and Safety Commissioner Janet Anderson PSM for their assistance and engagement in the Review.

I would like to thank the Chair and members of the Aged Care Quality and Safety Advisory Council for their contribution to the Review, as well as the Chairs and members of other external committees and forums who also gave generously of their time.

I would like to thank everyone who gave generously of their time and insights by participating in the Review's stakeholder consultation roundtables, one-on-one interviews and meetings, and those who went to the effort of preparing submissions.

I also wish to acknowledge the contributions provided by Department of Health and Aged Care staff and senior executive leaders, whose assistance to and engagement with the Review provided crucial insights into the issues I was asked to consider.

I am particularly grateful for the invaluable assistance provided by the Review team, comprised of Phil Brown (Lead), Kathleen Dalladay, Elena del Castillo Villanueva, Tony English, Sarah Hough, Peter Huta, Daniel Keys, Kym McConnell, Meagan Petteit, Danielle Pinkerton, Anne Tibaldi and David Weiss.

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EXECUTIVE SUMMARY

I was asked by the Minister to assess aspects of the Aged Care Quality and Safety Commission's (the Commission's) capabilities and performance. I have done so in the context of assessing the Commission's strengths, opportunities and weaknesses, and the extent to which these inhibit or enable a high-performing, contemporary, best practice regulator.

I have focussed on the future – what the Commission needs to do to ensure that it can successfully undertake its important role of ensuring the safety and wellbeing of older Australians in the context of the new Aged Care Act.

I have considered the context in which the Commission has had to perform its roles and functions since its inception in 2019, particularly the rapid expansion of its functions, funding and staffing.

During this time the Commission has faced significant challenges, including the COVID-19 pandemic and natural disasters in some regions.

The Commission has faced significant issues attracting and retaining staff in an environment of staff and skills shortages across the aged care sector and more broadly.

The Commission currently has a staff vacancy rate of 20 per cent which results in capability and capacity deficits. In particular, quality assessor staff are difficult to attract and retain.

In addition to staff shortages, the resourcing of corporate services such as ICT and HR have not kept pace with the growth in functions and staffing needs.

Despite these challenges, the Commission has been able to demonstrate success in a number of areas, including in its implementation of new functions.

I have also noted the additional scrutiny, functions, and challenges for the Commission as a result of the Royal Commission into Aged Care Quality and Safety (the Royal Commission) and the Australian Government's aged care reform agenda.

I have consulted extensively with providers regulated by the Commission, peak bodies, consumer representatives, and other stakeholders, and staff and leadership from the Commission and the Department of Health and Aged Care (the Department).

In assessing the Commission's capabilities, I have examined both domestic and international regulatory best practice approaches, trends and evidence.

I have also considered the new Australian Public Service Commission organisational capability framework and the Australian Government's Regulator Performance Guide to determine what constitutes capability best practice for a modern, high-performing regulator.

I have used these and other relevant elements of best practice as the benchmarks to assess the Commission's capability:

- clear purpose and clarity of role

- strategic and visible leadership, appropriate supporting structure and culture
- good internal governance
- accountability and transparency
- capable people
- robust and user focused ICT and data systems
- trust and reputation, and a focus on organisational continuous improvement
- resourcing
- regulatory strategy and operating model
- risk based and data driven
- cultural capability, and ability to deliver for diverse groups, and
- effective engagement and communications.

In my view, the Commission is taking important steps to ensure that it evolves into a high performing regulator. There is much to build from, and I commend the work of the Commissioner, her team and staff across the organisation for these steps.

However, it is clear that there is much more to be done.

I believe that the recommendations set out in this report are practical, constructive and achievable, and are essential to enable the Commission to address its capability gaps and meet the requirements and public expectations of the new Aged Care Act.

To become a trusted, high performing regulator, the Commission must as a matter of urgency take action to fix its organisational structure, senior leadership, and internal governance. It needs strategic, visible leadership, and a focus on being engaged right across the sector and community, in an open and transparent way.

The Commissioner must empower senior and executive level (EL) staff and current and emerging leaders and recruit senior executive service (SES) staff with high quality leadership capabilities.

The Commissioner needs to change the Commission's organisational structure to reduce functional silos, bring together like functions, improve accountability, spans of control and delegation of powers, and the redesign of internal strategic governance arrangements.

Workforce and ICT systems will need a sustained focus. The Commission needs to elevate these functions structurally and recruit expertise at SES Band 1 and EL levels. A major priority will be a new set of internal governance arrangements, with oversight by a new Deputy Commissioner Corporate.

The Commission urgently needs to fix significant problems in its complaints process and Serious Incident Response Scheme (SIRS). This is a huge workload, and the appointment of the new Aged Care Complaints Commissioner must proceed as a high priority.

The complaints system must be urgently reviewed to ensure that complaints are triaged appropriately, that complainants have assurance that concerns are being followed up, and the wider community gain trust that matters of concern to older Australians and their families are getting priority attention. There must be regular and more detailed reporting on complaints and SIRS.

The Commission's culture internally drives what is experienced externally. Therefore, the Commission must be more open, transparent and accountable. It must share information, engage more openly and work with providers. It must build on its recent good work engaging with consumers and providers but go much further.

The Commission must adopt a far more collaborative approach to shaping and delivering its regulatory responsibilities and work program, partnering with providers and peaks and utilising opportunities for co-design with providers and consumers.

The Commission must acquire a better understanding of the diverse needs and circumstances of aged care consumers and their communities, especially First Nations people, culturally and linguistically diverse people, people with dementia, veterans and LGBTIQ+ people, and older people living in regional and remote communities. In doing so, it must deliver more flexible and responsive consumer-centric approaches while ensuring quality and safety remains paramount.

The existing aged care legislative framework is not fit for purpose and is too complicated and rules bound. The new Act and regulatory system must encourage ongoing continuous improvement, driving higher quality care, and the development of risk approaches that ensure that the safety of older Australians gets the right and timely attention that is warranted.

To do this, the Commission must have a major focus on being data driven so that the risk-based regulatory vision is able to be realised. Without the right systems and capabilities – particularly robust data analysis – the vision will not come into being. The Commission must share much more information and data – on its own performance, but also providers, and what works, and what the key issues are. This will help drive ongoing continuous improvement and enable a more trusting and empowered sector.

While the Commission has been able to fund its range of activities through internal cross-subsidisation, particularly through the COVID-19 pandemic lockdown periods, a number of terminating measures, as well as increasing demand for some activities such as complaints, means that resourcing issues from 2023-24 must be addressed with some urgency. In particular, I recommend that a resourcing model be developed that includes for some functions a funding mechanism that sees its appropriation revenue directly determined by estimated workloads, which can be adjusted throughout each year based on actual workload – a demand-driven mechanism.

The Commission must also come together with the Department to ensure priorities are better articulated and understood, better data sharing, role clarity between the two agencies and their staff, and improved coordination of messaging and engagement with the sector. This is of critical importance for matters like education and support for providers.

If the Commission does these things – and this is an important caveat - I believe it will be set up for success.

Feedback I have received from stakeholders strongly suggests that the Commission has been overloaded and that the new functions coming on-line and being transferred from the Department have created pressure and resulted in serious risks to the Commission's business-as-usual (BAU) functions.

I consider therefore it would be ill-advised to require the Commission to take on any additional new functions, bar those already agreed upon, before the commencement of the new Aged Care Act. Rather, the Commission should be encouraged to bed down recent new functions and be given some 'clear air' to implement recommendations from this Review.

I also consider there are benefits to the Commission being the end-to-end aged care regulator, and do not support any of the Commission's current functions being removed.

The Royal Commission recommended in its Final Report that a new Aged Care Safety and Quality Authority be established in place of the Commission. The former Government accepted this recommendation, noting that this should be informed by the outcomes of this Review.

There are strong arguments however, to more effectively and efficiently achieve the objectives expressed by the Royal Commission by retaining the current Commission. This approach involves a less disruptive and more efficient and cost-effective approach by building on the strengths of the current Commission and the work already underway to achieve modern, world class regulation.

Therefore, I am not convinced that the creation of a new Authority and Board is either necessary or advisable at this time. What is more critical is to successfully implement the changes I have proposed.

However, retaining the current Commission requires changes to strengthen its governance arrangements. These include substantially strengthening the Aged Care Quality and Safety Advisory Council (the Advisory Council), including refreshing the membership to address skills deficits and increase diversity of representation.

I consider that the Advisory Council requires more independence and autonomy to enable proper scrutiny of the Commission, and direct engagement with the Minister.

I further recommend that the Inspector-General of Aged Care assess progress and whether more may need to be done in two years, including further consideration of the creation of a new Authority and Board if matters are not sufficiently progressed.

A consolidated list of the report's recommendations with timelines based on priority ratings is at Chapter 2.

CHAPTER 1: INTRODUCTION

The capability review (the Review) of the Aged Care Quality and Safety Commission (the Commission) responds to recommendations 10 and 104 of the Royal Commission into Aged Care Quality and Safety (the Royal Commission). Figure 1 refers. The Royal Commission delivered its final report in February 2021.

The Review was announced by the Minister for Aged Care, the Hon Anika Wells MP on 28 July 2022 and commenced on 4 October 2022.

Figure 1: Royal Commission recommendations 10 and 104

Recommendation 10: Aged Care Safety and Quality Authority (Commissioner Briggs)

1. The Aged Care Quality and Safety Commission should be abolished by 1 July 2022 and replaced by an independent Aged Care Safety and Quality Authority, overseen by a board made up of up to five members, with a Chief Executive Officer responsible to the Authority.
2. The Authority should have the overarching purpose of safeguarding the quality and safety of aged care through enforcing compliance with the Act and Standards. In carrying out this purpose, the Authority should actively engage with older people and their families and carers to ensure that their views are incorporated in the Authority's compliance and decision-making, and are kept informed of the outcome of regulatory activities.
3. The functions of the Authority are to:
 - a. approve and accredit providers
 - b. monitor and assess compliance with the quality and safety obligations required of providers under the new Aged Care Act
 - c. address non-compliance with quality and safety obligations by taking enforcement action including:
 - i. enforceable undertakings
 - ii. directions
 - iii. civil penalties on directors
 - iv. amending approval or accreditation conditions
 - v. appointing an administrator to assume responsibility for the conduct of a service
 - vi. revocation of approval as an approved provider or withdrawal of accreditation of a service
 - d. investigate and respond to complaints about the aged care system
 - e. provide timely and accurate data as specified by the Department for inclusion in the national information service, including information on compliance and accreditation activities, serious incident reporting and complaints by provider and service
 - f. publish information on the outcomes of regulatory actions, including information on system-wide regulatory activity and outcomes, and publication of enforcement action taken against individual providers
 - g. do anything incidental or conducive to the performance of any of the above functions.
4. The Authority should be fully funded from Budget appropriations.
5. The Authority's staff will be employed under the *Public Service Act 1999* (Cth). The Authority should ensure that it maintains an appropriate regulatory capability, including regulatory and investigatory skills, clinical skills, assessment skills, and enforcement skills.

Recommendation 104:

1. By 1 May 2021, the Australian Government should commission an independent review of the capabilities of the Aged Care Quality and Safety Commission.
2. By 1 January 2022, the Australian Government should implement the recommendations of the review and provide the resources identified in the review that are needed for the Quality Regulator to engage and develop a skilled and dedicated compliance and enforcement workforce, with the regulatory and investigatory skills, clinical knowledge, assessment skills, and enforcement skills required for it to meet its regulatory mandate.

1.1 Review scope and methodology

Review scope

This Review has been asked to consider whether the Commission has the appropriate resources, workforce, regulatory and investigatory skills, clinical knowledge, and assessment and enforcement skills, to meet its regulatory responsibilities and keep older Australians receiving Australian Government aged care services safe. The full Terms of Reference for the Review are at Appendix A. In summary, they require a capability review of:

- the Commission's:
 - organisational values, structure, leadership and culture
 - risk-management and decision-making approach, including delegation of powers, and the balance of the Commission's focus between compliance and education, and best practice promotion
 - adaptability to meet emerging challenges, risks and concerns within the aged care sector
- the efficient allocation of resourcing for and by the Commission, including in relation to workforce, structures, infrastructure and the identification of service duplication and gaps
- the role of Statutory Office Holders and key executive officers
- the capability of the workforce to perform the Commission's functions
- the capability of the Commission to undertake monitoring and enforcement in rural and remote areas, and to ensure nationally consistent but locally relevant application of its functions
- the capability of the Commission to undertake its functions for aged care services for older people with dementia, culturally and linguistically diverse consumers and specific diversity groups including First Nations people, veterans and the LGBTIQ+ communities
- the Commission's effectiveness in engaging and communicating with and educating older Australians, their families and carers and the community more broadly, and
- options for the establishment of a culturally sensitive and capable new aged care regulatory Authority.

The Review also took into account:

- the impact of Australian Government priorities and reform activities planned or underway to implement recommendations from the Royal Commission. This includes the legislative reforms associated with the new Aged Care Act
- the role of the Commission in rebuilding the community's confidence in the aged care regulator and the aged care system more broadly, and
- the role and responsibility of the Commission in working with the Department of Health and Aged Care (the Department) and the Australian Commission on Safety and Quality in Health Care to regulate aged care, including clarifying responsibilities and legislation.

Review methodology

The following methodology was adopted to inform the Review and address the Terms of Reference:

- the examination of a range of issues relevant to the functions of the Commission and Commission performance and workforce data
- extensive consultations and information sessions with Commission and Departmental staff to better understand the development, current functions and proposed additional functions of the Commission
- targeted consultations with consumer and provider peak bodies, Commission and Departmental advisory and reference groups, state and territory governments, and other Australian Government departments and agencies including other regulators, the Department of Finance and the Australian Public Service Commission
- a public submission process inviting interested individuals and groups to share their views about the capability of the Commission, and
- consideration of:
 - relevant reviews
 - similar national and international entities
 - best practice guidelines and models for regulatory bodies, and
 - lessons learned from sector innovations and other social care regulators.

Further detail about the Review consultations and public submission process is at Appendix B.

1.2 Grosvenor capability review of the Commission

In March 2021 the Commission engaged Grosvenor Public Sector Advisory (Grosvenor) to identify the organisational capabilities required to operate as a contemporary best practice regulator and develop recommendations for the Commission to optimise its performance and impact.

Grosvenor delivered its final report *Optimising capability to meet current and future challenges* in December 2021. The report findings, conclusions and recommendations are summarised at Appendix C.

My own research and consultations have echoed many of Grosvenor's conclusions about the need for the Commission to lift core capabilities to meet current and future requirements.

I also acknowledge that the Commission has taken some actions in response to the Grosvenor findings including developing a number of strategies, plans and frameworks (see Section 3.9), and has further actions planned.

Grosvenor's findings are referenced throughout the report.

1.3 Relationship between the Review and the Australian Public Service Commission (APSC) Capability Review Framework

The APSC Capability Review Framework has five core domains covering (1) Leadership and Culture, (2) Collaboration, (3) Delivery, (4) People and Resourcing and (5) Risk.

While this Review has specific Terms of Reference that inform its focus, it does have regard to the five domains of the APSC Capability Review Framework, and they are embedded in all aspects of this Review.

1.4 Report roadmap

The report is structured across six chapters.

Chapter 1: Introduction

This Chapter includes the Royal Commission recommendations relating to the Review, the Review scope and methodology, and the relationship between this Review and other capability reviews.

Chapter 2: Review recommendations and Action Plan

This Chapter contains a summary table of recommendations and an action plan for implementation.

Chapter 3: Context

This Chapter provides background on the Commission's origins, current operating environment and strategic regulatory approach, and a summary of the barriers and challenges it faces in delivering its functions.

Chapter 4: Towards a contemporary, high performing risk-based regulator

Against a set of key organisational and regulatory enablers, this Chapter discusses regulatory best practice principles and the Commission's current capability, and makes recommendations on the capability uplift the Commission requires.

Chapter 5: Regulatory functions and outcomes

This Chapter assesses the Commission's capability to deliver specific regulatory functions and makes recommendations to support it to achieve regulatory best practice.

Chapter 6: Retaining the Commission in its current form

This Chapter argues to retain the Commission in its current form and proposes recommendations for the reform of the Aged Care Quality and Safety Advisory Council.

In addition, the Report has seven Appendices:

1. *Appendix A: Review Terms of Reference.*
2. *Appendix B: Review consultations and public submission process*
3. *Appendix C: Summary of Grosvenor Final Report*

4. *Appendix D: Commission functions at March 2023*
5. *Appendix E: Comparison of national regulators*
6. *Appendix F: Comparison of international health and social care regulatory systems*
7. *Appendix G: Regulatory best practice principles and capabilities*
8. *Appendix H: Glossary*

CHAPTER 2: REVIEW RECOMMENDATIONS AND ACTION PLAN

2.1 Summary table of recommendations

The recommendations included in Table 1 are at a summary level. Where required, further detail is included under individual recommendations in the body of the report.

In addition, the Review has provided a broad timeframe for implementation of each recommendation based on any necessary sequencing and according to its priority. The timeframes associated with each priority are as follows:

- **Priority 1:** to be progressed as soon as possible, and by no later than 30 September 2023.
- **Priority 2:** to be progressed as soon as possible and by no later than 31 March 2024.
- **Priority 3:** to be progressed in line with introduction of the new Aged Care Act, expected to be operational from 1 July 2024.
- **Priority 4:** to be progressed in 2025.

Table 1: Summary of review recommendations

Number	Recommendation	Priority
2.1	The Commission to form a senior level Steering Group to oversee implementation of an Action Plan based on the Review recommendations.	1
4.1	The Commission to review and update its purpose, role and responsibilities statements, and review and update its website and other communication products to provide greater clarity about its place in the broader aged care system.	3
4.2	The Department and the Commission to establish a joint strategic policy and operational committee (Joint Strategic Committee), and update their overarching MoU.	1
4.3	The Commission to strengthen its leadership by fully implementing a new organisational structure to better support the Commission's purpose and outcomes.	1
4.4	The Commission to implement a robust, comprehensive and transparent corporate governance framework and publish the framework on its Intranet.	1
4.5	The Commission to adopt open disclosure as part of its regulatory practice and promote transparency about its practice within the sector and the community.	3
4.6	The Commission to accelerate the development and implementation of its Diversity and Inclusion Strategy.	1

Number	Recommendation	Priority
4.7	The Commission to develop a Cultural Capability Framework in partnership with key stakeholders.	2
4.8	The Commission to develop a detailed, holistic and thorough Strategic Workforce Plan that identifies skills gaps and focusses on all aspects of the employee lifecycle, is a key priority of ELG, and is the principal focus of a new People and Culture Governance Committee.	1
4.9	The Commission to establish appropriately resourced ICT governance and delivery processes to provide greater strategy, design and implementation oversight over the Aged Care Reform program and internal Commission ICT work program.	1
4.10	The Commission to accelerate its' Cyber Security Uplift Program to adequately address or mitigate current cyber security risks, including further education and awareness for staff.	1
4.11	The Commission's 2022-23 resourcing levels to be maintained through 2023-24.	1
4.12	The Department to urgently consider how the recommendations of this review which have resourcing implications will be funded.	1
4.13	The Department, the Commission and the Department of Finance to undertake a joint project in 2023 to develop an appropriate and ongoing funding model.	1
4.14	The Commission to update its Regulatory Strategy in consultation with all relevant stakeholders so that aged care providers, consumers and other interested parties can effectively contribute to the continuous improvement of aged care regulation, and commit to regular review of the Strategy.	2
4.15	The Commission to use a wider range of opportunities to actively communicate and promote its updated Regulatory Strategy, with a focus on ensuring aged care consumers, providers and the wider community have a better understanding of the Commission's regulatory practice and role in the aged care system.	2
4.16	The Commission to, in partnership with the Department, develop a strategic Data, Analytics and Risk Profiling Strategy, supported by the advice of a member of the Advisory Council with a data background, and with oversight by the Data and Intelligence Governance Committee.	2

Number	Recommendation	Priority
4.17	The Commission to develop a new, comprehensive communications and engagement strategy, including an external review of its current arrangements, and improved mechanisms and processes for communication and engagement with consumers from diverse backgrounds.	1
5.1	The Commission to actively work towards having a significantly higher proportion of accreditation site audits undertaken by its permanent quality assessor workforce, and do so gradually as deeds of offer with Third Party Provider suppliers are reviewed.	Ongoing
5.2	The Commission to implement the Quality Assurance Framework across all its regulatory functions and ensure regular reporting of assurance activities and key findings on the Commission's website to provide greater assurance to providers and consumers.	1
5.3	The Commission to review the Quality Assessor Retention Project and urgently implement measures to retain assessment staff, and extend the project to consider and address retention issues in other parts of the Commission's workforce.	1
5.4	The Commission and the Department to develop a new approach to the use of Exceptional Circumstances decisions and accreditation visits during crises and work together to substantially reduce the number of services covered by EC decisions, by December 2023. Progress to be reported to the Joint Strategic Committee.	2
5.5	The Commission to embed in policy the right to seek a review of decisions preceding a formal compliance decision in order to strengthen procedural fairness and actively promote this by improving the transparency and communication of decision review arrangements. Reviews must be undertaken by separate reviewers (Authorised Review Officers).	3
5.6	The Department to consider expanding the range of reviewable decisions under the new Aged Care Act.	3
5.7	The Aged Care Complaints Commissioner to deliver an enhanced complaints management system which ensures timely responses, is transparent and accountable, integrates information, and promotes open disclosure and supports the sector to use complaints to inform continuous improvement.	2
5.8	The Aged Care Complaints Commissioner to prioritise a thoroughgoing review of the revised operating model for SIRS to determine whether it is effective in managing the high volume of notifications and identifying and addressing risks associated with serious incidents.	2

Number	Recommendation	Priority
5.9	The Commission to fully integrate its financial and prudential regulatory functions into existing functions to support its implementation of a more sophisticated risk-based approach through the use of data analytics.	2
5.10	The Commission to pilot a Clinical Advice 'hub and spokes' model where some clinicians are embedded in regulatory areas to bolster clinical expertise and shape the advice provided.	2
5.11	No new functions to be added to the Commission before the commencement of the new Aged Care Act.	1
6.1	The Commission to be retained in its current form.	1
6.2	The Aged Care Quality and Safety Advisory Council to be strengthened to provide stronger independence, accountability and oversight.	1
6.3	The Inspector-General for Aged Care to undertake a review in 2025 to assess progress on implementing the recommendations of this Review, and to consider whether there is merit in abolishing the Commission and forming a new Authority and governing board.	4

2.2 Action plan

The Review recommendations summarised in Table 1 above are designed to be implemented in total to enable the Commission to obtain the capability uplift it requires to achieve its goal of world class, best practice regulation.

The recommendations have been prioritised to precede or align with the implementation of the new Aged Care Act in July 2024.

The Commission should establish an Action Plan for implementation of the recommendations, in consultation with other parties as required, by 1 July 2023.

Implementation of the Review recommendations should be overseen by a senior level Steering Group.

Recommendation 2.1: The Commission to form a senior level Steering Group to oversee implementation of an Action Plan based on the Review recommendations.

- Membership of the Steering Group should include the Commissioner, the Department's Deputy Secretary of Ageing and Aged Care, a member of the Aged Care Quality and Safety Advisory Council, and the Inspector-General of Aged Care.
- The Steering Group should be established by 1 July 2023.

CHAPTER 3: CONTEXT

3.1 Commission history

The Aged Care Quality and Safety Commission (the Commission) was established on 1 January 2019, bringing together the functions of the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner and creating a single point of contact for aged care consumers and providers in relation to quality of care and regulation.

Additional aged care regulatory functions were transferred to the Commission from the then Department of Health on 1 January 2020 – resulting in the Commission becoming the end-to-end regulator for aged care.

The Commission's functions continue to expand as reforms from the Royal Commission are progressively implemented. New functions for the Commission in the 2022-23 financial year to date include regulating:

- new financial reporting requirements for providers (July 2022).
- the expansion of the Serious Incident Response Scheme (SIRS) into in-home services (December 2022)
- a new Code of Conduct for aged care providers and workers (December 2022)
- strengthened provider governance arrangements (December 2022)
- transition care services (December 2022), and
- new caps on administration changes included by providers in home care package costs (January 2023).

A full list and timeline of foundational and new Commission functions is at Section 5.5.

The Commission's workforce and budget have grown substantially since establishment to support this expansion in functions. In 2019-20 the Commission's estimated annual budget and staff count was \$106.4 million¹ and 430 staff while in 2022-23 the Commission's estimated annual budget and staff count (at the time of the Review) is \$329.0 million² and 1,423.9 staff³. This represents an annual budget increase of 210 per cent over four years and a staffing increase of 230 per cent over the same period.

3.2 Purpose and Vision

The Commission's purpose 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 consumers about the quality of care and services.

¹ [Health Portfolio PBS Budget Statement](#) 2019-20 p.155

² [Commission PBS Budget October 2022-23](#) p.131 (note that this figure includes \$97 million of prior year appropriations)

³ Current as at 19 January 2023

The Commission's vision is that:

"... older Australians trust and have confidence that aged care services protect and enhance their safety, health, well-being and quality of life".⁴

3.3 Legislative framework

The Commission works within a complex legislative framework, including the *Aged Care Quality and Safety Commission Act 2018* (the Commission Act), the *Aged Care Quality and Safety Commission Rules 2018* (the Commission Rules), the *Aged Care Act 1997* (the Aged Care Act) and various subordinate legislation.

The Commission Act sets out the Commission's functions and powers, while the Commission Rules provide further details on the legal framework in which the Commission operates, including the processes which support the Commission to undertake its functions and exercise its powers.

The Aged Care Act is the overarching primary legislation that outlines the obligations and responsibilities of approved aged care providers. In particular, Chapter 4 of the Act sets out responsibilities of approved providers relating to the quality of care they provide, user rights for people to whom care is provided and accountability for the care that is provided and suitability of key personnel. The Act is supported by a large body of subordinate legislation. Responsibilities relating to Commission functions are included in six sets of principles (Accountability Principles 2014; Information Principles 2014; Quality of Care Principles 2014 (including the Accreditation Standards); Records Principles 2014; Sanctions Principles 2014; User Rights Principles 2014).⁵

3.4 Powers

The Commission has a range of regulatory and enforcement powers under the Commission Act and the Aged Care Act, which trigger the use of particular enforcement powers outlined in the *Regulatory Powers (Standard Provisions) Act 2014* in relation to certain obligations. They include monitoring powers, investigation powers, civil penalties, infringement notices, enforceable undertakings, and injunctions.⁶

3.5 Role and functions

The Commission is the national regulator for Australian Government subsidised aged care, with oversight of:

- approved providers of residential aged care, home care and flexible care services through which short-term restorative care (STRC) is provided in a residential or home care setting
- providers of Australian Government-funded aged care services, including the National Aboriginal and Torres Strait Islander Flexible Aged Care Program (NATSIFAC) and Commonwealth Home Support Program (CHSP), and

⁴ [Commission Corporate Plan 2022-23](#) p. 8

⁵ [Commission webpage | Legislation and policies](#)

⁶ DoHAC Briefing Paper, Aged Care Quality and Safety Commissioner's Regulatory Functions

- providers under the Transition Care, Multi-purpose services and Innovative care programs.⁷

The Commission Act sets out an expansive set of functions, summarised as follows:

- protect and enhance the safety, health, wellbeing and quality of life of aged care consumers
- promote the provision of quality care and services by approved providers of aged care services, and service providers of Australian Government-funded aged care services
- approve providers of aged care
- develop, in consultation with aged care consumers and their representatives, best practice models for the engagement of providers with their aged care consumers and promoting those models to providers
- regulate aged care services according to the Rules by accrediting, conducting quality reviews, monitoring the quality of care and services, and registering quality assessors
- ensure compliance by approved providers with their aged care responsibilities
- deal with complaints made, or information given to the Commissioner, in accordance with the Rules about an approved provider's responsibilities under the Aged Care Act or funding agreement
- impose sanctions on approved providers and lift sanctions, and
- provide education and information about its functions to aged care consumers and their representatives, aged care providers and the public.⁸

A more detailed list of the Commission's functions is at Appendix D.

3.6 Stakeholders

The Commission has a broad range of stakeholders, including aged care consumers, their families and friends; aged care providers; consumer and provider peak bodies; Australian Government ministers; other regulators including the Australian Health Practitioner Regulation Agency, the Australian Commission on Safety and Quality in Health Care, and the NDIS Quality and Safeguards Commission (NDIS Commission); Australian Government and state and territory public health departments and entities; health practitioner groups; and researchers and universities.

The Commission engages with several aged care advisory and consultative forums. It also takes advice from the Aged Care Quality and Safety Advisory Council, and consults with the Commission's Consultative Forum and Consumers and Families Panel.

⁷ DoHAC PowerPoint, Regulatory Functions of the Aged Care Quality and Safety Commissioner

⁸ [Commission Corporate Plan 2022-23](#) p. 10

3.7 Workforce

The Commission workforce totals 1423.9 staff of which 1150.2 are Australian Public Service (APS) employees and 273.7 are contract staff.⁹

This number excludes the Third-Party Provider arrangement which has been developed to deliver a supplementary Quality Assessor workforce (see Section 5.1). There are currently 173 registered Quality Assessors provided under the contract arrangements with the Third-Party Provider suppliers.

3.8 Operating environment

Since its inception the Commission has experienced substantial change in its regulatory roles and responsibilities, including in relation to functions transferred from the Department, and significant reforms arising from the recommendations of the Royal Commission.

The Commission has faced particular challenges in relation to the COVID-19 pandemic, including COVID-19 outbreaks in residential aged care and home care settings leading to restrictions on site visits to aged care services to carry out its regulatory monitoring.

The Commission also faces considerable ongoing challenges in both recruiting and retaining staff in the context of workforce shortages across the aged care sector.

While operating in this challenging and complex environment, the Commission has also achieved a great deal since 2019 in establishing itself, managing change, and delivering substantively expanded roles and responsibilities.

3.9 Strategic priorities and regulatory approach

Understanding how the Commission delivers its functions was a key focus of the Review. This section presents a high-level overview by outlining the Commission's strategic priorities and regulatory approach, and is complemented in the next section by a summary of how the Commission's performed against its public performance measures. More detailed commentary on performance against particular functions and areas where improvement may be required is included in Chapters 4 and 5.

3.9.1 Strategic priorities and regulatory approach

The Commission's 2022-23 Corporate Plan defines four strategic priorities, which it states shape its behaviour, underpins its decision making and actions and ensures it places the wellbeing of aged care consumers at the centre of everything it does:

- "We place consumers at the centre at all times.
- We are an effective, capable and accountable regulator.
- We contribute to improvements in sector performance, the safety and quality of aged care, and consumer experiences of care.
- We advance intelligence-led, risk-based proportionate regulation."¹⁰

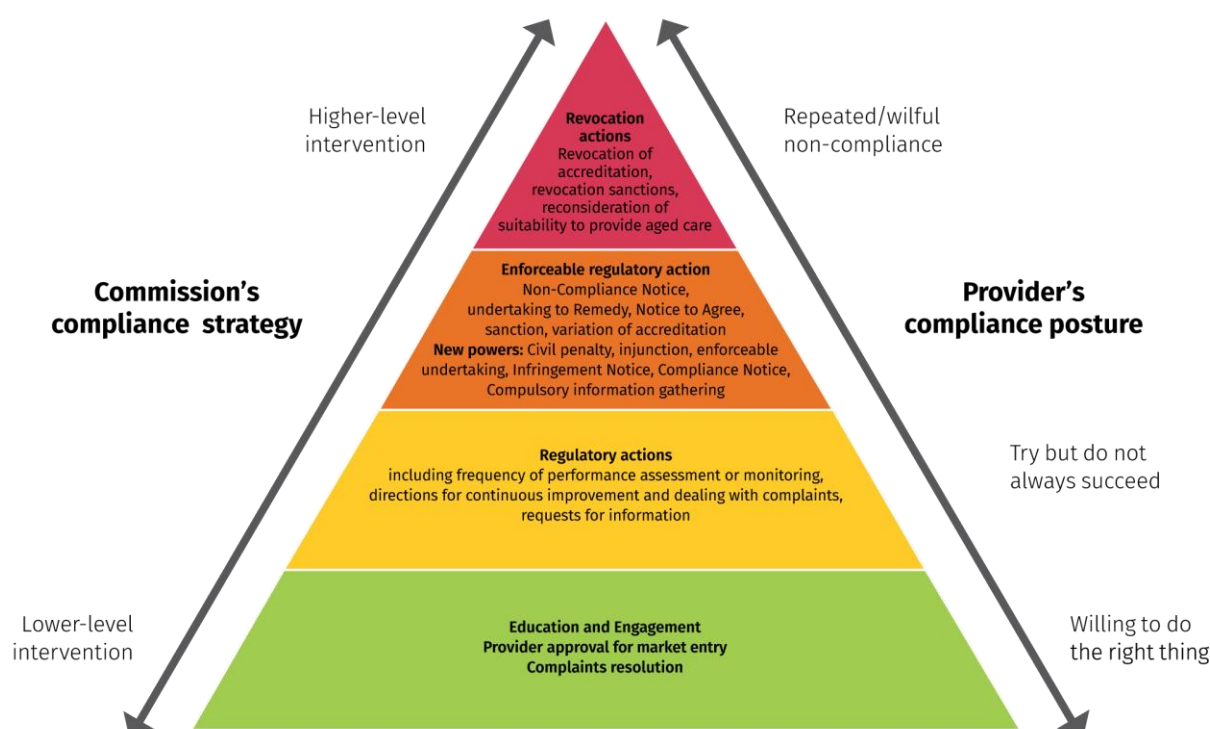
⁹ Current as at 19 January 2023

¹⁰ [Commission Corporate Plan 2022-23](#) p. 13

The Corporate Plan also outlines the Commission’s regulatory approach by way of reference to its Regulatory Strategy, Regulatory Operating model and compliance and enforcement approach.

The Commission’s Regulatory Strategy is described as providing “*clarity and transparency about the Commission’s approach to regulation*”¹¹. The Strategy outlines how the Commission seeks to empower and engage consumers, regulate providers, detect and mitigate risk and contribute to building sector capability¹² and presents the Commission’s regulatory approach as a pyramid which has “*cooperative and persuasive approaches at its base and more targeted and interventionist regulatory tools at the top, in response to potential or actual risk of harm to consumers.*”

Figure 2: The Commission’s Regulatory Pyramid.



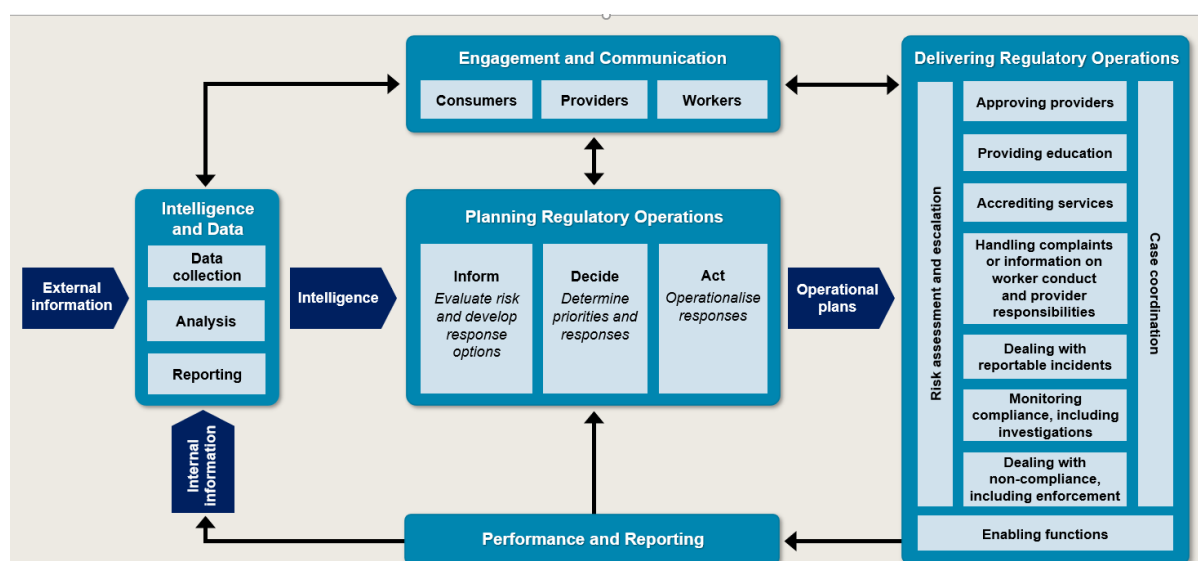
The Commission’s Regulatory Operating Model that underpins this approach is described as “*an intelligence-led, risk-based and proportionate approach to regulation*”, which aims to ensure activity is focused on areas of greatest risk and informed by a wide range of intelligence and data. Data analytics is highlighted as a key enabler to identifying and responding to sector wide trends and to improving sector performance through education and information which encourages behavioural change and investment in activities that improve capability.¹³

¹¹ [Commission Regulatory Strategy v 2.1, 14 February 2020](#) p.5

¹² [Commission Corporate Plan 2022-23](#) p.20

¹³ [Commission Corporate Plan 2022-23](#) p.21

Figure 3: The Commission's Regulatory Operating Model



Compliance and enforcement are a key element of this model. The Commission states it takes a risk-based, proportionate approach to managing non-compliance, which is informed by the provider's history and the consequence of harm to the safety, health, wellbeing and quality of life of consumers. Depending on the circumstances, the Commission may respond to non-compliance through administrative or enforcement actions.

3.9 2 Status of strategic documents

As noted in Chapter 1, the Commission is developing a suite of material to support its goal of becoming a best practice regulator and enable the capability uplift identified in the Grosvenor review. Many of these documents are referenced throughout this report. A list of these documents and their status is included in Table 2.

Table 2: Strategies, plans and frameworks referred to in the Review

Name	Status
Compliance and Enforcement policy (July 2021)	Being updated to reflect recent legislative changes.
Regulatory Strategy (1 January 2020)	Being updated. Will include new 'regulatory diamond'
Regulatory operating model – expanded to include new provider responsibilities e.g., Code of Conduct, SIRS in home care, governance obligations, 24/7 RN residential requirements and provider reporting	Current – noting some reforms don't commence until July 2023.
SIRS – High level Function based Operating Model	Current
SIRS Home Services <ul style="list-style-type: none"> Revised operating and resourcing model Framework to assist providers to understand harm and impact 	In development. To be implemented between January and June 2023.

Name	Status
<ul style="list-style-type: none"> • Patient Safety Incident Response Framework (PSIRF) 	
Compliance Business Improvement Project <ul style="list-style-type: none"> • Operating model developed by KPMG • National case allocation process • Compliance Manual • Uplift work management practices 	Current. Implementation commenced October 2022. Operating model reform expanded from original work to incorporate end to end regulatory design principles, new national structure and national case allocation / workflow. Detailed program of work developed to support structure, process and people change and capability uplift. External consultancy is onboard. The development of instructional material such as compliance manuals forms part of the program of work.
Financial and Prudential Regulatory Strategy <ul style="list-style-type: none"> • Market segmentation Joint Operating model • Provider triage function operating model • Commission financial and prudential operating model 	In development. The Commission and Department are scenario testing the joint operating model. This includes the development of principles to support referral of decisions to the Department. Implementation of the Commission's financial and prudential operating model is underway. Recruitment to support the operating model is on foot, with a phased approach planned over 2022/23.
Enterprise performance framework	Current - finalised and endorsed April 2022
Risk and Audit Committee Charter	Current
Internal audit charter, strategy and annual internal audit plan	Current
Internal audit guidance	In development
Capability uplift program	Ongoing
People Strategy 2021-23	Current
Enterprise Performance Framework 2022-23	Current
Security Plan 2021-2024	Current
Fraud Control Plan 2021-2023	Current
FOI protocols	Current
ICT governance	In progress – Change Advisory Board established Interim Architecture Review Board and Architecture Solutions Board endorsed.
Project Governance	Current
Learning and Development Strategy 2022-23	Current
Wellbeing Plan 2022-24	Current
Performance Development approach	Current
Accountable Authority Instructions	Current – to be reviewed concurrently with Corporate Governance Framework, Administrative Policy Framework and Delegations.
Enterprise Risk Management Framework	Current
Comprehensive Internal Audit work program 2022-23	Current
Privacy Framework	Current
Corporate Digital Toolkit	Living document – updated continuously as required by business areas.

Name	Status
Staff Capability Framework	In development.
Legislative Compliance Framework	In development. Framework in final phase of sign off. Will be circulated to responsible officers by 30 April 2023.
Corporate governance structure	In development – 6 to 8 months
Administrative Policy Framework	In development – 6 to 12 months
Assurance Frameworks	In development - early work being revisited. Implementation early 2023-24.
Integrity Framework	In development - implementation 2023-24.
Business Continuity Planning	In development - implementation 2023-24.
Change Management Framework	Current framework developed and approved 2022. Supporting artefacts and documentation launched. Community of Practice established.
Consumer engagement plan – May 2022	Current. Living document – current version dated December 2022
Data and Intelligence Capability Framework	In development. Work commenced March 2023.
Digital Strategy 2022-2025	Current
Data Management Framework	In development
Actionable intelligence tool	In development
Clinical Advisor capability and competency framework and tools	Current
Clinical Governance Framework	In development

3.10 Regulatory performance

3.10.1 Performance reporting – Portfolio Budget Statements¹⁴

Reporting actual performance against the performance targets set down in Portfolio Budget Statements (PBS) is one way of measuring the Commission's effectiveness. The Commission's PBS measures and targets have remained largely the same since its establishment in 2019. Three measures are identified:

1. Monitoring aged care service provider compliance with the aged care standards, by conducting a specified number of site audits for residential services, quality reviews for home care services and assessment contacts across all services.
 - It is difficult to confidently compare the Commission's performance commentary against the PBS estimated/expected results. While there are separate targets for the three types of activity, the Commission states the measure has been met but does not consistently and clearly report against each activity (see Table 3).

¹⁴ [Commission Annual Report 2018-19](#) p.68-79 ; [Commission Annual Report 2019-20](#) p. 85-98 ; [Commission Annual Report 2020-21](#) p. 87-132 ; [Commission Annual Report 2021-22](#)

Table 3: Reporting against PBS measure: Monitor aged care service provider's compliance with the aged care standards

	PBS Estimated/ Expected result	Commission Outcome
2020-21	<p>The Commission:</p> <ul style="list-style-type: none"> anticipates conducting over 400 site audits for residential care services and 50 quality audits for home care providers, and expects to complete over 10,000 assessment contacts across all services, inclusive of unannounced infection control spot checks in response to the COVID-19 pandemic. <p><i>ACQSC Portfolio Budget Statements 2020-21</i></p>	<p>Reporting appears linked to performance measure 6 (Evidence of effective monitoring and assessment of providers' compliance with aged care (Quality and Prudential) standards) in the Annual Report, which states the Commission conducted:</p> <ul style="list-style-type: none"> 3,663 more site visits and 9,379 more non-site activities than in 2019 – 13,042 regulatory activities in total 1,579 more site visits and 2,287 more non-site activities than in 2019–20 visited 1,121 more services than in 2019–20 (2,501 compared with 1,380 in 2019–20), primarily in the residential sector. <p><i>Annual Report 2020-21, p. 97</i></p>
2021-22	<p>The Commission:</p> <ul style="list-style-type: none"> anticipates conducting over 900 site audits on residential aged care services and 400 quality audits on home service providers, and expects to complete over 2,500 assessment contacts (both on and off-site) to support continuous improvement of the sector, which includes the completion of unannounced infection control spot check visits in line with the Commission's response to the COVID-19 pandemic. <p><i>ACQSC Portfolio Budget Statements 2020-21</i></p>	<p>The Commission's Annual report states this measure was met, with the Commission conducting:</p> <ul style="list-style-type: none"> 710 site audits with residential aged care services completed in 2021–22 and 188 quality audits with home services completed in 2021–22. <p>Further reporting is included under performance measure 10 (Monitor aged care provider quality and safety performance (including with the Aged Care Quality Standards) in the Annual Report, which states the Commission completed 8,459 assessment contacts, three and a half times the target of 2,257. This is attributed in part to restrictions on onsite visits arising from the pandemic and several natural disasters. Several specifically targeted assessment contact programs were delivered e.g. 500 phone-based assessment contacts to services in flood risk areas to monitor care and services and ensure that emergency management plans were in place and activated where required.</p> <p><i>Annual Report 2021-22, p. 109-110 and 92</i></p>

2. Resolving 80 per cent of complaints abouts service providers within 60 days.
 - The Commission has yet to meet this target. Of the complaints resolved in each year, the percentage of complaints resolved within 60 days has decreased from 75 per cent in 2019-20, to 67.6 per cent in 2020-21 and 67.3 per cent in 2021-22. This is attributed to an increase in complaint numbers and complexity and a surge in complaints arising from COVID-19.

- The Commission refers to improved productivity, as evidenced by the total number of complaints resolved each year increasing, from 8,081 in 2019-20 to 9,196 in 2020-21 (a 14 per cent increase) and to 9,469 in 2021-22 (a 3 per cent increase in comparison with complaints resolved in 2020-21).
3. Taking appropriate regulatory action to protect consumers and address provider non-compliance by issuing notices of direction, notices of non-compliance, notices to agree and sanctions.

The PBS does not set numerical targets for this measure, which is appropriate given it would imply there is a known level of non-compliance.

3.10.2 Performance reporting – internal performance measures

The Commission's Annual Reports include annual performance statements which define and report on internal priorities and performance measures. This is a useful adjunct as the PBS measures continue to focus heavily on "countable" regulatory activities, which, arguably do not reflect or support a risk-based approach to regulation. For example, there is little focus on education and consumer engagement activities and outcomes, or on initiatives that promote sector capability uplift.

The Commission's internal performance measures also evolve over time, reflecting its transition from a newly formed entity in 2019 to an independent end-to-end regulator with expanding functions in 2020-21. Table 4 shows the number of performance measures and the available levels of achievement in each year.

Table 4: Number of performance measures and levels of achievement, 2019-20 to 2022-23

	2019-20	2020-21	2021-22	2022-23
No. priority areas	6	4	5	3
No. performance measures	39	24	16	14
Status of performance measures	<ul style="list-style-type: none"> • 27 achieved • 10 partially achieved • 2 not achieved 	<ul style="list-style-type: none"> • 13 met • 10 partially met • 1 not met 	<ul style="list-style-type: none"> • 10 met • 5 partially met • 1 not met 	<ul style="list-style-type: none"> • Available when 2022-23 Annual Report published

Current priorities and performance measures, as outlined in Table 5 below, reflect the Commission's growing maturity and stated commitment to using data and intelligence to continue to improve its ability to:

- make informed, risk-based and proportionate decisions
- build internal capability and capacity
- inform and educate
- help drive increased trust in the aged care system, and
- deliver the government's reform agenda.¹⁵

¹⁵[Commission Corporate Plan 2022-23](#)

Table 5: Key activities and internal performance measures 2022-23

Key activity	Performance measure
1. Protect the safety, health, wellbeing, and quality of life of aged care consumers through our regulatory activities and decisions.	1-5 Reflect current PBS measures. 6. Monitor and take appropriate action in response to providers with potential or actual non-compliance with financial and prudential responsibilities including the Prudential Standards. 7. Improve the use of intelligence and enhance our risk-profiling and assessment to effectively target our regulatory responses.
2. Contribute to enhancing confidence and trust in the aged care system, empowering consumers and promoting best practice service provision through engagement, information and education.	8. Consumer feedback and engagement is used to inform the design and focus of our activities. 9. Promote best practice and support quality use of medicines through stakeholder engagement, including extending pharmacy outreach activities to more aged care services. 10. Underpin the Commission's activities with focused communications, information and education to support capability uplift and behavioural change in the sector.
3. Contribute to aged care reform through our regulatory activities, including the quality and safety, sector workforce, and governance in aged care.	11. Expand the Serious Incident Response Scheme (SIRS) and quality indicator program into home care. 12. Build organisational and clinical governance capability of leaders and governing bodies of Commonwealth subsidised residential and home care providers through targeted education and engagement. 13. Deliver a campaign on minimising restrictive practices including behaviour support 14. Establish regulatory arrangements for new Code of Conduct.

3.11 Barriers and challenges

The Commission highlighted several barriers and challenges to the effective delivery of its functions.

- The different needs and expectations of the diverse range of people receiving aged care.
- An aged care sector with marked differences in organisational characteristics and capability, which is under pressure to deliver services in a time of substantial reform, heightened public distrust and fiscal challenges.
- Delivering regulatory activity during the COVID-19 pandemic, where outbreaks and public health restrictions impact the Commission's capacity to undertake site-based assessments and deliver the accreditation program.
- Substantial change in the Commission's roles and responsibilities since its establishment in 2019, including in relation to functions transferred from the Department and reforms arising from recommendations of the Royal Commission.
- Managing the rapid growth associated with expanded functions and powers and

the impact legacy issues (including budget baselines, staff capacity and capability and ICT capability) have had on the Commission's ability to "scale up".

- Antiquated aged care legislation which does not support risk-based regulation.¹⁶
- ICT system development and data integrity, useability, and maturity issues, which constrain how well the Commission can use data and intelligence to make evidence-based decisions and drive a risk-based approach to regulation.¹⁷

Feedback from the Commission, the Department and the sector indicates that the current legislative framework does, in part, restrict the Commission's ability to be a modern, best practice regulator.

- The current framework is provider-centric and transactional, focusing on compliance with audits rather than encouraging a culture of care and improving older people's quality of life.
- The legislation sets out similar pre-market entry requirements, with some differentiation for residential and home care, but no differentiation between providers delivering different types of in-home care. This means the Commission screens all providers in the same way, regardless of the services provided, and then relies on post market assessment to identify issues in delivery. This places unnecessary burden on providers and creates complexity for the Commission as it cannot differentiate providers based on the risk associated with the services they deliver.
- There are 300 plus provider responsibilities under the legislation. Having such a large number of responsibilities creates challenges in terms of provider compliance, communicating risk and priorities, identifying which responsibilities have been breached or which to pursue, and under which pathway.
- Provider responsibilities are often duplicated across legislation. As new responsibilities are introduced, or the focus of particular areas of concern result in additional responsibilities being added to the legislation, there is increasing overlap with existing responsibilities. There is also some inconsistency between the responsibilities, which sends mixed messages to providers. This creates challenges for the Commission when undertaking performance assessments, seeking to educate providers and create a coherent regulatory narrative.
- Providers delivering similar services are regulated differently. The Commonwealth Home Support Program (CHSP) is delivered by service providers who are regulated under a grant agreement with the Department while home care providers are approved providers regulated under the Act. This causes additional complexity when providers deliver care under both systems and compliance action needs to be taken by separate bodies i.e. the Commission in relation to home care and the Department in relation to CHSP.

¹⁶ Commission PowerPoint, Session 1: Overview, 25 October 2022

¹⁷ Commission PowerPoint, Session 4: Data and Intelligence, 16 November 2022

- The legislation prescribes many different monitoring pathways and enforcement actions that can only be taken in certain circumstances. This creates complexity and confusion particularly where the Commission must align particular monitoring activity or enforcement actions with specific breaches of responsibilities. It also means enforcement actions cannot always be applied flexibly, in proportion to the nature of the risk to be addressed. Further, criminal offences only attach to a few matters, limiting the extent to which the Commission can pursue more serious matters, which reduces their deterrence effect.¹⁸

The Department advises the new Aged Care Act and regulatory model, which are expected to come into force in mid-2024, will aim to address these constraints. The new Act is fundamental to ensuring the Commission can operate as a contemporary, risk-based regulator. It must clearly define the Commission's roles and responsibilities and support the Commission to perform these effectively by enabling it to calibrate its powers to ensure it gets the balance right between safeguarding the welfare and rights of aged care consumers and taking a proportionate approach to the regulation of aged care providers.

However, the legal framework is not the only issue that impacts on the Commission's performance. Other key challenges follow.

Significant issues attracting and retaining a skilled workforce across both regulatory and corporate functions, with an overall staff vacancy rate across the Commission of 25 per cent and a vacancy rate as high as 34 per cent in the Corporate Services Group.¹⁹

- The capability of the leadership team to work together to embed and model an internal culture that demonstrates the behavior and practices required of a best practice regulator.
- The confidence of the leadership team to promote the work of the Commission and proactively manage public perceptions of the performance of the regulator and the quality of care provided in the sector.

These are considered further in subsequent chapters.

¹⁸ DoHAC, A new model for regulating Aged Care, Consultation Paper No.2 – Details of the proposed new model, April 2023

¹⁹ Current as at 19 January 2023

CHAPTER 4: TOWARDS A CONTEMPORARY, HIGH PERFORMING, RISK-BASED REGULATOR

This Chapter summarises the key enablers that I consider critical for the Commission to be a high performing risk-based regulator and sets out what success looks like for each enabler. It then assesses the Commission's performance and makes recommendations about changes that will be required to lift the capability of the Commission to achieve best practice in each of these elements.

Background

Regulatory approaches, both nationally and internationally, are shifting from a strong enforcement focus towards changing the behaviours of sectors or industries²⁰. Regulation therefore extends beyond compliance and enforcement to continuous improvement activities such as education, information, and incentives, which encourage and support providers to deliver better quality services and activities. It seeks to motivate providers, empower consumers, and is strongly underpinned by data analysis which provides an understanding of risk, and therefore guides and targets the range of tools at a regulators disposal to achieve behavioural change. As outlined in Section 3.9, the Commission has in place a Regulatory Operating Model which exhibits these features.

Going forward, new arrangements are to be put in place. A key development from mid-2024 will be a new Aged Care Act and a new Regulatory Model that will underpin the new Act. The most recent Departmental public consultation paper²¹ notes that the new model will

“place older people in Australia (older people) at the front and centre of regulation. It will increase protections for older people and empower them to exercise their rights in the context of a reformed and improved aged care system. These rights are expected to be outlined in a Statement of Rights to be included in the new Act. Importantly, pathways will also be made available for older people and their representatives to seek resolution of concerns about the standard of care provided to them – with strong action able to be taken by the Regulator where providers have done the wrong thing.

Under the new model, regulation will be proportionate to risk and support continuous improvement in the sector. The new model's four foundations build an approach that is:

- *rights based*
- *person-centred*
- *risk-proportionate, and*
- *focused on continuous-improvement.”*

²⁰ Grosvenor, Optimising capability to meet current and future challenges, 16 December 2021 p. 20

²¹ DoHAC, A new model for regulating Aged Care, Consultation Paper No.2 – Details of the proposed new model, April 2023

In anticipation of these reforms, the Commission is developing a new Regulatory Strategy and Operating Model, which illustrates the spectrum of activities from enforcement to provider support and motivation, and ongoing continuous improvement. This is discussed further at Section 4.9.

I strongly support the new approaches. In my view, they do not imply a weakening of focus on addressing non-compliance or prevent the Commission from using a range of enforcement actions to ensure that the safety of older people is paramount. What they do, however, is enable a focus more widely on lifting the performance and quality of the sector, and guide with a high level of precision the full suite of activities that are needed to achieve sector improvement.

What enablers are required for the Commission to be a high performing, risk-based regulator?

A range of enablers or elements are required for the Commission to be a high performing, risk-based regulator.

In identifying these enablers, I have considered national and international best practice principles, including those in the Australian Government's Regulator Performance Guide²², which the Commission is required to report against, the OECD Best Practice Principles on the Governance of Regulators²³, and the best practice principles identified in the Grosvenor report²⁴. There are, unsurprisingly, some overlapping principles. I have therefore chosen a suite of enablers – organisational and regulatory – that I consider most pertinent to the performance and roles of the Commission. The enablers are:

Organisational:

- Clear purpose and clarity of role
- Strategic and visible leadership, appropriate supporting structure and culture
- Good internal governance
- Accountability and transparency
- Capable people
- ICT and data systems
- Trust and Reputation, and a focus on organisational continuous improvement
- Resourcing

Regulatory:

- Regulatory strategy and operating model
- Risk based and data-driven
- Cultural capability, and ability to deliver for diverse groups
- Effective engagement and communications

²² [Department of Prime Minister and Cabinet, Regulator Performance Guide, July 2021](#)

²³ [OECD 2014, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy](#)

²⁴ Grosvenor, Optimising capability to meet current and future challenges, 16 December 2021 p. 20

No one enabler is sufficient to being a good regulator – all are required, and they each overlap and are interrelated and, as a whole, provide the foundations for a modern, best practice regulator.

My assessment of the Commission's current performance and recommendations against each of these enablers follows.

4.1 Clear purpose and clarity of roles

Best practice

An effective regulator must have a clearly articulated purpose, with clear and linked functions and mechanisms to co-ordinate with other relevant bodies to achieve desired regulatory outcomes.

Role clarity is essential for the regulator to understand and fulfill its role effectively. Roles should be well communicated and understood by providers and consumers.

In order to function well together, a policy Department and a delivery agency need to have a mature, contemporary, robust and transparent framework for engagement that is based on trust and respect for their respective roles and shared objectives. The framework should support regular strategic and operational engagement and collaboration, information, risk analysis and data sharing, and escalation and issues resolution arrangements.

What the Commission does now

Throughout the Review, staff at all levels demonstrated their understanding of the Commission's stated high-level purpose and role. A strong theme that emerged from staff consultations was the commitment of staff to protecting and enhancing the safety health, well-being and quality of life of aged care consumers. However, as discussed throughout this report, there are indications that there can be a lack of clarity within the Commission about its role, for example, in relation to regulatory posture and across 'siloes' functions.

There appears to be minimal ambiguity about the respective roles of the Commission and other regulators that interact with the aged care sector, including the Australian Commission on Quality and Safety in Health Care and the NDIS Commission. Each agency has demonstrated a clear understanding of respective roles and boundaries, and the Commission has well established and collaborative working relationships with these agencies.

Feedback from a range of individuals and groups consulted during the Review indicates that there continues to be some confusion among consumers, providers and the community about the purpose and role of the Commission. Many consumers or their representatives advised that often consumers do not understand what the Commission does including in relation to assisting consumers, e.g. through complaints handling. Providers and peak bodies generally had a good understanding of the Commission's functions, although some providers noted a lack of clarity around whether the Commission or the Department was responsible for information provision and education. Communications and engagement are discussed in more detail in Section 4.11.

Significantly, it was apparent that the relationship between the Commission and the Department could be enhanced. There were signs of miscommunication, misunderstanding of each other's roles, differing views about priorities, and no clear mechanism for escalation of key issues. The current Memorandum of Understanding (MoU) between the Commission and the Department has not been updated since it was established in April 2019 and does not appear to be assisting either party to work collaboratively or to clearly understand, respect, and trust the role boundaries (policy and delivery) for each organisation.

What the Commission and the Department need to do

The Commission can improve understanding of its role and functions by reviewing and updating its website and other communication products to describe its role and functions more clearly and, importantly, distinguish its role from those of others in the sector, including the new Inspector-General of Aged Care. This information will help stakeholders to have a better understanding of the Commission and help them navigate the broader aged care system. The Commission should look to the United Kingdom's Care Quality Commission website²⁵ as an exemplar. The Commission should also undertake a co-design process with key stakeholders.

Strategic engagement between the Commission and the Department should be formalised into systematic arrangements to support regular joint committee meetings between the Commissioner and the Deputy Secretary, Ageing and Aged Care, and relevant senior staff. The Joint Strategic Committee should address priorities, emerging risks and challenges, resourcing (including new policy proposals), roles and responsibilities (particularly in relation to stewardship and provider education), provide resolution of issues (such as the regulation of Infection Prevention and Control), and commission joint projects, such as data sharing.

A critical piece of work is to update the overarching MoU between the Commission and the Department to include clear role clarification, collaborative strategic and operational working arrangements, escalation points and resolution processes.

Recommendation 4.1: The Commission to review and update its purpose, role and responsibilities statements, and review and update its website and other communication products to provide greater clarity about its place in the broader aged care system.

- The changes should be incorporated into the proposed new Communications and Engagement Strategy (see Section 4.11 and Recommendation 4.14).
- The changes should align with the introduction of the new Aged Care Act which will require extensive website and communication product updates, scheduled for 1 July 2024.

Recommendation 4.2: The Department and the Commission to establish a joint strategic policy and operational committee (Joint Strategic Committee) and update their overarching MoU.

- The Joint Strategic Committee should be established by 1 July 2023 and should meet at least quarterly.
- The MoU should be updated by 30 September 2023.

²⁵ [Care Quality Commission \(cqc.org.uk\)](https://www.cqc.org.uk)

4.2 Strategic, visible leadership, and supportive organisational structure and culture

A high performing regulatory organisation would, in my view, have a leadership team that:

- is visible, both internally to all staff and externally to the sector and community more generally
- is focused on the bigger regulatory picture and is therefore strategic in its operations and posture
- supports and empowers decision-making at appropriate levels, and
- has a cohesive, supportive, transparent and accountable culture which is focused on ongoing continuous improvement.

In addition, its organisational structure would support the creation and maintenance of that culture and assist in the organisation being agile and able to adapt to a changing environment, as well as clear lines of responsibility, authority and accountability. Internal governance arrangements would be visible, well-understood, make decisions on more detailed arrangements, and therefore enable and support the leadership team to focus on the strategic.

I note in this context, that recent APS discussions point to a move away from a traditional hierarchy to an organisational structure that is based on self-managing and agile principles²⁶. The APS Hierarchy and Classification Review argued that organisational structures should promote delegated decision-making, encourage responsibility to be exercised at the appropriate level and discourage “micro-managing”.²⁷ This approach is supported by Australian and New Zealand School of Government (ANZSOG) research on leadership capabilities for regulators²⁸, the APS framework and the Organisation for Economic Cooperation and Development’s (OECD’s) recommended capability set.

The Australian Public Service Commission (APSC)²⁹ describes the bedrock of the APS as its culture, built on: impartiality; commitment to service; accountability; respect; and the highest standards of ethical behaviour. The values of a regulator like the Commission should support decision-makers at all levels being empowered to develop their understanding of the regulatory environment and exercise the discretion required to implement a risk-based, people centred regulatory strategy.

This is a critical for protecting the regulator’s credibility and shaping the regulatory environment.

²⁶ [The Australian and New Zealand School of Government, Agile: a new way of governing, 5 May 2020](#)

²⁷ [Australian Public Service Commission, APS Hierarchy and Classification Review, 26 August 2022](#)

²⁸ ANZSOG research on leadership capabilities for regulators [Research insights | ANZSOG](#)

²⁹ [State of the Service Report 2021-2022](#) p. 5

What the Commission demonstrates now

It is apparent that the Commission's inaugural Commissioner has led the organisation through rapid change and crisis events such as the COVID-19 pandemic, and many stakeholders were very positive about the Commissioner's strong leadership through these challenging circumstances. However, the Review heard from many, including Commission staff, the Department and members of the Advisory Council, who felt more needed to be done around enhancing leadership, supported by changes to organisational structure, to ensure a strong and effective Commission into the future.

It is clear that within the Commission, the Commissioner is highly visible. She communicates frequently with all staff, utilising different communication channels. She has visited all of the Commission's offices, over a challenging period that has involved COVID-19 lockdowns. Externally, however, the Review has heard that while the Commissioner does attend a range of fora, she is less visible to the sector and the community more generally. Effective regulators, in my view, are very pro-active in describing the importance of the role of their work, its breadth, and actively address misconceptions about the role and efforts that are being made on particular issues.

The current leadership structure is problematic. The Commissioner oversees an executive leadership group without a deputy, and almost all of the SES Band 1 Executive Directors report directly to the Commissioner. The only SES Band 2 is described as an Assistant Commissioner, does not have a deputising role, and is focussed on a particular area of the Commission's responsibilities. Span of control is a significant concern, particularly as the Commissioner appears to be the principal decision-maker in the organisation. This appears to contribute to inefficiencies and delays at times and impacts on the levels of responsibility and accountability of others in the leadership group.

The main governance forum, the Executive Leadership Group (ELG) does not appear to be a decision-making mechanism, but rather enables information-sharing across the SES cohort.

The Commission has grown rapidly to deliver on its increased scope of regulatory responsibility and it is clear that the structure that was in place to support an organisation of 537 staff in 2019 is not sustainable nor appropriate for an organisation of 1,424 staff in 2023. The current structure appears to perpetuate organisational silos.

More generally, staff have described an organisation that has immature processes, policies and systems which leads to inconsistent decision making at both the operational and corporate level. The Staff Input sessions also identified a lack of co-ordination across functions, slow decision making, lack of accountability for outcomes and difficulty sharing knowledge and building relationships, as some of the problems that arise due to the current organisational structure.

The APS Employee Census 2022³⁰ reveals that, of the 65 per cent of Commission staff who completed the Census, 41 per cent of respondents believe that the Commission SES cohort work as a team, 42 per cent of respondents feel there is effective communication between the SES and other employees, and 57 per cent of respondents report that their SES manager promotes cooperation within and between agencies³¹. These scores are lower than the average for regulatory agencies as a group.

The Review also heard that the Commission does not effectively use delegation, with most decisions elevated to the level of ELG SES members and the Commissioner. Staff Input sessions described this situation as creating a lack of trust and frustration as decisions become bottlenecked. It also has the effect of limiting the accountability of individual ELG members and their direct reports. Delegated decision making to the lowest appropriate level reflects a mature operational culture, increases accountability and streamlines decision making.

The siloed structure and resultant ethos also mean information sharing is inconsistent and often not timely. Staff observed that the Commission culture is fragmented, rules based, not conducive to collaboration, and risk averse. This view is supported by the APS Employee Census 2022, where only 34 per cent of respondents reported that the Commission supports the notion that failure is part of innovation³².

The Commission has started work on developing and articulating a One Commission culture underpinned by the APS values³³. However, there is limited evidence that various activities intended to embed the new culture have been effective. This is again supported by the APS Employee Census 2022 results³⁴ in which only 35 per cent of respondents identified that “the Commission operates as a joined-up organisation with a shared culture”.

Staff also observed a lack of interest in or ownership by the ELG of a One Commission culture, which can weaken staff commitment to a shared vision and limit accountability.

What the Commission needs to do

I consider the Commissioner must rely more upon the people and structures supporting the Commission’s shared mission. This means strengthening the leadership capability, implementing a new organisational structure and empowering decision makers at all levels of the organisation.

This will free the Commissioner to be more visible, strategically focused and proactive in taking forward the Commission’s mission and goals and the new regulatory strategy and operating model. This will build confidence and trust of government, the sector and the wider community. It is important that the Commissioner and the other members of the senior leadership team develop and maintain a strong visible public face.

³⁰ [Commission Highlights Report, APS Employee Census 2022](#) p.5

³¹ [Commission Highlights Report, APS Employee Census 2022](#) p.5

³² [Commission Highlights Report, APS Employee Census 2022](#) p.10

³³ Described in the Commission’s People Strategy 2021-2023. Page 8 outlines the activities required to develop a One Commission culture supported by signature behaviours.

³⁴ Additional questions included by Commission in APS Employee Census 2022

The Commissioner needs a Deputy Commissioner cadre of SES Band 2s. In my view, given the size, breadth and complexity of the work, there should be four Deputy Commissioners, as well as the Chief Clinical Advisor.

These Deputy Commissioners should be appointed for their strong leadership, communication and strategic skills, not just technical skills, and be part of the public profile of the organisation. Recruitment to Deputy Commissioner positions should be merit based and involve a suitable selection panel, e.g. to be made up of the Commissioner and Executives from the Department and the APSC.

'Like functions' should be brought together under each Deputy Commissioner. A Chief Operating Officer, or Deputy Commissioner Corporate, needs to be put in place urgently to rapidly lift the capacity and capability of the corporate functions to support the work of the wider organisation.

A proposed structure is set out below in Figure 4. This also sets out new SES Band 1 positions, which are discussed in Section 4.5, *Capable People*.

In addition, there is a benefit in bringing 'operational functions' under one Deputy Commissioner. The quality assessment and monitoring, compliance and financial and prudential functions will be more easily managed, gain greater traction, and will likely result in better efficiencies. This will result in a more joined up approach from assessment to enforcement activities.

A key early priority following establishment of this structure will be having 'vertical slice' workshops within each Group to better integrate functions, roles and culture and to identify improvements. In addition, these processes should focus on ideas and options to build staff capability and retain skills and expertise.

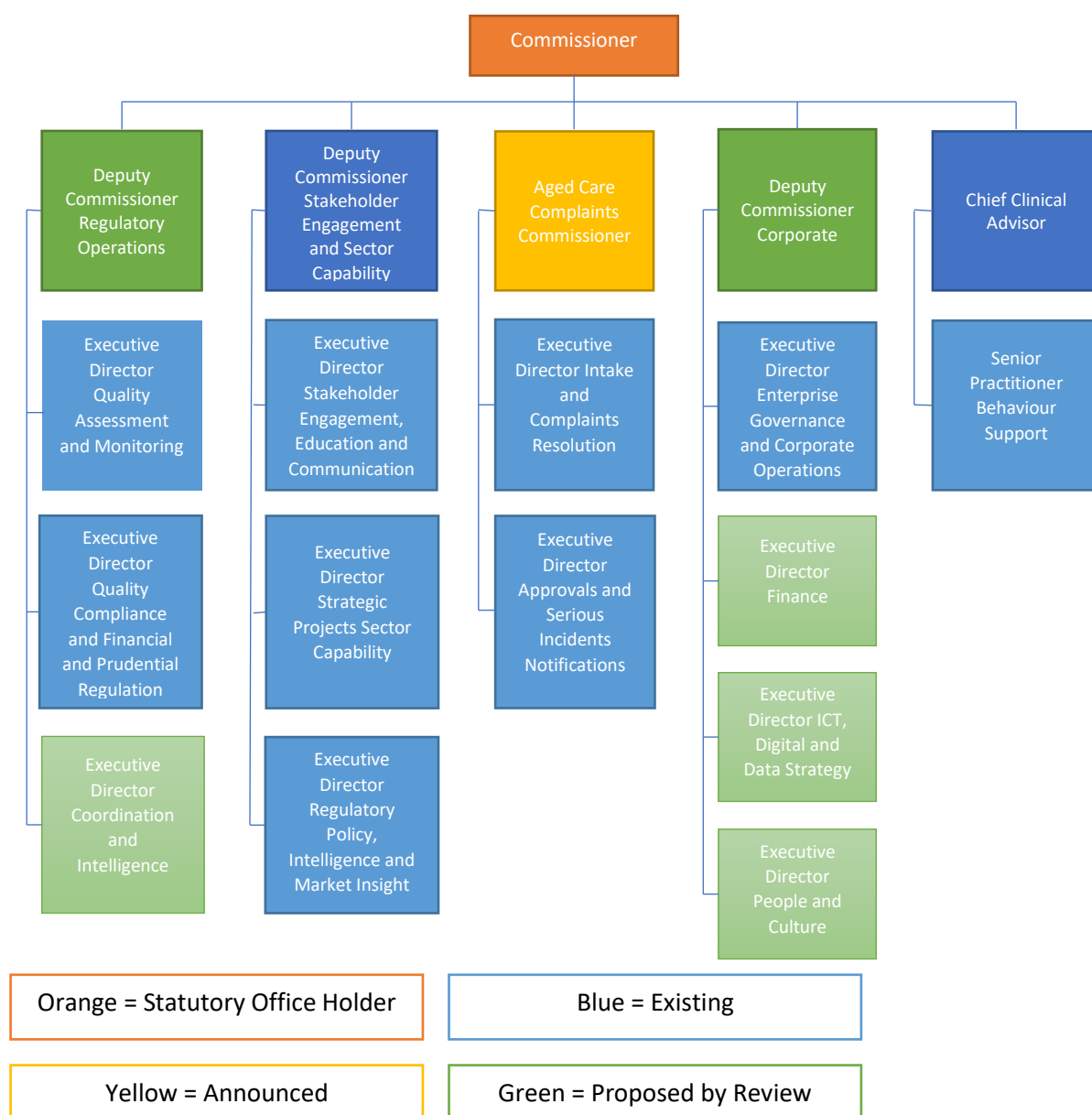
I note that any increase in the SES cohort will require negotiation with appropriate stakeholders to meet the requirements of the SES cap across the APS.

The membership (Commissioner, Deputy Commissioners and equivalent) and role of the proposed new ELG is discussed in Section 4.3, *Good internal governance*.

A key focus of ELG will be to lead, develop and maintain a more cohesive culture, one that values data and risk-based approaches across all of the work of the Commission, and is collaborative, transparent, respectful, accountable, and values diversity. ELG should also ensure that the culture values and promotes active engagement and transparency externally, with consumers and their families, and providers.

The One Commission Strategy is a good start but needs to be reinforced through a clear reporting and evaluation framework to measure the success of each of the initiatives. Currently, responsibility is shared between various groups across the Commission. ELG must clarify responsibilities and accountabilities to ensure that the Strategy succeeds and incorporate the reporting and evaluation framework into the governance framework discussed in Section 4.3.

Figure 4: Proposed new structure



I was asked to consider the role of Statutory Office Holders. Currently, only the Commissioner is a Statutory Office Holder appointment. I consider that this is appropriate, and do not consider that other roles should be given the specific status of Statutory Office Holder within the structure proposed.

I am aware that recruitment is underway for a new senior executive position of Complaints Commissioner reporting to the Commissioner, and do not propose that this be held up. I am not satisfied that establishing the Complaints Commissioner as a separate and independent Statutory Office Holder is necessary or desirable. However, given the importance of the complaints function to the wider operation of the aged care sector, particularly with regard to quality and safety at an individual and systems level, I consider it is appropriate to have a designated role within the new Aged Care Act with a focus on complaints to elevate the visibility and

importance of the function. Consideration could be given in the drafting of the new Aged Care Act to supporting this statutory role with functions and powers to enable the role to work effectively across the regulator (or with other regulators) in an objective and impartial manner.

Recommendation 4.3: The Commission to strengthen its leadership by fully implementing a new organisational structure to better support the Commission's purpose and outcomes, including:

- four Deputy Commissioners, at the SES Band 2 level, as well as the Chief Clinical Advisor
- bringing similar functions together under each Deputy Commissioner, and having a Deputy Commissioner Corporate to rapidly lift the capability and capacity of the corporate enablers, and
- ELG to lead a renewed drive to implement the One Commission Strategy.

The new structure should be in place by no later than 30 September 2023.

4.3 Good internal governance

Best practice

A comprehensive and robust governance framework is required to best support the purpose and functions of an organisation. It should be appropriate to the size of the organisation, support operational efficiency, and set appropriate levels of delegation and accountability. The governance framework should be transparent to and understood by all staff and should articulate clearly how and by who decisions are made. A good governance structure should also help focus the organisation on key areas of activity, be agile, and enable the executive leadership team to focus on strategic goals and risks.

What the Commission does now

Currently, the two formal governance committees are the ELG and the Risk and Audit Committee. The latter appears to be effective and fulfils the requirements of Australian Government agencies. The former, as noted earlier, appears to be an information sharing mechanism for the SES cohort, rather than a decision-making body.

Staff and SES Input sessions described a system where strategic planning and decision-making is in the main managed bilaterally by the Commissioner and the responsible SES officer. This approach provides little opportunity for peer review and scrutiny and does not demonstrate a collaborative and inclusive approach to ensure that all available data and intelligence is included in decision making. The Commission has advised the Commissioner has held periodic planning workshops with ELG to identify issues and risks, set direction and agree strategic priorities, and that there is structured Executive and broader staff involvement in the corporate planning cycle.

The Staff and SES Input sessions all emphasised the need for a governance framework with clear policy and procedures to build consistency and confidence in decision making across regulatory and administrative activities.

It is clear that the Commission has not had the bandwidth to fully focus on the internal governance and corporate systems required to support it to operate in its optimal state. The internal governance framework appears to be immature and has not developed to support the rapid growth and complexity of work the Commission has absorbed in a short period of time.

There is also a National Leadership Group (NLG), which includes all of the Commission's Executive Level 2s (EL2s) and above. The feedback provided is that the general focus of the NLG meetings are top-down one-way information sessions and while this is useful in building understanding of the changes occurring in the sector and the Commission, it does not draw on the experience and expertise of the EL2 leadership group to contribute to problem solving and innovation. While the NLG may not be an appropriate decision-making group, there are benefits in it having a more active and constructive role.

The Commission has advised it is working to deliver a framework to strengthen corporate governance. It will include a corporate governance structure and supporting administrative, assurance and integrity frameworks. It will:

“provide clarity around roles and responsibilities, support decision-making and delegate decision making to the lowest appropriate level, increase accountability and streamline decision making.”³⁵

What the Commission should do

A strong corporate governance framework should be developed and implemented to organise operational regulatory activity, organisational risk management, annual and corporate reporting and financial processes, information systems, data intelligence and people resources. This will ensure that strategic and tactical decision making is transparent and accountable and that all members of the organisation are clear about the arrangements in place and are able to contribute to positive organisational outcomes.

The governance framework should clarify that the revised ELG has a focus on key strategic issues and should not be engaged in day-to-day decision making that can be dealt with by other committees or designated positions. ELG should be made up of the Commissioner and Deputy Commissioners, with other staff invited to attend in relation to particular issues as required.

A series of additional governance committees, to be chaired by a Deputy Commissioner, should be authorised to make operational and administrative decisions as appropriate. These governance committees should cover the key areas of business of the Commission, and include at least a People and Culture Governance Committee, an ICT and Cyber Security Governance Committee, and a Data and Intelligence Governance Committee. The Commission could also consider implementing a time-limited governance committee to oversee the implementation of recommendations arising from this Review.

³⁵ Commission PowerPoint, Session 8: Corporate Enablers, 15 November 2022

The Terms of Reference of each committee, including its decision-making responsibilities, should be published on the Commission's Intranet site, and should be reviewed at least annually. A communique of key actions and outcomes from each committee following each meeting should also be published on the Commission's Intranet site.

Recommendation 4.4: The Commission to implement a robust, comprehensive and transparent corporate governance framework and publish the framework on its Intranet.

- The corporate governance framework should be implemented by no later than 30 September 2023.

4.4 Accountability and transparency

Best practice

The OECD identifies accountability and transparency as one of seven best practice principles for the governance of regulators and notes that regulators are accountable to ministers and the legislature, regulated entities, and the public³⁶, all of whom expect the regulator to conduct its functions transparently and with integrity to ensure confidence in the regulatory regime.

Transparent external accountability processes that encourage procedural fairness, easy-to-access and transparent complaints and feedback mechanisms, and regular publishing of information all contribute to building public trust and confidence in the performance of regulatory functions.³⁷

Robust internal accountability processes, such as holding regular reviews of operating procedures and rigorous ex-post reviews of regulatory actions to identify learnings and explore opportunities for improvement, can foster a culture of continuous improvement and reflection.³⁸

What the Commission does now

The Commission has reporting obligations under Part 6 of the Commission Act, including preparation of an Annual Report and Corporate plan, which comply with the *Public Governance, Performance and Accountability Act 2013*, and preparation of an annual operational plan. The Commissioner must consult the Minister and Advisory Council on the Corporate Plan.³⁹

The Commission undertakes annual performance reporting, including publication on its website of its Corporate Plan (which includes its operational plan), Annual Report and Portfolio Budget Statement. It also publishes information on its website about its Regulatory Strategy, operational policies and guidelines, performance reports, a register of non-compliance and regulatory actions and complaints directions.⁴⁰

³⁶ [OECD 2014, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy](#)

³⁷ [Department of Prime Minister and Cabinet, Regulator Performance Guide, July 2021](#)

³⁸ [Department of Prime Minister and Cabinet, Regulator Performance Guide, July 2021](#)

³⁹ [Aged Care Quality and Safety Commission Act 2018](#)

⁴⁰ [Home | Aged Care Quality and Safety Commission](#)

What the Commission should do

While the above suggests the Commission is fulfilling its formal requirements to be a transparent and accountable regulator, feedback indicates it needs to do more to embed these principles in practice.

Providers advised the Review that the Commission's regulatory decisions often lacked procedural fairness. Consumers raised concerns about the complaints process, including that the Commission does not always inform them of the progress or outcome of their complaint in a timely manner, and that they lack access to provider information relating to their complaints (see Section 5.3).

Providers asked for more information around how the Commission assesses risk and uses risk-based information to determine its regulatory activities, and considered the Commission has a defensive posture when issues are raised, or decisions questioned. Providers also suggested that some data requirements appeared to have limited value and stated they would welcome closer engagement on reporting requirements.

The Commission's Statement of Intent says, "In our interactions with providers including through our regulatory decisions, we will seek to promote provider accountability, transparency and continuous improvement.⁴¹ Addressing the issues identified here provides the Commission with the opportunity to demonstrate that it listens to and uses feedback to improve its practice and ensure it undertakes the full range of its functions accountably and transparently.

Recommendations 4.5: The Commission to adopt open disclosure as part of its regulatory practice and promote transparency about its practice within the sector and the community. The Commission should demonstrate this by:

- communicating with affected persons when something goes wrong, using these occasions as a learning opportunity and receiving constructive criticism in good faith
- sharing information about its assessment and risk profiling methodologies to improve confidence in its decision making and regulatory activity
- building on regular sector performance reporting by analysing and sharing data and intelligence to drive better practice and support policy development, and
- publishing a wide range of data, case studies and learnings from its regulatory practice.

Note the alignment of Recommendations 4.5 and 4.16.

4.5 Capable people

Best practice

The *APSC State of the Service Report 2021-2022* (page 67)⁴² identifies strategic workforce planning, as well as a focus on each aspect of an APS career journey (Employee Life Cycle), as essential to building capability. There is also an APS wide renewed focus on developing internal talent and providing opportunities for staff to apply skills and attributes, deepen experience and facilitate career progression as part of the learning journey in an APS career.

⁴¹ [Commission Statement of Intent](#)

⁴² [State of the Service Report 2021-2022 p. 67](#)

In a similar vein, the Grosvenor Report identified that a strategic workforce plan informs career progression, succession planning and professional learning and development.⁴³

The United Kingdom Care Quality Commission⁴⁴ uses strategic workforce planning to identify capabilities, aptitudes, skills and qualifications required to enable it to deliver better practice in regulation.

If implemented effectively, a Strategic Workforce Plan can be expected to have a positive impact on staff recruitment, development and retention by bringing in people of value to the organisation, by further training and developing those people, and by providing them with career paths to encourage them to stay with the organisation.

What the Commission does now

The significant growth of the Commission as well as the additional functions it has absorbed since January 2019, requires different capability and skills to support its regulatory activities and external engagement and communication.

It is not apparent that the Commission takes a forward-looking and holistic view in relation to attracting and building people capability. The Commission does not have a Strategic Workforce Plan to assist in understanding the skills and competencies required for the current and future workforce, and the right employment models to uplift capability to deliver its outcomes. People capability is a significant risk for the Commission as this impacts its ability to deliver outcomes. In relation to recruitment, onboarding and training and development in particular, Staff and SES Input sessions revealed a major capability gap in corporate support, which is not supporting the rest of the organisation to achieve its objectives. There is limited SES oversight on corporate functions.

The Grosvenor Report noted that “one enabler of interest is strategic workforce planning, which is currently not directly reflected in the Commission’s architecture”. In response to recommendations in the Grosvenor Report the Commission has commenced work on a Capability Uplift Program. The program has a focus on uplifting people, processes and systems across the four domains of strategic, engagement, regulatory, and enterprise-wide people capabilities. The Commission also has a People Strategy 2021-2023, a Learning and Development Strategy 2022-23, and a Wellbeing Plan 2022-24 (see Table 2).

However, it is not clear what progress has been made by the Commission in operationalising these projects. Feedback through Staff Input sessions as well as staff vacancy and attrition rates, all indicate the Commission has some way to go to improve its strategic approach to recruitment and retention, and capability uplift.

Skills

It is not clear that the Commission has undertaken a skills audit to identify the skills required to deliver its functions, and thereby enable the identification of skills gaps.

⁴³ Grosvenor, Optimising capability to meet current and future challenges, 16 December 2021 p. 22

⁴⁴ [Care Quality Commission \(cqc.org.uk\)](https://www.cqc.org.uk)

The Grosvenor report and feedback provided through Staff Input sessions, have identified skills gaps in the areas of customer relationships, ICT and systems development, data and risk profiling, complaints management, and forensic financial, clinical, communications and (situational) media management skills.

Cultural competency

An organisation that deals with a diverse range of stakeholders, consumers and providers needs to have a workforce that reflects this diversity. It needs staff who are skilled and knowledgeable in their dealings with those stakeholders, and processes and approaches that enable the organisation to cater for different contexts.

Stakeholders expressed concerns about the Commission's cultural capability⁴⁵ and in particular, its ability to appropriately assess services provided to people from diverse groups, including those in rural and remote settings, people with dementia, people with a disability and people from culturally and linguistically diverse (CALD) and First Nations backgrounds, veterans and LGBTIQ+ communities. Concerns related to inadequate training for Commission staff leading to a poor understanding of diversity and good practice and limited clinical expertise in dementia and dementia care.

The Commission's People Strategy identifies as a goal that it will enable diverse and capable people to join the Commission. The Commission has a number of strategies in train to increase its cultural diversity and competency. For example, I understand there has been a recent focus on recruiting and supporting quality assessors from a First Nations background and increasing entry pathways through participation in the Indigenous Australian Government Development Program.

Commission staff stated they value the Indigenous Staff Network and support the Reconciliation Action Plan, which they believe could be strengthened by including requirements for identified positions and cultural safety training across the organisation as very few staff understand what cultural safety means. Staff also spoke about the challenges First Nations people face engaging with government entities and emphasised the importance of developing relationships and working with First Nations groups to define and provide a safe pathway for First Nations people to raise concerns.

Feedback from external stakeholders identified a perception that the Commission lacks understanding of the value of building cultural competency skills to support creating a culturally safe space when engaging with First Nations peoples and their families.

The *APSC State of the Service Report (2021-2022)* notes that as an employer it is crucial that there is strong First Nations representation at every level in an organisation. This is to ensure that an organisation can benefit from the cultural perspectives of First Nations Australians.

⁴⁵ Cultural capability refers to the skills, knowledge, behaviours and systems that are required to plan, support, improve and deliver services in a culturally respectful and appropriate manner.

The Commission currently has a target of 3 per cent representation of First Nations peoples in its workforce. This will need to be reviewed in light of the Government's 5 per cent target of First Nations peoples' representation by 2030⁴⁶.

First Nations external stakeholder groups have identified themselves as ready partners to assist the Commission to build cultural competency skills and could work closely with Commission staff in their engagement with First Nations peoples.

Recruitment and capacity

The Commission's workforce data shows a 20 per cent vacancy rate across the organisation. The Corporate Services group has a 34 per cent vacancy rate⁴⁷ placing significant pressure on key enabling capabilities including ICT, people and financial management.

As a result, functions such as ICT are spread thin and do not have the capacity to keep pace with the expectations of the business and manage the significant risks and interdependencies with the Department.

For example, ICT APS staff and contractors currently represent less than 5 per cent⁴⁸ of the Commission's overall staffing level. In comparison, ICT APS and contracting staff represent 15 per cent⁴⁹ total staffing within the Department and 17 per cent⁵⁰ within the Civil Aviation Safety Authority, a regulator of similar size and ICT complexity.

While I acknowledge there are workforce shortages in many sectors, the Review has heard through Staff Input sessions that the work of the Commission is a strong attractor for staff, and staff are strongly committed to the goal of quality and safe care for consumers. The Staff Input sessions confirmed that people across the Commission are working very hard to deliver outcomes for the aged care sector. There is further evidence to support this in the APS Employee Census 2022 which reported that 91 per cent of Commission staff are "happy to go the extra mile at work when required".⁵¹

The Review has also heard through Staff Input sessions of several concerns relating to recruitment, including:

- the human resources area is understaffed and there is a high turnover of staff leading to loss of corporate knowledge and capability, including in relation to knowledge about APS recruitment policies and practices
- inadequate systems, processes and technology to support recruitment
- many line areas have had to undertake their own recruitment activity without any corporate support because of the issues outlined above, and
- recruitment processes and delegate approvals are slow and lead to suitable candidates being lost to other recruitment processes.

⁴⁶ [State of the Service Report 2021-2022 p. 24](#)

⁴⁷ Current as at 19 January 2023

⁴⁸ Commission IT Governance, Workforce Planning and Financial Governance Report, 31 October 2022

⁴⁹ Department of Health Annual Report 2021-2022, Information Technology Division, 10 November 2022

⁵⁰ Civil Aviation Safety Authority Information Technology Group, 25 November 2022

⁵¹ [Commission Highlights Report, APS Employee Census 2022](#) p.3

Staff training and development

The Commission's People Strategy 2021-2023 identifies as a goal that it will 'develop our people and help them grow'.

The Commission's Learning and Development Strategy 2022-23 identifies a range of approaches to support learning and development including training resources, work practices, courses, and people (e.g. mentoring and peer learning groups).

The Review heard a range of concerns about staff training and development through Staff Input sessions including tight schedules, reactive and ad hoc approaches, and quality concerns.

Regulatory skills and the ability to apply risk-based methodology in a regulatory environment are skills that the Commission continues to require to deliver on its purpose and outcomes. While there has been some work done to build a relationship with ANZSOG there may be greater opportunities for the Commission to partner with other regulatory agencies, the APSC Academy, and the ANZSOG National Regulators Community of Practice to foster and contribute to the development of these skills which will assist the Commission to continue to create learning pathways for its staff.

Staff wellbeing

The Commission's People Strategy 2021-23 identifies as a goal that the health and wellbeing of people are nurtured. The Commission's Wellbeing Plan 2022-24 is linked to the People Strategy and includes initiatives across the four interconnected domains of purpose, mind, energy and environment.

Staff wellbeing was an issue that was raised in all the Staff Input sessions and by the union representing Commission staff. Staff in the customer facing sections of the Commission such as complaints, serious incident reporting, quality assessors and review were concerned that the Commission did not pay sufficient attention to supporting staff in these areas and in particular the provision and opportunity for debriefs following challenging interactions.

In particular, I am aware of serious staff wellbeing concerns raised in the media. These concerns were brought to the attention of the Review during Staff Input sessions, including in relation to accusations of bullying, harassment, and concerning work practices, leading to toxic cultures and high staff turnovers, and were raised with the Commission at the time the Review became aware of them.

The issue of work-related cumulative and/or vicarious trauma was raised in several Staff Input sessions. Staff commented that this is an issue that is not well managed or supported in the Commission.

Retention of staff

The SES Input session participants described Commission staff as dedicated, work focussed, collegiate and genuinely committed to and caring about ensuring a high quality, safe aged care sector.

The NLG Input Session described the Commission's staff as having the

"ability to adapt, respond and work well together to deal with critical issues and that staff had a genuine dedication to the outcomes of the Commission and ensuring that services to aged persons are of a high standard."

Despite these consistent reports and the strong brand attraction of the Commission described above, the number of staff exiting the Commission, the staff exit survey data, APS Employee Census data and Staff Input sessions, identify significant issues within the Commission in terms of culture, structure and leadership which need to be addressed to capitalise on the strong brand attraction and not lose newly recruited staff in a short period.

The significant number of people exiting the Commission creates a drain on resources in terms of recruitment, onboarding and team time to coach new members until they are familiar with the work environment. It also creates an unsettled feeling across the organisation.

Workforce data shows that Commission staff are predominately at the APS6, and EL1 level in the Quality Assurance and Complaints areas, and that 50 per cent had worked at the Commission for 12 months or less. This rate of attrition needs to be further analysed to understand the reasons why 305 staff (including contract and short-term appointments) exited the organisation in a 12-month period.

While there are a number of key roles that need focussed attention including ICT, data analytics and risk profiling, compliance, investigations, prudential auditing and complaints, one key component of the Commission's workforce arguably requires particular attention. There needs to be a specific and creative value-proposition to take to market to attract those people with the capability and skills set to fit the Quality Assessor profile, and active consideration should be given to creating a clear development and career path for this cohort. This could include programmed time out of role to build regulatory and leadership skills, specific time rotations in other roles in the Commission and other options to provide time out of their role and encourage skill and capability development. In addition, an option to explore is an arrangement under the Commission's Enterprise Agreement to make provision for an appropriate reward and recognition structure that takes account of the specific requirements of the roles such as annual accreditation, and frequent and often unplanned travel requirements.

Conclusion

While the Commission has instigated some important initiatives around building people capability, an integrated, detailed, and sustained overarching strategy is required with close senior level oversight. Existing strategies should be linked to a new Strategic Workforce Plan, which will cover an initial three years from commencement, and be subject to an external evaluation prior to cessation so that the next iteration can be put in place in a timely fashion.

Recommendation 4.6: The Commission to accelerate the development and implementation of its Diversity and Inclusion Strategy.

- As part of the Diversity and Inclusion Strategy, the Commission to immediately identify positions to be filled by First Nation people in all areas of the Commission which have contact with aged care consumers, their families, aged care providers and the public, so that First Nations people can liaise directly with First Nations staff.

Recommendation 4.7: The Commission to develop a Cultural Capability Framework, in partnership with its Indigenous Staff Network, trusted First Nations Groups and the proposed Aboriginal and Torres Strait Islander Aged Care Commissioner. The Framework should bolster the role of the Indigenous Staff Network and articulate the changes required to ensure:

- the Commission's systems, processes, practices, structure and culture are responsive to the cultural needs of First Nations people
- all staff are supported to develop the skills, knowledge and behaviours that are essential to provide culturally appropriate regulatory activity
- the work environment is culturally respectful and supportive for First Nations staff.

The Commission should review the Framework regularly, and report publicly on associated measures and initiatives.

Recommendation 4.8: The Commission to develop a detailed, holistic and thorough Strategic Workforce Plan that identifies skills gaps and focusses on all aspects of the employee lifecycle, is a key priority of ELG, and is the principal focus of a new People and Culture Governance Committee. The Plan should:

- encompass the aspects of the areas outlined above, including skills audits, cultural competency, recruitment and capacity, staff development and wellbeing, retention, and career progression and
- be supported by the Commission recruiting SES Band 1s with leadership and specific technical skills to new positions as Executive Director People, ICT, Data and Intelligence, Finance and Coordination and Intelligence.

The Plan should be implemented by no later than 30 September 2023.

4.6 Robust and user focused ICT and data systems

In order to become a high performing regulator, the Commission's digital and ICT systems must be connected to systems and data in the Department and broader Aged Care eco-system, be user focused and user friendly, support improved decision making and embed quality into delivery of outcomes and increase organisational agility. (See also *Risk based and data driven*, Section 4.10.)

What the Commission does now

Prior to the establishment of the Commission, a number of key business applications and technology services were provided by the Department. Consultation highlighted the challenges the Commission faced at that time in getting the appropriate priority within the Department for change and a lack of agility in responding to stakeholders and staff. Establishing dedicated ICT functions allowed the Commission to have greater control and autonomy over direction, delivery and operations. However, this decision placed capability and capacity pressure on the Commission as services were introduced and subsequently matured.

Since its inception, the Commission has considerably uplifted the maturity of ICT strategy, delivery and operations. However ICT, is still seen as a significant organisational barrier and more needs to be done. Throughout consultation, staff highlighted frustration with the lack of enabling ICT capabilities and the considerable delays in delivering foundational ICT capability uplift.

The current ICT delivery model is not scalable with the majority of engagement and management responsibility falling on a small number of resources already at capacity. Numerous complex interdependencies exist between the data and digital work programs across the Department and Commission which will further increase as a result of the Aged Care Reform program.

What the Commission needs to do

Significant ICT capability and capacity uplift is required across the full breadth of Digital, Data and ICT functions from strategy and planning, analysis and design, delivery and operations and cyber security. Consideration should be given to alignment with the Department's ICT functions to strengthen working relationships, reduce friction, increase productivity, and drive the uplift of digital and data solutions.

There is a need for the Commission and Department to develop much closer working relationships to better achieve their digital and data goals, including through consultation on a strategic data, analytics and risk strategy, data and digital strategy and design, data sharing and ICT program governance.

Further transparency and improved working relationships are also required throughout the development of new policy proposals to ensure all ICT impacts on the Commission are identified and costed and that all ICT impacts and year on year sustainment costs are considered.

Recommendation 4.9: The Commission to establish appropriately resourced ICT governance and delivery processes to provide greater strategy, design and implementation oversight over the Aged Care Reform program and internal Commission ICT work program.

Work should commence immediately and be completed by September 2023.

4.6.1 Cyber Security

The Protective Security Policy Framework (PSPF) defines the essential cyber security controls required by agencies to appropriately mitigate cyber security risks. Resourcing constraints are inhibiting the ability of the Commission to achieve and maintain the required level of cyber security compliance under the PSPF.

What the Commission does now

A review of the Commission's Information Security Manual Essential 8 (E8) compliance was undertaken in late 2022. This review highlighted a number of high to extreme risks and determined that a significant uplift activity was required to implement the controls required to meet the risk appetite determined by the Commission.

The Commission has a defined cyber security E8 uplift program underway to address the risks identified in the review, however, the priority placed on the uplift work program does not match the residual risk faced by the Commission. This work program requires a significant level of acceleration to adequately mitigate current cyber security risks.

What the Commission needs to do

It is widely recognised that government agencies face considerable challenges achieving compliance with the Information Security Manual E8. However, more focus and attention is required by the Commission to drive the implementation of controls that mitigate unacceptably high risks.

Further education and awareness for the Commission's Senior Executive should also be prioritised to ensure they have an adequate understanding of the residual cyber risks and potential consequences for the Commission.

Recommendation 4.10: The Commission to accelerate its Cyber Security Uplift Program to adequately address or mitigate current cyber security risks, including further education and awareness for staff.

- Work should commence immediately and be completed by 30 September 2023.

4.7 Trust and reputation, and a focus on organisational continuous improvement

Best practice

The Australian Government's [Regulator Performance Guide](#) identifies three principles of regulator best practice - continuous improvement and building trust is the first principle⁵².

Effective regulation relies on stakeholders having trust in the regulator. Trust does not automatically appear and cannot be legislated - it is something an organisation must work towards and earn. Continuous improvement is a key enabler in this journey. Regulators must continuously improve how they do their work to build trust and confidence in their regulatory settings and the system they regulate⁵³.

Regulators build and sustain trust in a number of ways, many of which have been identified elsewhere in this report.

Building trust of government and the community must be a key objective of the regulator. It should be driven by the organisation's senior leaders and be reflected in their performance agreements, and by the Advisory Council.

A trusted regulator should be able to demonstrate that it is:

- competent and conscientious - has the right people with the right skills and knowledge to do the job professionally
- sensitive - is paying attention and takes appropriate action to address risk and avoid harm, and
- ethical - doing the right thing⁵⁴.

⁵² [Department of Prime Minister and Cabinet, Regulator Performance Guide, July 2021](#)

⁵³ James Shipton, [Regulation, trust, and social license](#), ANZSOG National Regulators Community of Practice webinar, 11 August 2020

⁵⁴ James Shipton, [Regulation, trust, and social license](#), ANZSOG National Regulators Community of Practice webinar, 11 August 2020

What the Commission does now

The Commission is actively developing these elements. By implementing the recommendations of this report, and by demonstrating the qualities above, older Australians, their families and the community will gain confidence in Australia's aged care system and in the people delivering services. They will know the regulatory framework will support high-quality and safe care and deter poor performance and be confident that the regulator will take quick and appropriate action.⁵⁵.

4.8 Resourcing

Issues

Along with a significant increase in its responsibilities since it was established, the Commission's resourcing has also increased substantially over the same time. For example, appropriation funding increased from \$83.4 million in 2019-20 (the first full year of the Commission's operations) to \$201.8 million in 2022-23.

However, previously approved time-limited new policy funding is currently scheduled to end over the forward financial years. A summary of the Commission's terminating measures is provided in Table 6 below, which includes both operating and capital expenditure.

Table 6: Summary of the Commission's terminating measures

Measure	Terminating	Total 2022-26 (\$M)
Expanded Quality Assessor Workforce	mid-2022	24.7
Third-Party Quality Assessment Workforce	mid-2023	18.3
Improving Quality and Safety Across the Aged Care Sector (incl. SIRS)*	mid-2023	9.5
Aged Care Prudential Oversight	mid-2023	4.9
Care and Support Sector Regulatory Alignment Next Steps	mid-2023	3.8
Improving Aged Care Data and Tracking Quality	mid-2023	3.1
Aged Care Complaints Commissioner and additional ASL	mid-2024	9.9
Aged Care ICT to Enable Reform	mid-2025	7.8

* This is effectively a terminating measure as ongoing funding is only \$43,000 in 2023-24 and beyond.

Consequently, the Commission's appropriation revenue is estimated to fall from a peak in 2022-23 of \$201.8 million to \$184.8 million in 2023-24 and then decline further to \$176.5 million in 2024-25 and \$177.4 million in 2025-26. The Commission states the gap between costs and cost recovery revenue is also expected to increase over the forward estimates due to the increased cost of delivering site audits (see below).

Discussions with both the Commission and the Department indicate that the Commission appears to have sufficient financial resources for the 2022-23 financial year. However, this is mainly due to delays in recruiting the workforce required to deliver its regulatory role.

⁵⁵ DoHAC, A new model for regulating Aged Care, Consultation Paper No.2 – Details of the proposed new model, April 2023

Beyond that, as funding starts to decline, the Commission has identified a pressure in 2023-24 due to additional costs it is incurring in conducting its accreditation program. The Commission has identified a funding gap for the 2023-2024 financial year with respect to their site audit cost recovery arrangements for residential aged care services (see below). The gap between fees revenue and costs incurred through site audit activity has been managed by the Commission, since 2017, through the diversion of funds from other regulatory activities where implementation has been delayed or offset by one-off additional funding to respond to the Royal Commission and COVID-19. Since July 2021, these costs have escalated further due to the need to supplement the number of site audits being undertaken through the use of third-party providers (see Section 5.1). The Commission has advised they are not able to meet the ongoing gap between the actual cost of the audit function and fees charged (cost recovery) for 2023-2024. This gap is estimated to be approximately \$20 million.

Cost recovery

The Commission has two functions which are subject to cost recovery arrangements – approved provider applications and accreditation. The Cost Recovery Guidelines require agencies to undertake an annual review of costs before each financial year begins and to publish a Cost Recovery Implementation Statement (CRIS).

Provider application fees were introduced in November 2021 and are fully cost recovered. A CRIS for 2022-23 is published on the Commission's website.⁵⁶

In 2016 Government announced a move from partial to full cost recovery for accreditation. The Commission's predecessor entity (the Australian Aged Care Quality Agency) introduced full cost recovery for accreditation in May 2017. However, cost recovery arrangements and fees for accreditation have not been reviewed or updated since this time and the Commission does not have a published accreditation CRIS – rather its website states a CRIS for 2019-20 is "coming soon".⁵⁷

The Commission identifies the following factors as having impacted on the Agency and Commission's ability to undertake regular reviews to update the fees.

- The development from 2017 and introduction in 2019 of new Aged Care Quality Standards, which were likely to affect the effort required to undertake an accreditation activity and therefore its associated cost. The Commission states time was needed for quality assessors to bed down their understanding of the new Standards and for the Commission to better align its business systems.
- The onset of the COVID-19 pandemic from early 2020, which reduced the number of site audits that could be carried out, resulting in limited data around accreditation activity, and a reallocation of resources within the Commission to ensure an effective response to the COVID-19 pandemic.

To compound matters, the Commission states the cost of delivering site audits has increased significantly since 2017 due to increased wage and travel rates; implementation of the new Standards, resulting in a longer auditing process; the

⁵⁶ [Commission Cost recovery Implementation Statement – Applications for aged care approved provider status 2022-23](#)

⁵⁷ [Commission webpage | Cost recovery for accreditation](#)

requirement to publish site audit reports; increased rates of non-compliance; and challenges with workforce supply and retention.⁵⁸

The Commission refers to its non-compliance with the Cost Recovery Guidelines as “administrative rather than legal” and describes the risk as “acceptable as it is of a short-term nature”. I do not agree with that view and consider that early action should be taken to rectify the situation, particularly in light of the increased costs being incurred.

I understand the Commission is consulting with the Department and the Department of Finance on this matter and that this issue will be considered in the context of the 2023-24 Budget process.⁵⁹

Aged Care Regulatory Resource Model

In recent years, the Commission has devoted substantial effort to the development of an Aged Care Regulatory Resource Model (the resourcing model). Work on it commenced in 2018 and the model has been progressively refined and appears to have become a sophisticated and robust model through its various iterations.

The resourcing model does not cover all aspects of the Commission’s operations – it excludes corporate functions and cost recovered activities (which are modelled through separate cost recovery models) - but it does model the workforce impacts directly associated with many of the Commission’s more demand driven regulatory processes. However, while the model has been used as an evidence base for new policy proposals and as an internal management tool, it does not directly drive the determination of any of the Commission’s resourcing.

Funding of Review recommendations

This Review has made a number of recommendations that have resourcing implications for the Commission. These will need to be considered in budget processes in the near future.

Conclusions

Agencies that face significant changes in demand for their services over time can be at a disadvantage funding wise because of the delay and uncertainty between a change in demand occurring and it being funded through a Budget process. The Commission may be in this situation, where a significant change in its workload driven by external factors (for example, an increase in complaints) is unlikely to be recognised via any change in its funding for a year or more.

The Commission will need to be properly resourced in order to be able to effectively discharge its functions and have appropriate frameworks and internal governance for ensuring the most effective deployment of resources to meet its priorities. A resourcing drop from mid-2023 poses considerable risks for the Commission to meet these priorities.

Recommendation 4.11: The Commission’s 2022-23 resourcing levels to be maintained through 2023-24.

⁵⁸ Commission response to request for Information: Cost Recovery

⁵⁹ Commission response to request for Information: Cost Recovery

Recommendation 4.12: The Department to urgently consider how the recommendations of this review which have resourcing implications will be funded.

Recommendation 4.13: The Department, the Commission and the Department of Finance to undertake a joint project in 2023 to develop an appropriate and ongoing funding model. This could include, for limited appropriate functions, a funding mechanism for the Commission that sees its appropriation revenue directly determined by estimated workloads with adjustments through the year on a ‘no-win, no-loss basis’ against actual workloads. This could be similar to models that currently exist for resourcing elements of Services Australia’s work.

This work should commence immediately and be completed by September 2023.

4.9 Regulatory strategy and operating model

Best practice, contemporary regulation is founded on regulatory activity which is risk-based, outcome-focused and proportionate, and focused on behavioural change rather than enforcement. Regulators are supported to achieve this through a suite of well-calibrated activities and powers, which seek to ensure they get the balance right between encouraging behavioural change and enforcing compliance action.⁶⁰ The Regulatory Strategy of a modern contemporary regulator clearly describes how this balance will be achieved.

Contemporary regulatory strategies outline the organisation’s approach to regulation, in the context of risk-based, outcome-focused, proportionate regulation. They set out regulatory objectives and describe how data and intelligence is used to achieve these objectives. They explain how the organisation detects and treats risk, outlines the preventative and responsive activities and actions available to the organisation, and describes when these will be deployed and why. The activities and actions outlined in the strategy are guided by well-calibrated risk assessments and presented in a way that stakeholders are easily able to understand, and which supports the balance the regulator is seeking to achieve.

Contemporary regulatory strategies also commit the organisation to engaging with stakeholders on changes in regulatory approach and publishing information about the organisation’s performance, to ensure transparency and accountability and to build trust.

The Commission’s Regulatory Strategy appears to reflect contemporary best practice regulation. The Strategy:

- details how the Commission seeks to empower and engage consumers, regulate providers, detect and mitigate risk and contribute to building sector capability
- describes the Commission’s regulatory approach, presented in diagrammatic form as a pyramid, as having

*“cooperative and persuasive approaches at its base and more targeted and interventionist regulatory tools at the top, in response to potential or actual risk of harm to consumers”.*⁶¹

⁶⁰ Grosvenor, Optimising capability to meet current and future challenges, 16 December 2021, p20; Commission Briefing Note, Optimising Capability Project

⁶¹ [Commission Corporate Plan 2022-23](#) p. 20

- refers to changing provider behaviour and states
*“that neither persistent punishment nor persistent persuasion is effective on its own in achieving this”.*⁶²
- outlines how the Commission uses data and intelligence to target its regulatory efforts and engage appropriately with providers around particular risks
- describes how the Commission uses education, information, and targeted communications as key preventative tools, and
- commits to publishing information about its regulatory and complaints activities, and to engaging with stakeholders to help build confidence and trust in the aged care system.⁶³

Despite having a regulatory strategy which espouses best practice principles, the current legislation locks the Commission into a rules-based system which makes implementation of the strategy less than optimal (see Section 3.11). This does not mean the Commission cannot undertake risk-based regulation. Rather, it constricts the degree to which the Commission can divert resources to risk as it is required under the legislation to deliver work which is programmatic rather than risk led, for example, the accreditation program (see Section 5.1).

In addition, a range of other factors were identified during the Review which undermine the Commission’s capacity to deliver contemporary, risk-based regulation. These are set out generally in this Chapter and include ICT system development and data integrity, useability, and maturity issues, which constrain how well the Commission can integrate and use data and intelligence to drive a risk-based approach to regulation, and effective communication and engagement with the sector.⁶⁴

The Commission is updating its Regulatory Strategy to prepare for reforms and reflect its growing capability and maturing regulatory practice. The updated Strategy presents the Commission’s regulatory approach in the shape of a diamond (see Figure 5), which it describes as a

*strengthened, renewed model for responsive regulation which integrates both ‘compliance regulation’ and ‘aspirational regulation’, thereby offering a more cohesive representation of the broad conception of regulation that underpins responsive regulation theory, and the limited but vital role of law within it*⁶⁵

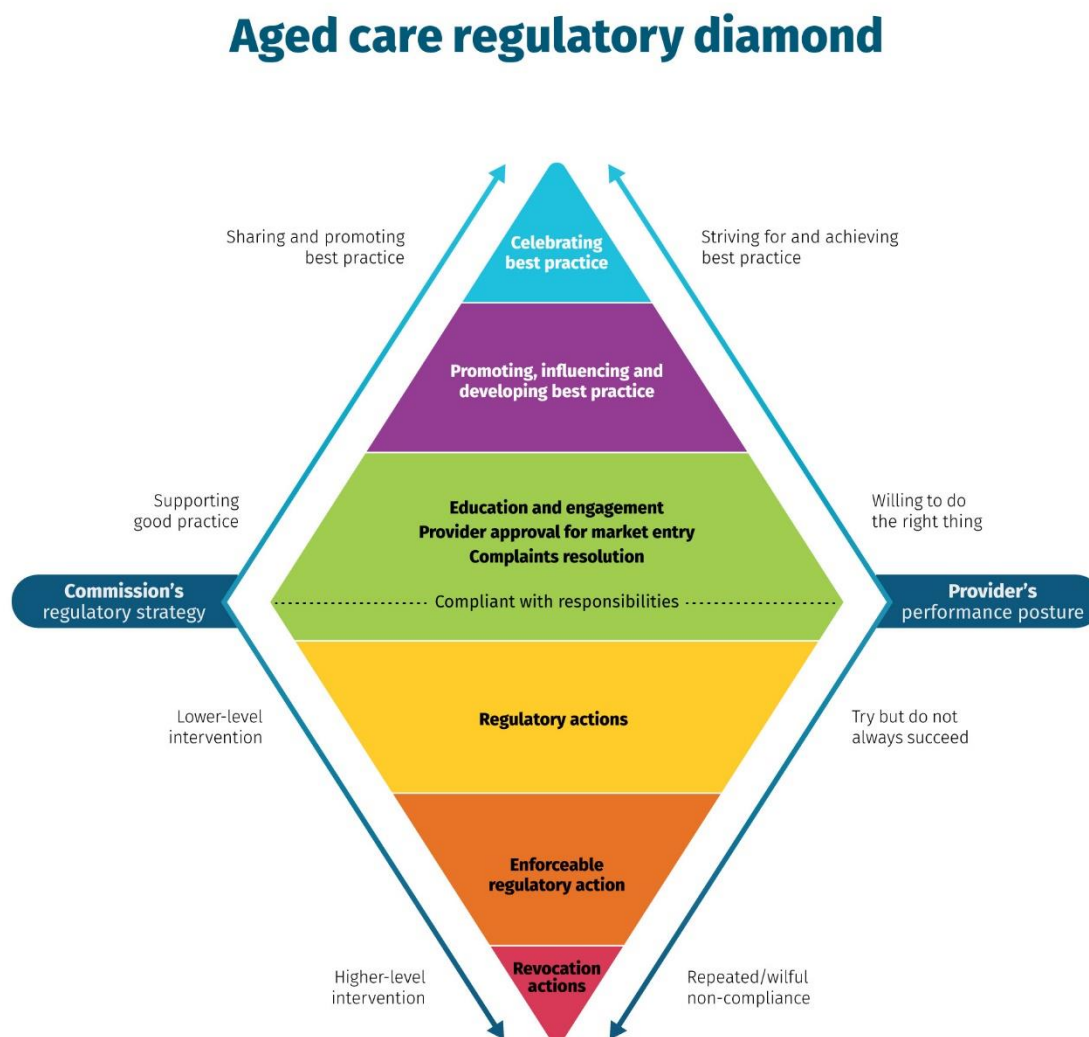
⁶² [Commission Regulatory Strategy v 2.1, 14 February 2020](#)

⁶³ [Commission Regulatory Strategy v 2.1, 14 February 2020](#); [Commission Corporate Plan 2022-23](#) p.8, 13 and 20

⁶⁴ Commission PowerPoint, Session 4: Data and Intelligence, 16 November 2022

⁶⁵ Jonathon Koleib, [When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond](#), November 2015

Figure 5: The Commission's Regulatory Diamond.



While the Commission continues to demonstrate a strong commitment to best practice and contemporary regulation, there is however a gap between what the Commission's Regulatory Strategy says, and what happens in practice.

Stakeholders raised concerns about how well the Commission integrates data across its operational areas to identify provider and system-wide risk, how effectively it targets its regulatory efforts to respond to particular risks, and the degree to which it achieves a balance between encouraging changes in provider behaviour through guidance, information and education versus compliance and enforcement action. This suggests the Commission still has a way to go to get the balance right between compliance and enforcement activities and activities which encourage and support providers to deliver better quality care.

Stakeholders have identified inflexible regulatory approaches as a barrier to delivering appropriate services for diverse group including those in rural and remote settings, people with dementia, people with a disability and people from CALD and First Nations backgrounds, veterans and LGBTIQ+ communities As an example of inflexible approaches, the Review heard approval processes make it difficult for Aboriginal Community Controlled Health Organisations (ACCHOs) to become aged care providers⁶⁶. ACCHOs described the process as costly and time-consuming. They noted that having a central point of contact in the Commission would prevent multiple re-submissions of approval documentation.

I consider the Commission should update its Regulatory Strategy in consultation with all relevant stakeholders and look to ensure its success by:

- addressing workforce recruitment, retention and capability gaps identified elsewhere in this report, and
- communicating and promoting the Strategy through a wide range of channels where participants can ask questions and are supported to understand the regulatory activities and actions and persuasive strategies available to the Commission and how the Commission balances these in its interactions with providers.

Recommendation 4.14: The Commission to update its Regulatory Strategy in consultation with all relevant stakeholders so that aged care providers, consumers and other interested parties can effectively contribute to the continuous improvement of aged care regulation. The Commission to commit to regular review of the Strategy.

Recommendation 4.15: The Commission to use a wider range of opportunities to actively communicate and promote its updated Regulatory Strategy, with a focus on ensuring aged care consumers, providers and the wider community have a better understanding of the Commission's regulatory practice and role in the aged care system.

4.10 Risk-based and data driven

A high performing risk-based regulator needs to be data driven. A good regulator will have almost all of its activities shaped by the collection and analysis of data from a range of sources, and for those activities to be carefully calibrated according to risk and likely greatest impact on behaviour change. It will share data and use analysis to enable providers to greatly increase their understanding of how the Commission assesses quality of care, what key risks are (including how risk profiles are developed) across the sector and develop and promote analytical summary reports from different perspectives to enhance provider capacity and shape behaviour. It will also use data to engage with consumers and their families, and where relevant, the wider community. This work will be underpinned by a solid investment in effective data and intelligence systems, and capable data analysts. (See also *Robust and user focused ICT and data systems*, Section 4.6.)

⁶⁶ The National Aboriginal Community Controlled Health Organisation includes a Board, advisory committees and accountability mechanisms for directors, such as a Code of Conduct and a Charter

What the Commission does now

The Commission has demonstrated a strong commitment to developing its risk profiling capacities and to become more data driven. As noted in Section 4.6, some steps have been taken, with the support of the Department, to develop good data systems. Some skilled staff have been recruited, and there is an emerging data culture, and sound strategies are being developed.

Throughout consultation, staff consistently highlighted opportunities to use digital and data solutions to improve effectiveness and staff productivity. Staff acknowledged that work is underway to improve systems and that they are improving over time. However, there was a general sense that more can and should be done.

The Commission's Executive acknowledge the importance of digital and data approaches to achieving organisational outcomes but noted that it was also one of the most significant capability gaps faced by the Commission that needed to be addressed. The Department has been leading the development of a Risk Based Targeted Information System (RBTIS) platform to provide an integrated data system to enable effective risk-based regulation. Additionally, the Department is responsible for provisioning data and intelligence for other systems. Both systems are critical in enabling the Commission to undertake its role in regulating the sector.

The Commission is increasingly moving towards the use of evidence-based, data driven approaches for the delivery of services and leverages a wide variety of data sourced internally and from external sources and via data sets and consistent, applications provided by the Department. Some challenges exist in integrating data from multiple sources to present a consistent, holistic, single view of provider, customer, risk etc. It appears that internally, several systems are in place that provide important intelligence but lack integration – this is a significant barrier to the Commission becoming a truly risk-based regulator.

Structured processes exist for delivering standardised, evidence-based risk identification tools however data integration barriers are currently limiting ad hoc data discovery and the ability to realise data related innovation.

The ability for the Commission to discover what data, insights and intelligence are available within the Department (and vice-versa) is limited and consultation highlighted a lack of confidence in both agencies in the quality, completeness, and accuracy of data.

What the Commission needs to do

As the Commission's approach to regulation shifts to become a world class, high performing risk based and data driven regulator, there must be early effort to increase greatly the use of digital and data solutions to increase delivery effectiveness, build trust with the sector and community and increase staff productivity – for example, tailoring education and support activities to providers who are trying hard to enhance their quality of care, and targeting more structured and well executed compliance efforts where there appears to be risks of unsafe practices.

Building this capability and capacity in partnership with the Department must be a key organisational objective for a sustained period of time.

I acknowledge that recruiting and retaining staff with strong data analysis skills is challenging, with many organisations competing for these skills. However, the success of the Commission will only be realised with a strong cohort of officers with data analysis and risk profiling expertise.

There is also a need for the Commission and Department to develop much closer working relationships to better achieve their information goals, including through consultation on a strategic data, analytics and risk strategy, data design, improved data sharing and enhanced data governance arrangements.

Greater focus is needed on discovering and sharing intelligence and insights available across the entire aged care ecosystem and strategically designing evidence-based approaches that contribute to the delivery of the Commission's goals.

Recommendation 4.16: The Commission to, in partnership with the Department, develop a strategic Data, Analytics and Risk Profiling Strategy, supported by the advice of a member of the Advisory Council with a data background, and with oversight by the proposed Data and Intelligence Governance Committee (see Section 4.3). The Governance Committee to consider:

- strategic alignment of data and risk profiling initiatives to the updated role and functions of the Commission
- a data analysis and risk profiling staffing strategy informed by consultations with staff, industry and academia and adopts innovative approaches to uplifting capability that are to be evaluated over time on a 'try, test, learn' basis
- methods for increasing trust of the community and the sector and increasing transparency in the system – e.g. publishing analytical papers for public release and promotion, drawing from a wide range of data (note alignment with Recommendation 4.5), and
- releasing profiling methodology to providers so that the sector has a good awareness and understanding of how risk is identified (note alignment with Recommendation 4.5).

Progress on the delivery of this Strategy should be regularly reported to ELG and the Advisory Council.

4.11 Effective engagement and communications

A contemporary, high performing regulator must have strategically planned and executed external communications as one of its' key capabilities⁶⁷.

Well planned and executed engagement is identified as a key principle of best practice for Australian regulators:

*Regulators are expected to be open to feedback on how they regulate and be clear with the public on why and how they regulate.*⁶⁸

⁶⁷ Grosvenor, Optimising capability to meet current and future challenges, 16 December 2021 p.21

⁶⁸ Appendix F: Australian Government's Regulator Performance Guide principles of best practice.

The Grosvenor report also found that:

*Engagement capabilities are essential for improving consumer satisfaction as well as provider interactions and supporting the effectiveness of the Commission's regulatory function through provider engagement and sector education.*⁶⁹

What the Commission does now

The Commission uses a number of channels to communicate with the aged care providers, consumers and the general public⁷⁰, such as its website, social media platforms, Quality Standards app, Aged Care Bulletin and media relations.

The Review heard concerns about the Commission's 'one size fits all' approach not working for its diverse stakeholder groups. For example, the Commission's website and written material are too complicated and not well targeted to meet the needs of people from diverse groups, including those with dementia, people with a disability and people from CALD and first nations backgrounds, veterans and LGBTIQ+ communities.

A Consumer Engagement Plan was presented to the Review including a number of initiatives to ensure consumer engagement is embedded in the Commission's activities, such as the creation of the Consumers and Families panel in August 2022 and provider education through Webinars and face to face workshops⁷¹.

The Commission identifies engagement capabilities as important to ensuring the Commission establishes and maintains effective stakeholder relationships and supports the delivery of consumer centric outcomes.⁷²

The Commission's *Enriching Life Through Care* program provides roundtable forums for the Commission to connect with senior sector leaders and hear directly about how providers are responding to consumer aged care expectations. The Commission should actively build upon this important initiative.

What the Commission needs to do

The Commission has identified the importance of effective engagement and communications in its drive towards becoming a world-class regulator⁷³ and that it still has much to do to get there. Identified improvements include:

- using co-design principles to ensure communication and education products are simpler, clearer and more accessible to a broader audience
- using more contemporary, engaging and responsible communication channels and products which reflect the diversity in the community, and

⁶⁹ Grosvenor, Optimising capability to meet current and future challenges, 16 December 2021 p.31-32

⁷⁰ [Commission Annual Report 2021-22](#)

⁷¹ Commission PowerPoint Session 6: Consumer and provider engagement, communication and education, 15 November 2022

⁷² [Commission Corporate Plan 2022-23](#) p.15

⁷³ Commission policy paper, Becoming a world-class regulator of aged care in Australia, 2022.

- expanding its networks within the sector and with other regulators to create more connection opportunities to learn and share expertise and information and influence provider behaviour.⁷⁴

In its assessment of the maturity of the Commission's engagement capabilities, the Grosvenor report⁷⁵ found that:

- a key role for the Commission is to elevate the consumer voice and engage broadly to ensure the system is built around people's needs, preferences and circumstances to ensure services are inclusive, relevant and appropriate, and
- it is important for the Commission to educate providers and support them to be accountable for meeting quality and safety standards.

Stakeholder feedback to the Review strongly suggests that the Commission could do more to improve its communication and engagement with consumers, their representatives, and with providers:

- improve web design and usability
- focus on easy to find information and transparency
- consider offering information in other languages, as per the Department's website
- consider including a webchat service and a provider portal as per the United Kingdom Care Quality Commission website⁷⁶, and
- consider opportunities to consult with and co-design content with users.

As noted earlier, the ELG team of the Commissioner and Deputy Commissioners should more actively communicate the work of the Commission through media and other communication channels, including correcting erroneous reporting as this arises.

Recommendation 4.17: The Commission to develop a new, comprehensive communications and engagement strategy, including an external review of its current arrangements, and improved mechanisms and processes for communication and engagement with consumers from diverse backgrounds.

- The external review should consider its current strategy, processes and products for communication and engagement with aged care consumers, their families and carers, providers, peak bodies and the broader community.
- Improved mechanisms and processes are required for communication and engagement with consumers with high care needs and consumers from diverse backgrounds e.g. First Nations people, CALD, and those living in rural and remote communities, and embed co-design principles and practice in their development.

⁷⁴ Commission policy paper, Becoming a world-class regulator of aged care in Australia, 2022.

⁷⁵ Grosvenor, Optimising capability to meet current and future challenges, 16 December 2021 p.32

⁷⁶ [Care Quality Commission \(cqc.org.uk\)](https://www.cqc.org.uk)

CHAPTER 5: REGULATORY FUNCTIONS AND OUTCOMES

Chapter 4 considered the key elements or features of a contemporary, high performing, best practice regulator, and the extent to which the Commission is exhibiting those elements. This Chapter builds on the broader commentary, identifying areas where the Commission is not always demonstrating regulatory best practice and including recommendations which will support the Commission to do so.

5.1 Accreditation

Residential services must be accredited by the Commission to receive Commonwealth subsidy under the *Aged Care Act 1997*. Re-accreditation is also made by the Commission following a site audit in which the service is assessed against the Aged Care Quality Standards (Quality Standards). Audits must be conducted on site by registered quality assessors and are generally unannounced. A Commission delegate makes the re-accreditation decision based on the assessment team's audit report and the provider's response to this report. The re-accreditation decision includes determining the period of re-accreditation, which is typically three years if there is a finding of full compliance or minimal non-compliance. Shorter periods are conferred where there is a finding of significant non-compliance.

The Review heard considerable commentary about the Commission's capacity to deliver the reaccreditation program in the context of the COVID-19 pandemic and environmental disasters, and initiatives employed to address these challenges, including the Commission's Third-Party Provider (TPP) Program and the Department's exceptional circumstances (EC) decisions.

Issues around quality assessor and decision maker capabilities, recruitment and retention and the broader quality assessment framework were also raised in this context.

Quality assessors and decision makers

Stakeholders expressed a range of concerns around the capabilities of quality assessors and decision makers in the Quality Assessment and Monitoring Group (QAMG), including:

- lack of timely assessments
- varying interpretation of the Quality Standards leading to inconsistencies in assessments and assessment outcomes
- the quality of written assessments, including poorly evidenced reports and decisions which fail to reflect materials provided during or after the assessment
- the cultural capability of assessors and their ability to flexibly consider very different contexts and models of care, including in relation to special needs groups
- assessors not being aware of relevant state-based legislation
- assessors lacking the skills and experience to assess clinical matters

- lengthy periods elapsing between assessments being undertaken, decisions being made, and non-compliance being followed up, and
- a general lack of transparency in quality assessment processes and decision making.

These issues can have a significant and compounding impact on providers. When the QAMG finds a provider has not met a Quality Standard or other provider responsibility, its decision and supporting information is referred to delegated decision makers in the Commission's Compliance group, who must then make a decision on compliance. This can ultimately result in a decision to issue a notice of non-compliance or sanction against the provider. It is therefore critical that all information provided by the QAMG is accurate and relevant.

The Review heard maintaining an adequate number of capable quality assessors has been an ongoing challenge for the Commission and that retaining skilled decision makers and compliance officers is also problematic, creating a loss of regulatory consistency and expertise. As of 1 December 2022, the Commission had 344 active registered quality assessors, approximately 50 per cent of which are supplied through the TPP Program. When the TPP Program commenced, 60 per cent of TPP assessors did not seek ongoing registration after 1 year. There has been considerable improvement in retention, with 28 per cent of assessors now not seeking registration beyond a year.⁷⁷ The vacancy rate in the Approvals, Compliance and Investigations Group is 26 per cent.⁷⁸

The Commission indicated it has made “*a significant effort in recent years to implement improvements in the recruitment, training, registration, supervision and performance monitoring processes of the quality assessor workforce*”⁷⁹ and outlined a range of measures to improve capability. This included establishing a business improvement project in 2022 to explore and map the development journey of quality assessors, with a focus on providing the right foundational training. I understand the Commission is currently implementing recommendations from this project.

The Commission also advised it has started a Quality Assessor Retention Project to support staff to stay in the role and is developing a Quality Assurance Framework to ensure that the QAMG's activities and decisions “*comply with the Commission's quality assurance approach and applicable legal and regulatory requirements; and are consistently consumer-centric, risk-based, responsive and intelligence-led.*”⁸⁰

While it is clear the Commission has placed significant focus on recruiting and training assessment staff, continued staff turnover and relatively high use of contracted assessors (primarily through the TPP program) indicates more needs to be done to retain and support permanent assessment staff. Similarly, it is critical that poor retention rates in other areas (such as the existing Compliance group) are understood and addressed to ensure delegated decision makers are experienced and supported in their work.

⁷⁷ Commission response to request for information: Quality controls for quality assessors

⁷⁸ Current at 19 January 2023

⁷⁹ Commission response to request for information: Quality controls for quality assessors

⁸⁰ Commission response to request for information: Quality controls for quality assessors

Quality assurance issues across the Commission's regulatory functions also require urgent attention. While the Commission's 2022-23 Operational Plan refers to adopting a whole of Commission Quality Assurance Framework by June 2023, this framework is not yet in place and only the QAMG has identified quality assurance as a priority.⁸¹

Third Party Provider (TPP) Program

In 2021 the Commission appointed four organisations, under separate Deeds of Standing Offer, to deliver site audits under the TPP Program. The program was described as one of a number of 'treatment strategies' employed by the Commission to address a 'backlog' of site audits under the re-accreditation program. This backlog was attributed to a combination of factors, including:

- higher rates of non-compliance with the new Quality Standards introduced in 2019 when providers moved to consumer-centric standards with a larger number of requirements, resulting in shorter periods of accreditation that were generally two years or less⁸²
- workforce shortages, particularly in relation to quality assessors, and
- additional regulatory activities to address COVID-19 pandemic risks.

The Commission sought and received significant funding to deliver this program in 2021-22 and 2022-23. I understand additional funding is being sought to extend the program in 2023-24.

I note the Commission has a dedicated quality assurance team *"to drive the performance of Third-Party Provider contractors"* and understand these arrangements were introduced because several suppliers *"underestimated the complexities, volume and standards or work involved in report preparation and gathering/documenting the evidence required by the Commission to make a decision on compliance"*.⁸³

While I acknowledge TPP suppliers have contributed to the delivery of the accreditation program and that there is broad parity in costs between audits delivered by the Commission and TPP suppliers, I consider this is a core function of the Commission and that the high proportion of assessments undertaken by TPP assessors, represents a significant risk for the Commission. As deeds of offer with TPP suppliers are reviewed, the Commission should seek to reach a better balance to ensure more activity is brought in house and undertaken by its permanent quality assessor workforce.

Recommendation 5.1: The Commission to actively work towards having a significantly higher proportion of accreditation site audits undertaken by its permanent quality assessor workforce, and do so gradually as deeds of offer with Third Party Provider suppliers are reviewed.

⁸¹ [Commission Corporate Plan 2022-23](#)

⁸² Commission response to request for information: Additional Funding for Site (reaccreditation) Audits 2023-24

⁸³ Commission response to request for information: Third Party Provider Overview

Broader quality assessment framework

The Review also heard concerns about the current quality assessment framework, including:

- the binary nature of assessment against the Quality Standards, whereby a requirement is met or not met, encourages providers to do the bare minimum, rather than incentivising excellence and innovation
- the assessment methodology of 'pass' or 'fail' is subjective and unsound, with one unmet requirement under a particular Standard resulting in failure of the entire Standard,
- allied health needs not being explicitly assessed as part of the Standards, resulting in the risk of consumers being left with unmet needs even while providers may be found to have met the Standards, and
- all Standards having the same weight even though some Standards are more critical than others for the consumer.

The Review considers these shortcomings should be addressed through the design of a new regulatory system for aged care and a new assessment methodology for strengthened standards. The Commission will shortly commence a pilot of these strengthened standards. The pilot will inform how the Commission assesses provider performance by testing a re-designed approach to auditing and assessment across a variety of service types and sizes and considering how graded assessment can be used to better differentiate performance.⁸⁴

Recommendation 5.2: The Commission to implement the Quality Assurance Framework across all its regulatory functions by June 2023 if possible and by no later than 30 September 2023, and ensure regular reporting of assurance activities and key findings on the Commission's website to provide greater assurance to providers and consumers.

Recommendation 5.3: The Commission to review the Quality Assessor Retention Project and urgently implement measures to retain assessment staff and extend the project to consider and address retention issues in other parts of the Commission's workforce.

Exceptional circumstances

The COVID-19 pandemic significantly disrupted the Commission's ability to deliver the re-accreditation program as quality assessors were frequently unable to conduct onsite visits. The Commission initially managed this issue by using an own motion reconsideration power to extend accreditation periods for up to 18 months for lower risk services. In addition, the Commission worked with the Department to ensure continuity of accreditation and subsidy via exceptional circumstances (EC) provisions set out in the *Aged Care Act 1997*, the delegation for which sits with the Department.

⁸⁴ Commission factsheet, [Strengthened Aged Care Quality Standards pilot program](#)

The Department has expressed concerns about the number of EC requests and the risks associated with not having visibility, through an onsite audit, of the quality and safety of care delivered at services, for potentially five or more years. I note the Commission has visited impacted services to undertake other monitoring activities.

The Department processes EC decisions based on referrals from the Commission. In April 2020 there were 13 services on EC, whilst the total number of services peaked at 863 in November 2021.

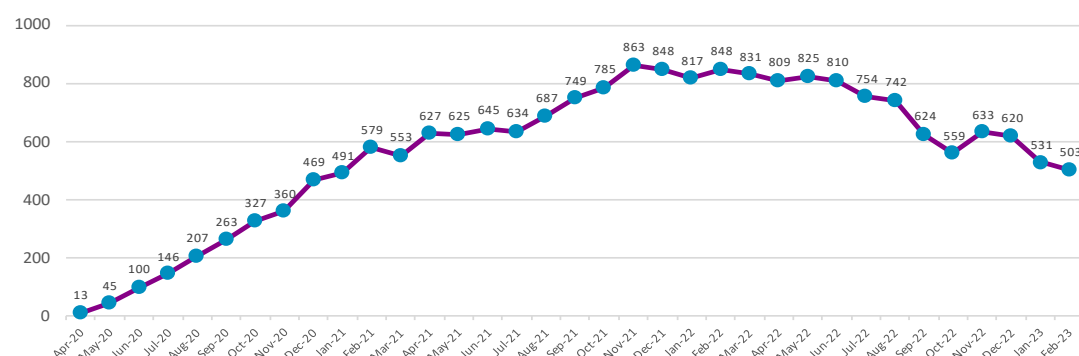
As of February 2023, there were 503 services on EC. The Commission advises they are focused on this issue and that their forecasting indicates *“the requirement for additional exceptional circumstance decisions will be significantly lower from July 2023.”*⁸⁵

While the number of requests for EC decisions is trending down, I consider the Commission must increase its efforts to reduce the number of services covered by EC decisions and work closely with the Department to ensure improved information sharing to identify and address risk and transparent reporting of progress.

Figure 5: Number of services on an EC – April 2020-February 2023⁸⁶

Exceptional Circumstances

Number of services on an EC April 2020 28 February 2023 (actual ECs issued as at end of month)



Recommendation 5.4: The Commission and the Department to develop a new approach to the use of Exceptional Circumstances decisions and accreditation visits during crises and work together to substantially reduce the number of services covered by EC decisions, by December 2023. Progress to be reported to the Joint Strategic Committee (see Recommendation 4.2).

⁸⁵ Commission response to request for information

⁸⁶ Commission PowerPoint Session 2: Regulatory Strategy and Aged Care reforms, 3 November 2022.

5.2 Reconsiderations of reviewable decisions

In its series on the governance of regulators the OECD notes that an integral part of building trust and confidence is ensuring processes for internal review of delegated decisions and information and access to appeal processes⁸⁷.

Affected persons can apply for reconsideration of certain decisions made by the Commission under the Commission Act and Rules⁸⁸. The Commission may also reconsider a decision on its own initiative. Reviewable decisions include decisions relating to:

- the approval and revocation of a person or body as a provider of aged care
- giving a compliance notice to an approved provider, and imposing and not lifting a sanction on an approved provider
- accrediting and not accrediting commencing and existing services, the period of accreditation and date of effect when a decision is made to revoke accreditation
- registration of a person as a quality assessor, including cancelling a person's registration and refusing to register them for a further period
- taking no further action in relation to an issue raised in a complaint or to end a resolution process in relation to an issue raised in a complaint
- the making of a banning order against an individual (including decisions not to vary or revoke the banning order or a condition of the banning order)
- suitability of an approved provider or an individual who is one of the key personnel of an approved provider (including decision not to vary or revoke the suitability determination)

Performance assessment decisions made in the Quality Assessment and Monitoring Group (QAMG) are preliminary decisions that inform the accreditation decision. These decisions are not reviewable decisions under the legislation.⁸⁹

Sections 74K, 74L and 74M of the Commission Act set out the process for requesting a reconsideration of a reviewable decision. The Commission's website includes information on the Commission's process and responsibilities, including a Regulatory Bulletin published in March 2022. Requests must be in writing, set out the reasons for the request and be made within a specified timeframe. The reconsideration decision must be made by a Commission decision-maker who was not involved in making the original decision and is at least at the same level as the person who made the decision. The decision-maker reconsiders the original decision on its merits based on administrative law principles and can consider all relevant information following the original decision, including information or evidence up to the time of the reconsideration decision.⁹⁰ All reconsideration decisions are made by a team in an area within the Commission which is separate from the operational areas in which the original decisions are made.

⁸⁷ [OECD 2014, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy](#)

⁸⁸ Full list of reviewable decisions is set out in section 74J of the [Aged Care Quality and Safety Commission Act 2018](#)

⁸⁹ [Aged Care Quality and Safety Commission Act 2018](#) ; [Aged Care Quality and Safety Commission Rules 2018](#)

⁹⁰ [Commission Regulatory Bulletin 2021-12 Reconsideration of reviewable decisions](#)

The Review heard examples of QAMG decision-makers refusing to change assessment reports after factual errors had been corrected and reports of providers being fearful of the Commission's reaction to them raising concerns about assessment processes and experiences. Provider peak bodies suggested independent review mechanisms were necessary, and that compliance decisions should not be published until after an appeals process is exhausted.

As many QAMG performance assessment decisions are not reviewable under the legislation, the impact on providers of poor-quality assessment reports and administrative decision making which fails to encompass procedural fairness is significant. The practical implications include providers being required to remedy issues which do not exist, being subject to further unnecessary assessment from the Commission, having published assessment reports and a star rating which are unfairly based on inaccurate information, and possible impacts on ongoing funding.

There also appeared to be a level of confusion regarding who can review decisions, with some stakeholders believing the original decision maker, or someone at a lower level to the original decision maker, is involved – neither of which is the case.

The Review also notes the number of reconsideration requests in 2021-22 appears low. Conversely, the number of decisions upheld following review is high.

- Complaints: 121 requests for review were received – 80 were finalised, and 5 were set aside in order to undertake a new resolution process.
- Accreditation: 4 requests for review were received and all 4 decisions were affirmed.
- Compliance matters: 3 requests were received – 2 decisions were affirmed, and 1 decision was varied.⁹¹

The review process requires attention to prevent a situation where approved providers are impacted by incorrect administrative decisions. The Commission should review its current processes to assure itself that:

- all administrative decision making incorporates procedural fairness
- reconsideration decisions include consideration of whether the facts relied upon by the original decision maker were accurate in the first place, and
- the information on review rights is understood and supported in practice by a genuine commitment across the organisation to procedural fairness.

Recommendation 5.5: The Commission to embed in policy the right to seek a review of decisions preceding a formal compliance decision in order to strengthen procedural fairness and actively promote this by improving the transparency and communication of decision review arrangements. Reviews must be undertaken by separate reviewers (Authorised Review Officers).

Recommendation 5.6: The Department to consider expanding the range of reviewable decisions under the new Aged Care Act.

⁹¹ [Commission Annual Report 2021-22](#) p. 176-177

5.3 Complaints processes

The Royal Commission recognised that an effective and transparent complaints management process is vital in identifying and addressing quality and safety issues before consumers are significantly affected and informing a culture of continuous improvement in the sector.

The Royal Commission highlighted the importance of a strengthened and more transparent complaints process, where the regulator closely examines provider complaints handling arrangements, talks to more consumers about their experiences when assessing provider performance, provides better information to older people on how to make a complaint and access advocacy, seeks complainants' views before closing their complaint, provides complainants with better information on the outcome of their complaint and reports more detailed information on complaints, including the number, nature and outcome of complaints by provider and service.⁹²

The Review heard several of the issues identified in the Royal Commission continue. Examples were provided of complainants waiting a long time to receive a response from the Commission, not receiving advice that their complaint had been finalised, “feeling ignored” and believing that the Commission is focused on closing complaints rather than resolving them, and concerns that complaints have not been appropriately addressed.

“... carers who make complaints report that they are not provided enough information about the progress or outcome of complaints”. (Peak body)

Similarly, there was a call for increased understanding of complaints processes to

“... address concerns reported by carers that they are hesitant to make complaints about aged care services due to potential retribution by providers following reporting of concerns” (Peak body).

Some stakeholders believe the Commission sides with providers as evidence provided by complainants may be contrary to the Commission's findings and complainants are not able to review material from the provider. Other issues included inconsistency in complaints handling across states, concerns around the transparency of outcomes and not being able to resolve complaints in a timely manner, as evidenced by the Commission not meeting its performance measure related to complaints resolution (see Section 3.10).

Staff also raised concerns around high caseloads, IT systems which don't support the sharing of information across operational areas, difficulties getting timely input from the Commission's clinical unit and feeling as if they work in silos (see Section 4.2).

I appreciate the Commission is dealing with an increasingly large volume of contacts (60,606 calls, 17,469 emails, 14,196 web forms and 600 contacts through other channels between July 2022 and the end of February 2023) and acknowledge strategies implemented by the Commission to improve understanding of its complaints handling processes and make it easier for people to provide feedback, raise a complaint or make an enquiry, including:

⁹² [Royal Commission into Aged Care Quality and Safety, A Summary of the Final Report](#)

- education and training materials, including a best practice feedback and complaints handling module on the Commission's online learning system, a Guide on Open Disclosure and factsheets on making and resolving complaints, and⁹³
- a 'New Front Door', which the Commission describes as a best practice contemporary call centre, focused on providing improved customer service and achieving better outcomes for consumers, as well as improved job satisfaction for Commission staff.⁹⁴

I also understand a dedicated Aged Care Complaints Commissioner will shortly be appointed to oversee improved complaints management (as recommended by the Royal Commission⁹⁵) and that this role will be supported by a significant number of additional staff to ensure a new fast-tracked improved complaints process, which focuses on ensuring consumers feel safe and heard

"... it's important that they are given a safe and responsive means to voice their complaints and concerns, knowing that they will be taken seriously and action will be taken to rectify the situation."⁹⁶

The appointment of an Aged Care Complaints Commissioner is an important next step in developing and leading improvements in complaints processes.

I understand the new Complaints Commissioner will also have oversight of the Serious Incident Response Scheme (SIRS). The Review heard significant concerns from staff around the volume of notifications and the assessment of risk. The Commission advised a revised operating model is currently being implemented to better manage the high reporting volume - more than 51,000 notifications were received by the Commission between commencement in April 2021 and July 2022.⁹⁷ I consider the Aged Care Complaints Commissioner should prioritise a thoroughgoing review of this new operating model.

Recommendation 5.7: The Aged Care Complaints Commissioner to deliver an enhanced complaints management system which:

- ensures timely responses to complainants that explain the status of their complaint
- is transparent and accountable, with more detailed, published information on complaints and notifications, including at the provider and sector level
- integrates information from contacts, complaints and notifications with other regulatory areas in the Commission, and
- promotes open disclosure and supports the sector to use complaints to inform continuous improvement.

Priority is to be given to enhancements which can be made without amendment to primary legislation, with any requested changes to primary legislation to be referred to the Department for consideration at part of the new Aged Care Act.

⁹³ [Commission website](#)

⁹⁴ Commission PowerPoint Session 3: Commission functions, 8 November 2022

⁹⁵ [Royal Commission into Aged Care Quality and Safety, A Summary of the Final Report](#); [Aged Care Royal Commission Final Report: Recommendations](#)

⁹⁶ Labor election policy, July 2022

⁹⁷ Commission PowerPoint Session 3: Commission functions, 8 November 2022

Recommendation 5.8: The Aged Care Complaints Commissioner to prioritise a thoroughgoing review of the revised operating model for SIRS to determine whether it is effective in managing the high volume of notifications and identifying and addressing risks associated with serious incidents.

5.4 Financial and prudential regulation

Financial and prudential regulation is a recent addition to the responsibilities of the Commission. The Commission will continue to acquire additional responsibilities from the Department, with financial viability monitoring and associated case management commencing from July 2023. Subject to Government decision, further responsibilities for the Commission are expected to commence with the new Aged Care Act, including the making of prudential standards. These functions require new skills sets among Commission staff. Recruitment to new positions will likely be a challenge in a tight labour market. However, the range of functions across the Commission is also an opportunity, as staff can develop new skills and transfer within the Commission to build upon their expertise and experience.

I note activities underway within the Commission to improve the sector's understanding of its expanded role, including publication of prudential and financial factsheets and monthly insight reports and an upcoming campaign on investment management strategies to help residential providers better understand their obligations when investing refundable deposit balances.⁹⁸

I also recognise the strong collaboration and proactive approaches between the Commission and the Department to support the successful transition of these functions. A joint operating model has been collaboratively developed to ensure respective functions work together in a day-to-day operational sense, while also meeting shared objectives and strategic outcomes. For example, the functions of the ACQSC to identify and monitor viability risk will help inform both its regulatory levers to manage those risks, and the Department's support program levers to manage those risks (where appropriate), to collectively ensure that aged care services, particularly in thin markets, continue to deliver essential services to residents.

The Review understands the Commission and Department are currently scenario testing the joint operating model. It is vital this work is implemented and that these materials are shared with the sector as soon as possible to complement existing information products and provide greater transparency and assurance on the Commission's regulatory approach.⁹⁹

⁹⁸ [Commission Financial and Prudential Regulatory Insights – February 2023](#) ; [Commission Aged Care Quality Bulletin #38 – February 2022](#)

⁹⁹ Commission PowerPoint Session 3: Commission functions, 8 November 2022

It will also be essential for the Commission to consider how to best integrate prudential activities with other regulatory activities, to minimise burden on providers, enhance intelligence and understanding of risk, and drive provider improvements. Financial risk can often be an early indicator of risks to the quality of care in a service. For this reason, it is important that the Commission's financial and prudential functions be fully integrated with other information as it implements a more sophisticated risk-based approach through the use of data analytics.

Equally, the Commission must continue to work closely with the Department after the transfer of functions to ensure early identification and mitigation of risk, at both the provider and sector level, and to review and re-calibrate the joint operating model, where required.

Recommendation 5.9: The Commission to fully integrate its financial and prudential regulatory functions into existing assessment functions to support its implementation of a more sophisticated risk-based approach through the use of data analytics.

5.5 Chief Clinical Advisor Group

The introduction of the Chief Clinical Advisor and supporting functions and staff has been an important development for the Commission in assisting its internal operations and enhancing clinical knowledge more generally in the sector.

The Chief Clinical Adviser Group comprises:

- a Clinical Unit, which provides clinical support and advice to Commission staff
- a Restrictive Practices Unit, which provides support and advice to Commission staff on issues relating to behaviour support and restrictive practices
- a Clinical Pharmacy Unit, which educates, guides, and supports residential providers on medication issues and delivers a Pharmacy Outreach Program
- specialised clinical consultants, including an infectious diseases physician and a consultant pharmacist.¹⁰⁰

The Review heard the Clinical Unit, and to a lesser degree the Restrictive Practices Unit, are experiencing recruitment issues and that it is challenging to find staff with the right skills mix who can assess issues and provide clear and succinct advice which assists regulatory officers and delegates to make sound, evidence-based decisions.

The Review also heard concerns from Commission staff that delays in responding to requests for advice can prevent them from assessing and responding to risk quickly. Quality assessors expressed frustration at not having real time access to clinical advice to assist them in responding to issues identified during an assessment. Similarly, complaints handling can be delayed whilst waiting for clinical advice.

¹⁰⁰ Commission PowerPoint Session 5: Functions of the Chief Clinical Adviser, 21 November 2022

The Commission advised a Clinical Advice Framework which includes education for all staff in core clinical knowledge is almost complete. While this recognises the desire of regulatory staff to feel more confident when dealing with clinical issues, the Commission could build on this by implementing a ‘hub and spokes’ model where some clinicians are located in regulatory areas to bolster clinical expertise and shape the advice provided. This model would arguably help address criticisms from the sector regarding the perceived lack of clinical expertise and capability within quality assessors specifically, and regulatory officers more broadly (see Section 5.1). I consider that implementation of this framework is critical and that it should continue to be enhanced over time.

I acknowledge there is also good work underway to support and inform the sector through the Restrictive Practices Unit, the Clinical Pharmacy Unit, under the direction of specialised consultants and through campaign activities, including the recent food and nutrition campaign. The Review received little feedback on these areas, so it remains unclear how effective the Commission’s outreach is in lifting clinical capability across the sector. More generally, and over time, the Commission may wish to consider outsourcing clinical advice.¹⁰¹

Recommendation 5.10: The Commission to pilot a Clinical Advice ‘hub and spokes’ model where some clinicians are embedded in regulatory areas to bolster clinical expertise and shape the advice provided.

5.6 The functions of the Commission

As noted earlier, the Commission has experienced an intense period of change since it was established on 1 January 2019, bringing together the functions of the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner. The Commission’s regulatory functions have continued to expand as reforms from the Royal Commission are progressively implemented.

Table 7 summarises these developments.

Table 7: Functions timeline

Commission Functions Timeline	
Date	Function/s
1 January 2019	<p>Establishment of the Aged Care Quality and Safety Commission and Commissioner of the Commission, with the following functions:</p> <ul style="list-style-type: none"> (a) protecting and enhancing the safety, health, well-being and quality of life of aged care consumers (b) promoting the provision of quality care and services by approved providers of aged care services and service providers of Commonwealth funded aged care services (c) consumer engagement functions (d) complaints functions (e) regulatory functions, and (f) education functions.

¹⁰¹ Commission PowerPoint Session 5: Functions of the Chief Clinical Adviser, 21 November 2022

Commission Functions Timeline	
Date	Function/s
1 July 2019	Commencement of: <ul style="list-style-type: none"> new Aged Care Quality Standards (single set of Standards applicable to all services types – replaced Accreditation Standards (residential) and Home Care Standards (home care). Charter of Aged Care Rights (replaced Charter of Rights and Responsibilities)
1 July 2019	Commencement of National Aged Care Mandatory Quality Indicator Program (NACQIP) - all residential providers to collect data on 3 quality indicators.
1 January 2020	Transfer of functions from Department of Health <ul style="list-style-type: none"> approval of all residential and home care providers aged care compliance activity (including prudential compliance) administration of compulsory reporting arrangements for assaults
1 October 2020	Management of certain aspects of NACQIP transferred from the Department.
1 April 2021	Serious incident response scheme (SIRS) – residential – 1 st stage (Priority 1 rollout)
1 July 2021	Expansion of NACQIP – all residential care providers to collect data on 2 additional quality indicators, bringing the number to 5 in total.
1 July 2021	Strengthened provider obligations regarding use of restrictive practice in residential care or short-term restorative care in a residential care setting.
1 Sept 2021	Strengthened provider obligations regarding behaviour support plans
1 October 2021	SIRS – residential – 2nd stage (Priority 2 rollout)
1 July 2022	New financial reporting requirements for providers
1 December 2022	SIRS – home services
1 December 2022	Code of Conduct for aged care providers, governing persons and workers
1 December 2022	Strengthened provider governance requirements
1 December 2022	Regulatory functions for transition care services move to the Commission.
1 December 2022	Aged Care Complaints Commissioner and ‘new fast tracked’ complaints scheme (not yet in place)
1 April 2023	Expansion of NACQIP – all residential aged care providers to collect data on 6 additional quality indicators, bringing the number to 11 in total.
1 July 2023	24/7 registered nurse requirements in residential care
1 October 2023	Care minute requirements
1 July 2024	New Aged Care Act, including new regulatory model and strengthened Quality Standards

A number of stakeholders argue the Commission is overloaded and that implementing new functions in short time frames compromises the Commission's BAU activity and impacts its ability to contribute to development of the new Aged Care Act and regulatory framework. It was also argued that functions are not well integrated.

Some stakeholders suggested certain functions should be moved out of the Commission to lift this load.

“The Commission keeps getting more functions – it has reached organisational capacity. Has to focus on too many things. Does it all have to sit with the commission?” (Government advisory group)

“The current model creates role conflict and a lack of capacity for the regulator to focus on the care of individuals. The promotion and provision of incentives

for existing providers to meet and improve quality standards, and audit and accreditation, requires a different approach and conflicts with complaints management and community education. All these functions should not be delivered by one agency.” (Community Group)

The Review heard that there is a lack of clarity between the responsibilities associated with regulation and stewardship. There was also a perception that some of the Commission’s roles and functions are fundamentally contradictory, with some stakeholders noting there may be tensions relating to trade-offs between regulatory posture and other objectives such as education and continuous improvement.

However, there was also strong support from stakeholders for integrating functions. For example, some stakeholders held the view that quality and complaints should be together and should share intelligence.

“The crux of the issue is continuous improvement. There is lots of reporting on what is wrong, but what can we learn from this and how can it help to improve things. These functions need to be together to drive risk approach”.
(Government advisory group)

Another key example is prudential functions. The Department retains high level policy around financial and prudential strategy and market segmentation but financial monitoring functions have been transferred to the Commission.¹⁰² The Department provided as an example of the pitfalls of looking at these issues in isolation, that sanctioning providers with financial issues could result in the Department having to intervene to prevent forced closure.

“The regulator should retain responsibility for prudential regulation because poor or deceptive financial management is often associated with poor quality performance.” (Peak body)

I see significant benefits in joining a range of functions in the context of the new regulatory principles of risk-based regulation. Systemic issues identified across the organisation, as well as the identification of patterns and trends will, with the right skills and tools, inform and shape intelligence-led targeted interventions. This joined-up approach better enables the Commission to build sector capability, which is a key goal.

On balance, therefore, I support the Commission retaining all existing functions. The recommendations around better integration of functions through structure and culture changes, enhanced leadership and internal governance arrangements will go a long way to addressing concerns that have been raised.

However, I am recommending that before any additional functions are added, bar those already agreed, the Commission should be supported to bed down recent new functions and given some time to lift internal capability and implement recommendations from this review.

¹⁰² This process commenced in July 2021 with risk identification and monitoring transferring on 1 July 2023 and the Bond guarantee scheme (pay Refundable Accommodation Deposits back where providers insolvent) transferring on 1 July 2024, subject to legislative changes through new Aged Care Act

Recommendation 5.11: No new functions should be added to the Commission before the commencement of the new Aged Care Act.

CHAPTER 6: RETAINING THE COMMISSION IN ITS CURRENT FORM

Under the Review Terms of Reference, I was tasked to ‘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 responsibilities’. This Chapter sets out the factors I have considered, and the position I have arrived at.

Structures for regulators

A number of policy and regulatory imperatives underpin the selection of appropriate governance structures and other arrangements for Australian Government public sector bodies. The OECD¹⁰³ notes that a regulator requires governance arrangements that ensure its effective functioning, preserve its regulatory integrity and delivers the regulatory objectives of its mandate. The framework identifies three main governance structures for independent regulators:

- strategic oversight by a Board with regulatory decisions delegated to Chief Executive Officer (CEO) and staff
- the Board makes most regulatory decisions, and
- an individual makes substantive regulatory decisions and delegates other decisions to staff.

All Commonwealth entities are governed by an accountable authority that is the person or group of persons that has responsibility and control over the entity’s operations. The accountable authority is designated in an Act or the Public Performance Public Governance Performance and Accountability (PGPA) Rule. In governing their entity, the accountable authority has oversight of decisions made to ensure proper use of resources, financial sustainability, the performance of the entity in achieving its purposes and the establishment of appropriate systems of risk management and internal control.¹⁰⁴

Corporate boards are generally, but not exclusively, reserved for commercially focused bodies that are legally and financially at arm’s length from government such as Australia Post. Department of Finance (DoF) Drafting Direction no 3.6 (86) notes that, in general: (a) a non-corporate statutory body will have a CEO and not a governing board (but may in some cases have an advisory committee); and (b) a corporate statutory body will usually have a separate governing board (and a CEO who may or may not be part of the governing board).

¹⁰³ [OECD 2014, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy](#)

¹⁰⁴ [Types of Australian Government Bodies | Department of Finance](#)

The OECD¹⁰⁵ notes that generally single member regulator models, where consolidation of decision-making power rests solely with the Commissioner, are considered to offer a lower level of accountability and strategic oversight compared with multi-member authorities.

A comparison of selected Australian regulators at Appendix E, shows a range of structures are used including corporate and non-corporate, with governing boards and without.

Guidance developed by DoF¹⁰⁶ recommends avoiding unnecessary proliferation of Government bodies, and that governmental functions and activities be allocated to, and performed by, existing government entities. If new entities are needed, then the preference is for new Commonwealth governmental authorities rather than new government-owned companies. DoF's guiding principle is to 'maximise efficiency by leveraging existing capabilities.'

6.1 Current arrangements

Structure of the Commission

The Commissioner is an accountable authority under section 33(2) of the *Aged Care Quality and Safety Commission Act 2018* (the Commission Act). The Commissioner and the staff of the Commission together constitute a Statutory Agency for the purposes of the *Public Service Act 1999*.

The Commission is an independent regulator and is "not subject to the direction on individual regulatory decisions by executive government".¹⁰⁷ The Commission Act provides for this under *section 22*

"A direction given by the Minister under subsection (1):

- (a) must be of a general nature only; and
- (b) must not relate to a particular aged care consumer, approved provider or service provider of a Commonwealth-funded aged care service."

A description of the Commission's legislative framework is set out in Chapter 2.

The Aged Care Quality and Safety Advisory Council

The Commission Act also establishes the Aged Care Quality and Safety Advisory Council (the Advisory Council). The Advisory Council does not exercise a governance function. The functions of the Advisory Council under *section 38* of the Act are:

¹⁰⁵ [OECD 2014, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy](#)

¹⁰⁶ Department of Finance, [Public Governance, Performance and Accountability Act 2013 \(PGPA Act\)](#)
[Commonwealth entities and companies](#)

¹⁰⁷ [OECD 2014, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy](#)

- (a) *on its own initiative or at the request of the Commissioner, to provide advice to the Commissioner in relation to the Commissioner's functions; and*
- (b) *at the request of the Minister, to provide advice to the Minister about matters arising in relation to the performance of the Commissioner's functions.*

Under section 40 of the Commission Act, the Advisory Council comprises a Chair and at least six, and not more than 10, other members. Advisory Council members are appointed by the Minister by written instrument on a part-time basis for a period not exceeding three years. A member may be reappointed (section 41). All members of the Advisory Council must have substantial experience/knowledge in a specified field relevant to aged care, a full list of which is provided in Section 41(3) under the Act.

The Minister may, by legislative instrument, give written directions to the Advisory Council about the performance of its functions. The Minister last made a request for advice under Section 38 (b) of the Commission Act on 1 October 2019. In response to this, the Advisory Council provided an options paper entitled *Regulatory powers of the ACQSC 2019*¹⁰⁸.

The Minister(s) have made other requests to the Advisory Council through discussions and correspondence and this forms part of the Advisory Council's agenda. The Advisory Council's strategic priorities are also influenced by the Statement of Expectations from the Minister.

The Minister is invited to attend Advisory Council meetings which occur six times per year, however, Ministers have historically attended infrequently¹⁰⁹. The Advisory Council writes to the Minister following every meeting to report on the matters discussed.

The Advisory Council must be consulted on the Commission's Corporate and Annual Operational Plans (as required under Part 6, Section 54).

In addition to the Commission Act, the Advisory Council is guided by a 'charter'¹¹⁰ that sets out matters not covered in the Act including remuneration; participation of ex-officio members; code of conduct, agenda setting and frequency of meetings.

6.2 The Royal Commission findings

In formulating my recommendations, I have carefully considered the findings of the Royal Commission (See Figure 1) which recommends the Commission be abolished and replaced by an independent Aged Care Safety and Quality Authority.

¹⁰⁸ [Commission Options Paper - Regulatory Powers of the ACQSC - Final 2019](#)

¹⁰⁹ Commission response to request for information, December 2022

¹¹⁰ Advisory Council Charter, April 2022 v1

Commissioner Briggs proposed a Government Leadership model, in which the roles of System Governor and Prudential Regulator would be undertaken by the Department, and the Quality Regulator role undertaken by an Aged Care Safety and Quality Authority (replacing the Commission). The previous Australian Government response (May 2021) accepted this recommendation, noting it would be informed by the 'outcomes of the capability review of the Aged Care Quality and Safety Commission to be undertaken in 2023'. I note that subsequent Government decisions resulted in a number of functions being transferred from the Department of Health and Aged Care to the Commission, including prudential functions (see Section 5.4).

The Royal Commission came to its recommendation to abolish the Commission¹¹¹, noting that it:

- is overly concerned with processes and not focused on outcomes
- is not responsive to the experiences of older people
- has a poor track record of enforcement, and
- has a reactive approach to monitoring and compliance

The Royal Commission placed these shortcomings in the context of the broader regulatory system which it claimed lacks transparency, accountability and responsiveness and overall has not provided assurance of high quality and safe care.

Commissioner Briggs' recommendation specifically states the new Authority should be overseen by a board, with a CEO responsible to the Authority.

6.3 Retain the Commission with a significantly enhanced Advisory Council

I am not convinced that the creation of a new authority and board is either necessary or advisable at this time. A new authority, regardless of its form or legal structure, would not necessarily address the systemic issues that are barriers to the Commission's capability as described throughout this report.

My recommendation is to retain the Commission's current legal structure as a statutory agency under the *Public Service Act 1999* and a listed entity under the Commission Act. This recommendation is contingent on the successful implementation of substantive reforms to the Commission, based around steps that the Commission has already commenced, those set out in this Review, as well as reforms to the broader regulatory environment, and in particular the introduction of a new Aged Care Act from July 2024.^a

¹¹¹ Described in Royal Commission [Final Report - Volume 2: The current system](#) p. 226

This approach is less disruptive and more efficient and cost-effective as it builds on the strengths of the current Commission and the work already underway. Moreover, a transition to a new structure in line with the Royal Commission findings would require significant additional resources, which would be better directed to strengthening the current Commission and addressing identified capability issues and resourcing deficits. Abolishing the Commission could also result in a raft of unintended consequences, including a high likelihood of setting back the reform agenda as a new structure is established and embedded.

I also do not agree that Commissioner Briggs' proposal to implement an executive governing board is warranted at this time. However, I strongly recommend the Aged Care Quality and Safety Advisory Council be significantly reformed to embed it as a stronger accountability mechanism, to ensure the Minister has access to independent advice about emerging issues and risks and to help drive the strategic direction of the Commission. The Advisory Council was established in a different context and must evolve to meet the current and future needs of the Commission. This proposal is detailed in Section 6.4 below.

If this approach is agreed, I recommend a review be undertaken in 2025, once the regulatory reform and new Aged Care Act are embedded, to assess whether sufficient progress has been made in implementing the recommendations of this Review, and whether the Advisory Council is operating optimally. This should be a role for the Inspector-General of Aged Care who is already mandated to review the implementation of the Royal Commission recommendations. I would expect that the Inspector-General would consider whether there is merit in considering whether to abolish the Commission and form a new Authority with a governing Board at that point.

Recommendation 6.1 The Commission to be retained in its current form.

Recommendation 6.2 The Aged Care Quality and Safety Advisory Council to be strengthened to provide stronger independence, accountability and oversight (see detail below in Section 6.4).

Recommendation 6.3 The Inspector-General for Aged Care to undertake a review in 2025 to assess progress on implementing the recommendations of this Review, and to consider whether there is merit in abolishing the Commission and forming a new Authority and governing board.

6.4 Aged Care Quality and Safety Advisory Council – a substantially enhanced role

My recommendation to retain the Commission in its current form is contingent on strengthening the Advisory Council to increase its effectiveness, independence and transparency. The Advisory Council should act as an independent check to the authority of the Commission. It should alert government to key risks and emerging issues, recommend remedies to these issues and help drive the strategic direction of the regulator.

Some proposals to strengthen the Advisory Council are dependent on changes to the Commission Act, which should occur as quickly as possible to enable full implementation of the proposals.

Review and refresh the Advisory Council membership

The Advisory Council comprises members who have a wealth of knowledge and experience in aged care, in areas such as clinical care, service delivery, research and advocacy. However, as set out in more detail in Section 5.6, the Commission has grown exponentially, its functions are expanding and its operating context is becoming increasingly complex as it continues to transition to risk-based regulatory practice. The Advisory Council must also expand and evolve.

As a matter of priority, the Minister should fill three vacant Advisory Council positions. Although members should continue to be appointed by the Minister, consideration could be given to advertising these and future vacancies to better target expertise and allow a wider pool of potential Advisory Council members to apply through a published process. This could improve transparency and provide additional legitimacy and trust in the Advisory Council.

Consideration should also be given to the outcomes of the Review of Public Sector Appointment Processes that forms part of the Public Service Reform Agenda¹¹². This Review is due to report in mid-2023 and will include a focus on: clarifying the role of public sector boards and how needed skills and standards are set; options for transparent processes to identify and recruit board members; how ministers are advised on selection of board members; and improving the diversity of board membership (including in terms of gender, CALD, First Nations and geographic representation).

In addition to ensuring advisory council vacancies are filled in a timely way, the Commission Act should be amended to increase the size of the Advisory Council from 6-10 members to 8-12 members. As the Commission grows, so too does the workload for advisory group members. The Commission Act amendments should also specify the appointment of a deputy Chair position to assist the Chair in their duties. This is likely to strengthen the leadership of the Advisory Council and provide additional support to the Chair.

I specifically recommend the Commission Act amendments expand the eligibility criteria for Advisory Council membership to address skills deficits and increase diversity of representation. The skills and experience that will be increasingly important going forward are expertise in:

- contemporary regulatory best practice, noting there is growing recognition of regulation as a distinct profession requiring specific capabilities.
- financial and prudential understanding, which will become increasingly important as the Commission takes a greater role in prudential oversight of the aged care provider sector, and

¹¹² [Review of Public Sector Board Appointments Processes | APS Reform](#)

- data analytics, a critical skill set as the regulatory approach increasingly relies on intelligence and risk profiling to set priorities for compliance activities.

Although members should continue to be appointed on the basis of their expertise to represent the public interest, as opposed to the interests of particular constituents, increasing the number of members will allow for a more culturally diverse membership. For example, we have heard that the Commission needs to lift its cultural awareness and capability. In particular it is critical to ensure the experiences of First Nations consumers, carers and communities can be appropriately reflected and culturally safe regulatory approaches are embedded.

Similarly, I have heard and agree that the Advisory Council would benefit from more members with provider experience to ensure that its advice is well informed about the issues that impact providers. In addition, as outlined below, it is important that Advisory Council members have direct access to stakeholders' views including providers.

Expand the functions of the Advisory Council

The Advisory Council is a significant asset for the Minister, and I believe the Government could be better leveraging its skills and expertise. The Minister should consider tasking the Advisory Council more regularly under the auspices of the Act. This will reinforce the Advisory Council's independence and legitimacy and thereby further empower the Council members.

The Ministerial Statement of Expectation for the Commission states "the Government expects to be fully informed in a timely manner about any emerging trends, issues or risks relevant to the Commission's operations, particularly those that may impact on Government operations or policies". As an independent accountability mechanism, the Advisory Council should routinely identify key risks in the regulatory context and make the Minister aware of significant issues on the horizon.

One barrier may be that the current Commission Act does not sufficiently empower the Advisory Council or gives it too vague a remit.

I consider that as part of the regulatory reform underway, the Advisory Council is provided with greater levels of freedom to convene and review any matters under the Commission Act and report to and advise the Minister (currently the Minister must request advice under the Act). It is recommended that the Advisory Council's role be expanded to include the function of strategic oversight of the Commission. The Commission Act should also be amended to specifically direct the Advisory Council to identify systemic performance issues and refer these matters to the Minister and/or the Inspector General of Aged Care (through the Minister) if appropriate.

The Advisory Council's role should be further clarified in a revision of the Advisory Council Charter. This could include reviewing its role in identifying any risks and issues pertaining to the Commission's performance of its regulatory functions that would extend to internal governance and workforce arrangements. To support this function, the Advisory Council should routinely have access to evidence-based reports such as staff vacancy rate/turnover, skills gaps and APS Employee Census survey results and be encouraged to participate in activities with Commission executives including strategic planning sessions. A Commission workforce representative should also be appointed as an ex-officio member by invitation of the Chair.

Greater independence from the Commission

Advisory Council members have reiterated their great respect for the Commissioner's leadership, but it is hard to see how the Council can adequately perform its role as an accountability mechanism for the Commission when it does not appear to be sufficiently independent from it. I understand that the agenda is largely set by the Commission based on a workplan developed "with the Council" but heavily influenced by the Commissioner and Commission. Ex-officio members of the Department and the Commission take part in all meetings as a matter of course.

I believe the Advisory Council lacks a distinguishable role that is separate from the Commission itself, noting the Commissioner is an ex-officio member of the Council and has a high degree of influence on the agenda, deliberations and advice.

I consider the Advisory Council should have a greater level of independence and autonomy and could be more effective in the quality and relevance of its advice.

I recommend actions to strengthen the independence and autonomy of the Advisory Council through a separate, independent Secretariat function focussing on agenda setting and development of advice.

Subject to its prescribed functions and powers, the Advisory Council should operate in the way it determines. The charter that guides its operation should be reviewed and revised in consultation with the Department and the Commission.

To preserve its independence, the Advisory Council should limit the attendance and participation of ex-officio members at its meetings. The Chair may invite ex-officio members to attend relevant parts of an Advisory Council meetings.

Recommendation 6.2: The Aged Care Quality and Safety Advisory Council to be strengthened to provide stronger independence, accountability and oversight, by the following actions:

- The Minister to immediately fill three Advisory Council vacancies as a matter of urgency.
- The Minister to directly task the Advisory Council to provide advice on issues of concern on a more regular basis.
- The Advisory Council appointments process to be reviewed to align with any relevant outcomes of Review of Public Sector Appointment Processes due to report in mid-2023.

- The Commission Act and other arrangements to be amended as required to:
 - a. Increase the number of Advisory Council members.
 - b. Designate a Deputy Chair role to assist the Chair.
 - c. Expand eligibility criteria for membership to include:
 - i. contemporary regulatory best practice
 - ii. financial and prudential understanding, and
 - iii. data analytics.
 - d. Improve the diversity of the Advisory Council.
 - e. Allow the Advisory Council to convene and review any matters under the Commission Act and report to the Minister, and specify the functions of:
 - i. strategic oversight of the Commission, and
 - ii. the identification of systemic performance issues and reporting of these to the Minister.
 - f. Strengthen the independence of the Advisory Council.

APPENDIX A – REVIEW TERMS OF REFERENCE

Aged Care Quality and Safety Commission Independent Capability Review

TERMS OF REFERENCE

Purpose

In line with recommendations 10 and 104 from the Royal Commission into Aged Care Quality and Safety, an independent review of the capabilities of the Aged Care Quality and Safety Commission (Commission) is to be undertaken.

The capability review will support the aged care regulator to deliver safe and high-quality care for older Australians now and into the future. The review will identify improvements that would support the aged care regulator to undertake strong regulatory activities, embed best practice, increase accountability and to enhance its quality and prudential activities.

The full spectrum of regulatory functions will be considered, across both home care and residential aged care, now and into the future. This will include all activities that ensure the safety and protection of older Australians, risk monitoring and management, quality monitoring and reviews, compliance intervention, accreditation, approval and audit, financial and compliance reporting, complaints management and resolution, education – of aged care consumers and providers, and engagement/communication with the community.

The review will take into consideration the Australian Government priorities and reform activities recently delivered, planned or underway.

In examining best practice for the aged care regulator, regard will be given to relevant legislation¹¹³, legal obligations, aged care quality responsibilities and standards and the roles of all stakeholders (older Australians, providers, and all levels of government) to deliver a transparent aged care experience that our community expects, and older Australians deserve.

Methodology and timing

The review will be undertaken by an independent and appropriately skilled person who has experience in the public sector and regulatory reform (selected in line with Department of Health and Aged Care Procurement Standards). The reviewer will be supported by a dedicated support team comprising appropriately skilled individuals.

A preliminary report is to be delivered to Government at the mid-way point of the review. The final review including recommendations, and a summary of findings must be reported back to Government within six-months of commencement.

Where required, the Department of Health and Aged Care and the Commission will facilitate access to information and evidence and other logistical support.

¹¹³ Including but not limited to the *Aged Care Quality and Safety Commission Act 2018*, the *Aged Care Quality and Safety Commission Rules 2018*, the *Aged Care Act 1997*, the *Aged Care Act 1997* objects and principles and the *Public Governance, Performance and Accountability Act 2013*.

Scope

The review is to consider:

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 (CALD) 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.

Additional considerations

In undertaking the review, regard should be given to:

- 1. Progress in the Commission's performance since the previous iteration of the Commission and

the Quality Standards.

- 2. Previous reviews of the Commission and similar entities, including:
 - a. [Review of National Aged Care Quality Regulatory processes, Australian Law Reform Commission \(Report 131\) Elder Abuse - A National Legal Response, Independent Commissioner against Corruption report on Oakden](#) and;
 - b. [Independent Inquiry into events at Earle Haven Retirement Village](#) and [Joint Standing Committee releases report on NDIS Commission.](#)
- 3. Similar International entities, including:
 - a. [UK Care Quality Commission](#) and;
 - b. [ISQua - The International Society for Quality in Health Care.](#)
- 4. Best practice guidelines and models for regulatory bodies (national and international), including:
 - a. [OECD Best Practice Principles on the Governance of Regulators - OECD](#) and;
 - b. [Principles of best practice regulation | Department of the Prime Minister and Cabinet \(pmc.gov.au\).](#)
- 5. Lessons learned from sector innovations and other social care regulators, including opportunities to align and promote consistency of practice (e.g., digitisation of health services).
- 6. The legislative reforms planned or underway, as part of the new Aged Care Act.
- 7. The impact of Government priorities and reform activities (already delivered, planned or underway) to implement recommendations from the Royal Commission into Aged Care Quality and Safety, including potential/expected future interactions and impact on the Commission.

8. The role of the aged care regulator in rebuilding confidence of the community in the aged care regulator and the aged care system more broadly.
9. The role and responsibility of the Commission in working with the Commonwealth Government Department of Health and Aged Care and the Australian Commission on Safety and Quality in Health Care (ACSQHC) to regulate aged care, including clarifying responsibilities and legislation impacts across the sector, state and federal departments and health agencies.

Consultation

Noting the extensive stakeholder consultation undertaken as part of the Royal Commission into Aged Care Quality and Safety, the review should consider relevant and targeted consultation with:

1. Older people receiving aged care services, their families, carers and advocates and peak bodies.
2. Aged care workers, relevant unions, and professional bodies.
3. Aged care providers and their peak bodies.
4. The Council of Elders, the National Aged Care Advisory Council, the Aged Care Quality and Safety Commission, the Aged Care Quality and Safety Advisory Council and the Department of Health and Aged Care.
5. Specific diversity groups including Aboriginal and Torres Strait Islander people, veterans and the LGBTIQ communities.
6. Other regulators in Australia, including social care regulators and the Australian Commission on Safety and Quality in Health Care.
7. Relevant ministers and officials from the Commonwealth and state and territory governments.

APPENDIX B - REVIEW CONSULTATIONS AND PUBLIC SUBMISSION PROCESS

Review consultations

The review Terms of Reference at Appendix A identified 7 categories of stakeholders to be consulted through targeted consultations, including:

1. Older people receiving aged care services, their families, carers and advocates, and peak bodies.
2. Aged care workers, relevant unions, and professional bodies.
3. Aged care providers and their peak bodies.
4. The Council of Elders, the National Aged Care Advisory Council, the Aged Care Quality and Safety Commission (the Commission), the Aged Care Quality and Safety Advisory Council and the Department of Health and Aged Care (the Department).
5. Specific diversity groups including Aboriginal and Torres Strait Islander people, veterans and the LGBTIQ+ communities.
6. Other regulators in Australia, including social care regulators and the Australian Commission on Safety and Quality in Health Care.
7. Relevant ministers and officials from the Australian Government and state and territory governments.

All groups were invited to participate in consultations either individually or as part of a group apart from state and territory governments, as they were invited to provide a written submission to the review.

The consultation strategy for the review included:

- targeted consultations with aged care consumers and their families, carers, advocates and other representatives, aged care providers, and other stakeholders, where possible via existing or including advisory bodies and reference groups convened by the Department and the Commission
- deep dives, focus groups and interviews with relevant Departmental line areas
- deep dives, focus groups and interviews with the Commissioner and Commission staff, including in relation to ICT issues
- consultations with other Australian regulators, and
- discussions as needed with other Australian public service departments.

In the period from October 2022 to February 2023 the review conducted targeted consultations with a total of 93 individuals and groups including:

- 39 with the Commission
- 24 with the Department
- 18 with consumer and provider representative groups
- 3 with unions representing the aged care workforce, and

- 9 with other regulators and Commonwealth Government departments and agencies.

Review public submission process

A public submission process to enable interested individuals and groups to share their views on the capability of the Commission, was conducted through the Department's Consultation Hub. The submission process was publicised through the Department's Aged Care Engagement Hub and MyAgedCare Newsletter, and promoted by the review team during stakeholder consultations.

While the public submission process closed on 2 December 2022, late submissions were also accepted.

A total of 62 submissions were received from:

- individual consumers, consumer representatives and other interested parties
- individual providers
- consumer and provider peak bodies
- unions, and
- state and territory governments.

All submissions were treated in accordance with the confidentiality arrangements included on the Department's Consultation Hub for this review. While unattributed quotes from some submissions have been included in the review report, no material has been used from submissions where the submitter has requested full confidentiality.

APPENDIX C – SUMMARY OF GROSVENOR FINAL REPORT

Background

In March 2021, the Commission engaged Grosvenor Public Sector Advisory (Grosvenor) to identify the organisational capabilities required to operate as a contemporary leading practice regulator and develop recommendations for the Commission to optimise its performance and impact.

This project involved the following key activities:

- development of a Capability Architecture, comprised of four groups and 37 capabilities, that identifies and articulates the current and future organisational capabilities that will be required by the Commission (see diagram at the end of Appendix C)
- independent assessment of the current and future maturity of capabilities within the Commission and identify where there may be capability gaps
- a benchmarking exercise to understand how other regulators have established and developed their organisational capability, and
- prioritisation of effort in uplifting the Commission's capabilities to meet current and future requirements.

Grosvenor delivered its final report, *Optimising capability to meet current and future challenges*, to the Commission in December 2021.

Key Findings and conclusions

- *Finding 1:* The maturity assessment showed uplift is required against all 37 identified capabilities. Gaps across capabilities varied, with the greatest gaps currently in the Strategic and Enterprise-wide capabilities. Regulatory and Engagement capabilities had less significant gaps, however capabilities in these groups are regarded as critical for world leading regulators with holistic, consumer/person-centric models of care, and can influence uplift based on interactions and dependencies with other capabilities.
- *Finding 2:* There is appetite across the Commission to uplift capabilities to achieve the desired maturity levels and the Commission is working to strategically prioritise the uplift, leveraging the interaction of capabilities to drive complementary uplift.
 - *Conclusion 1:* Maturity uplift is required across all capabilities in the Commission's Capability Architecture through future uplift initiatives.
 - *Conclusion 2:* Enterprise-wide capabilities provide a foundation for efficiency and quality, enabling the effective delivery of external facing capabilities such as those related to regulation.
- *Finding 3:* While internal communication was acknowledged as being positive in feedback from Commission staff and the APS Employee Census results, the capability assessment based on the Commission's National Leadership Group (NLG) insights indicated that there was a need for further uplift to both internal and external communications. Priorities associated with world leading practice include strategically planned external communications and media relations for

proactively managing relationships, building public confidence and trust, and enhancing the reputation and credibility of the regulator. Feedback from staff highlighted that the Commission has more work to do in this area.

- *Conclusion 3:* Internal communications will continue to be important for embedding the capabilities, achieving the Commission's aspirations and supporting the reform.
- *Conclusion 4:* Engagement with the sector and the public is essential to define, clarify and promote the role of the Commission. Proactive and strategic management of matters with the potential to arouse media interest will help build public trust and enhance the Commission's reputation as a regulator.
- *Finding 4:* Uplift of organisational transformation and change management capabilities will be essential in the implementation of the Capability Architecture and to support future whole of Commission reforms.
 - *Conclusion 5:* Transformation and Change Management capabilities are integral to how the capability uplift will be achieved and therefore, require heightened focus by the Commission. The Commission's recently established Transform Reform Program Office will be integral to development of these capabilities.
- *Finding 5:* There is a discernible shift in both Australian and international regulatory practice away from enforcement to the notion of 'constructive enforcement'¹¹⁴.
- *Finding 6:* Whilst seeking a more collaborative relationship with stakeholders, world leading regulators are always prepared to use the full extent of their regulatory powers to elicit compliance with care quality and safety standards.
 - *Conclusion 6:* A transition to 'constructive enforcement' to align with world-leading regulatory practice requires staff with 'soft'¹¹⁵ skills to work with stakeholders to optimise outcomes, whilst maintaining the authority to enforce quality standards.
- *Finding 7:* The benchmarking exercise revealed that many regulators are not necessarily aware of their organisational capabilities, instead focussing on manifesting change and cultural renewal through a People Capability Framework.
 - *Conclusion 7:* People capability is a significant contributor to organisational capability and People Capability Frameworks can provide a link between the skills and contribution of individuals to organisational capability and achievement of organisational objectives. When both frameworks are developed and implemented, an organisation is at the forefront of world leading regulatory practice and human resource management.

¹¹⁴ A constructive compliance approach recognises the importance of providing all participants within a regulatory framework with comprehensive information and education about their duties and responsibilities. It balances the use of positive motivators and deterrence measures to improve outcomes. *Aged Care Workforce Industry Council Submission to the Independent Capability Review of the Aged Care Quality and Safety Commission*. 2 December 2022 https://acwic.com.au/acwic_news/submission-to-the-independent-capability-review-of-the-aged-care-quality-and-safety-commission/

¹¹⁵ Types of 'soft' skills include curiosity, initiative, persistence, adaptability, leadership and social or cultural awareness. <https://www.open.edu.au/advice/insights/what-are-soft-skills-and-why-are-they-important>

- *Finding 8:* Along with the implementation of recommendations from the Royal Commission, the ecosystem remains dynamic with proposed changes to the regulation of care for older Australians, veterans and people living with disabilities which may see greater alignment of regulatory approach and oversight.
 - *Conclusion 8:* The Commission has an opportunity to build its profile as a world leading regulator and lead the way in best practice, including how to balance regulation with engagement to drive desired outcomes in the sector to lead reform with confidence. Strategic external communications will help to enhance the Commission's ability to influence policy and decision-makers.

Recommendations

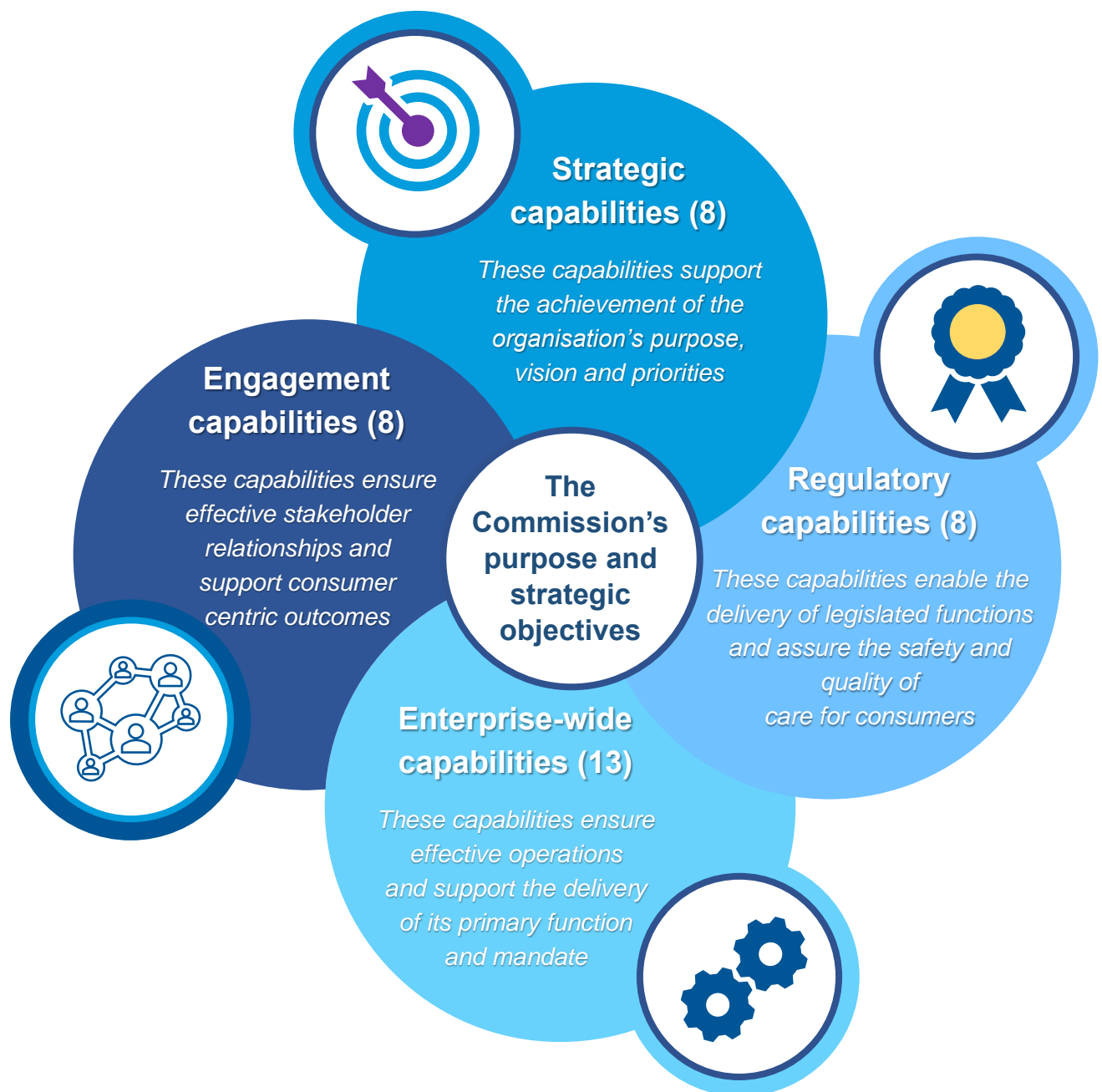
Capability architecture recommendations

- Implement the Capability Architecture into the Commission through the following activities:
 - Agree on the purpose and use of the Capability Architecture throughout the Commission's operations
 - Assign responsibility to the Reform and Transformation Project Office (RTPO) for embedding the Capability Architecture into the Commission and driving capability uplift
 - Determine the approach and sequence of actions to capability uplift through the development of a capability uplift Action Plan
 - Embed the Capability Architecture through effective change management
 - Apply Grosvenor's approach to capability uplift to support the development of capability maturity, and
 - Maintain the Capability Architecture to ensure it remains relevant and conduct 12-monthly reviews of capability maturity.

Enabling recommendations

- Develop a Workforce Capability Framework and an appropriate Workforce Plan.
- Reflect organisational capability and priority initiatives in corporate planning and organisational performance reporting.
- The Commission becomes an active member of regulatory excellence bodies and engages with professional regulatory learning and development opportunities through the Australian Public Service (APS) Academy.
- Develop a positioning strategy, that embraces the notion of constructive enforcement, emphasising organisational capability in line with the Commission's strategic objectives and ambition to influence stakeholder and public perceptions of the Commission.
- Consider using the capability architecture as a valuable lens to review and refine the Commission's operating model and structure.

Commission Capability Architecture



Source: ACQSC FINAL REPORT: Optimising capability to meet current and future challenges Prepared by Grosvenor Public Sector, 16 December 2021 (unpublished)

APPENDIX D - COMMISSION FUNCTIONS AT MARCH 2023

The Commission Act sets out an expansive set of functions, some of which reflect specific regulatory requirements or programs while others have a more over-arching remit. The full list of functions and an explanation where required follows:

- **Protecting and enhancing the safety, health, well-being and quality of life of aged care consumers.**
- **Approving providers to deliver aged care services** – providers of residential aged care, home care and flexible care must be approved by the Commission to receive Australian Government subsidies to provide aged care. NATSIFLAC and CHSP providers do not require legislative approval because they provide care under grant agreements with the Department of Health and Aged Care.
- **Ensuring approved providers comply with their responsibilities under the Commission Act and Aged Care Act** - Once approved, all providers are required to meet the Aged Care Quality Standards (the Quality Standards) and other provider responsibilities detailed in the legislation and/or grant agreements. All providers are also subject to ongoing monitoring and assessment by the Commission.

There are more than 300 provider responsibilities under the legislation. Recent reforms have introduced two new, high-profile responsibilities, under the Quality of Care Principles 2014¹¹⁶, relating to serious incidents and restrictive practices.

- The Serious Incidents Response Scheme (SIRS) requires providers to have an effective incident management system (IMS) in place and to use this to continuously improve their management and prevention of incidents. Providers are also required to notify the Commission, within prescribed timeframes, when reportable incidents occur.¹¹⁷
 - Providers are required to satisfy a number of conditions before and during the use of a restrictive practice. These include documenting what alternatives have been considered; regular monitoring of the consumer and regular review of the practice when a restrictive practice is used; and the development of a behaviour support plan for every consumer where a restrictive practice is being considered or applied. The use of restrictive practices is assessed under a number of the Quality Standards and inappropriate use of restrictive practices is reportable under SIRS.¹¹⁸
 - The Commission has the power to take regulatory actions when dealing with SIRS notifications and may take enforceable regulatory actions if non-compliance is identified with any provider responsibility.
- **Imposing sanctions on approved providers and lifting sanctions** – Where an approved provider has not complied with one or more of the provider responsibilities detailed in the legislation and has failed to remedy the non-compliance in an agreed timeframe, the Commission can impose a sanction. Different sanctions may be imposed depending on the circumstances of the non-

¹¹⁶ [Quality of Care Principles 2014 \(legislation.gov.au\)](https://www.legislation.gov.au/Details/2014/00506)

¹¹⁷ [An introduction to the SIRS | Aged Care Quality and Safety Commission](#)

¹¹⁸ [Minimising the use of restrictive practices | Aged Care Quality and Safety Commission](#)

compliance. Sanctions include revocation of approved provider status, loss of Commonwealth subsidies for new persons receiving care, or revocation of allocated places. Certain sanctions may be lifted on application by the approved provider.¹¹⁹

- **Promoting the provision of quality care and services by approved providers and service providers.**
- **Consumer engagement functions** – The Commission is required to develop best practice models for providers to use in engaging their consumers in joint planning and delivery of care and to promote these models to providers. The models must be developed in consultation with aged care consumers and their representatives.
- **Education functions** – The Commission is required to provide information and education about our functions to providers, consumers, their representatives and the general public. The Commission is also required to collect, correlate, analyse and disseminate information about its functions.
- **Complaints functions** – The Commission is required to deal with complaints and information about a provider's responsibilities under the Aged Care Act and/or grant agreements.
- **Code functions** – The Code of Conduct for Aged Care applies to providers of residential aged care, home care and flexible care. Approved providers, their governing persons and aged care workers must comply with the Code. NATSIFAC and CHSP providers and staff are not required to comply with the Code. The Commission has a range of powers and tools to deal with breaches of the code, including requesting additional information or documentation, requiring a provider to take a specific action, undertaking an investigation or requiring the provider to undertake an investigation and issuing a banning order which stops or restricts a person from being involved in the provision of aged care.¹²⁰
- **Regulatory functions** – The Commission's regulatory functions include:
 - Accrediting residential aged care services and flexible care services through which STRC is provided in a residential aged care setting. Services must be accredited against the Quality Standards to receive Australian Government subsidy. Commencing services generally receive 12 months accreditation following a desk-based assessment. Re-accreditation requires an onsite audit. Services can receive up to 3 years re-accreditation.
 - Conducting quality reviews of home care services, CHSP services, NASTIFAC services and flexible care services through which STRC is provided in a home. Quality reviews require an onsite audit and must be conducted every three years.
 - Monitoring the quality of care and services provided by all services. This includes performance assessments and monitoring contacts to monitor service provision between accreditation/ re-accreditation audits and quality reviews (these may be conducted on or off-site), review audits of

¹¹⁹ [Aged Care Quality and Safety Commission - Glossary | Aged Care Quality and Safety Commission](#)

¹²⁰ [PowerPoint Presentation \(agedcarequality.gov.au\)](#)

residential services where serious issues are identified in relation to the Quality Standards (these must be conducted on site) and requiring plans for continuous improvement where particular requirements are not met.

- Registering quality assessors against requirements set out in the Commission Rules. Assessors must be registered to perform functions and exercise particular powers under the Commission Act, including completing undertaking accreditation audits and quality reviews.
- **Reconsidering and reviewing certain decisions made under the Commission Act.**
- **Any other functions conferred on the Commissioner in the Act or Rules.**
- **If the Commissioner considers it appropriate, seek and consider clinical advice that is relevant to the performance of any of its functions.**
- **At the Minister's request, advise the Minister on any of the Commission's functions.**¹²¹

¹²¹ [Aged Care Quality and Safety Commission Act 2018 \(legislation.gov.au\)](https://www.legislation.gov.au/idx/asx/links.xhtml?act=12018001&disposition=as-is)

APPENDIX E – COMPARISON OF SELECTED NATIONAL REGULATORS

	Aged Care Quality and Safety Commission	National Disability Insurance Scheme Quality and Safeguards Commission	Australian Skills Quality Authority	Australian Prudential Regulation Authority	Australian Commission on Safety and Quality in Healthcare
Overview	<ul style="list-style-type: none"> • End to end regulator of Commonwealth subsidised aged care. • Mandated to protect and enhance the safety, health, wellbeing and quality of life of aged care consumers and to promote the provision of quality care and services by approved providers of aged care services, and providers of Australian Government-funded aged care services. 	<ul style="list-style-type: none"> • Improves the quality and safety of NDIS supports and services. 	<ul style="list-style-type: none"> • Regulator for all registered training organizations (RTOs) in Qld, SA, Tas, AC, NT and NSW. in VIC and WA provided that: <ul style="list-style-type: none"> – The RTO offers any course within ACT, NSW, NT, QLD, SA and TAS, or – If the RTO chooses to offer courses to international students who have chosen to study in Australia or on student visas. 	<ul style="list-style-type: none"> • Supervises institutions across banking, insurance and superannuation and promotes financial system stability in Australia. • Mandated to protect the Australian community by establishing and enforcing prudential standards and other components of the prudential framework to maintain the safety and soundness of the institutions it regulates. 	<ul style="list-style-type: none"> • Leads and coordinates national improvements in the safety and quality of health care.

	Aged Care Quality and Safety Commission	National Disability Insurance Scheme Quality and Safeguards Commission	Australian Skills Quality Authority	Australian Prudential Regulation Authority	Australian Commission on Safety and Quality in Healthcare
Functions	<ul style="list-style-type: none"> • Approves providers of aged care. • Develops best practice models for providers, in consultation with aged care consumers • Regulates aged care services according to the Rules by accrediting, conducting quality reviews, monitoring the quality of care and services, and registering quality assessors. • Ensures compliance by approved providers with their aged care responsibilities. • Deals with complaints made, or information given to the Commissioner, in accordance with the Rules about an approved provider's responsibilities under the Aged Care Act 1997 or funding agreement. • Imposes and lift sanctions. 	<ul style="list-style-type: none"> • Responds to concerns, complaints and reportable incidents relating to NDIS participants • Registers and regulates NDIS providers and oversees NDIS Code of Conduct and NDIS Practice Standards • Monitors compliance against the NDIS Code of Conduct and NDIS Practice Standards, including undertaking investigations and taking enforcement action • Monitors the use of restrictive practices within the NDIS with the aim of reducing and eliminating such practices • Oversees implementation of nationally consistent NDIS worker screening check, in partnership with states and territories 	<ul style="list-style-type: none"> • Regulates: <ul style="list-style-type: none"> – training providers that deliver VET qualifications and courses to students in Australia or offer Australian qualifications overseas – providers that deliver VET courses to people who are living in Australia on student visas – certain providers that deliver English Language Intensive Courses for Overseas Students. • Accredits VET courses to ensure they meet nationally approved standards, based on industry, enterprise, education, legislative and community needs. • Assures training packages to provide compliance assessment 	<ul style="list-style-type: none"> • Establishes a comprehensive framework of prudential standards and practice guides. • Licenses banking, insurance and superannuation businesses to operate in Australia. • Supervises operating business to ensure that under all reasonable circumstances they keep their financial promises made to their beneficiaries. • Identifies prudential risks proactively and takes action to prevent harm before it occurs. 	<ul style="list-style-type: none"> • Formulates standards, guidelines and indicators relating to healthcare safety and quality matters • Advises health ministers on national clinical standards • Promotes, supports and encourages the implementation of these standards, and related guidelines and indicators • Monitors the implementation and impact of the standards • Promotes, supports and encourages the implementation of programs and initiatives relating to healthcare safety and quality • Formulates national schemes for the accreditation of organizations that provide healthcare services, and relate to healthcare safety and quality

	Aged Care Quality and Safety Commission	National Disability Insurance Scheme Quality and Safeguards Commission	Australian Skills Quality Authority	Australian Prudential Regulation Authority	Australian Commission on Safety and Quality in Healthcare
	<ul style="list-style-type: none"> Provides education and information about matters relating to its functions to aged care providers, consumers and public 	<ul style="list-style-type: none"> Provides guidance and best practice information to NDIS providers on how to comply with their responsibilities Focuses on education, capacity building and development for people with disability, NDIS providers and workers Facilitates information sharing with the National Disability Insurance Agency, state and territory authorities and other Commonwealth regulatory bodies. <p>The NDIS Commission does not conduct audits against the NDIS Practice Standards - this is done by approved quality auditors.</p>	<p>of training products prior to recommending for endorsement.</p>		<ul style="list-style-type: none"> Publishes reports and papers relating to healthcare safety and quality <p>The ACQSHC does not conduct accreditation (this is conducted by an independent accrediting agency approved by the Commission) or deal with complaints (this is done by state-based health care complaints commissions and AHPRA and practitioner bodies where the complaint refers to an individual practitioner).</p>
Regulatory approach/ focus	<ul style="list-style-type: none"> Current regulatory approach moves from cooperative and persuasive approaches to more targeted and 	<ul style="list-style-type: none"> Strategic leadership values and prioritises the voices of participants as 'the 	<ul style="list-style-type: none"> Seeking to shift regulatory posture, away from input and compliance controls to a focus on self- 	<ul style="list-style-type: none"> Relationship-based supervision model to enhance its regulatory influence through close working relationships – 	<ul style="list-style-type: none"> Employs a partnership model (patients, carers, clinicians, Australian, state and territory health

	Aged Care Quality and Safety Commission	National Disability Insurance Scheme Quality and Safeguards Commission	Australian Skills Quality Authority	Australian Prudential Regulation Authority	Australian Commission on Safety and Quality in Healthcare
	<p>interventionist regulatory tools in response to potential or actual risk of harm to consumers.</p> <ul style="list-style-type: none"> Seeking to move to responsive regulation which integrates both 'compliance regulation' and 'aspirational regulation'. 	<p>makers of their own destinies.'</p> <ul style="list-style-type: none"> Strategic partnerships used to co-design the regulatory framework, grounding regulation in quality and safety rather than compliance, and resulting in a sense of co-ownership. 	<p>assurance and excellence in training outcomes.</p> <ul style="list-style-type: none"> Provider self-assessment is an important regulatory tool and data source. Significant internal reform to regulatory practice underway, supporting broader reform in the VET sector. 	<p>described as an ex-ante (pre-emptive) approach to risk management.</p> <ul style="list-style-type: none"> Has shifted from 'enforcement as a last resort' to 'constructively tough enforcement', signaling to stakeholders it is ready and willing to use enforcement options to ensure compliance. 	<p>systems, private sector, and healthcare organisations) to lead and coordinate national improvements in the safety and quality of health care.</p>
Funding source	<ul style="list-style-type: none"> Australian government funded. Cost recovery of some functions. 	<ul style="list-style-type: none"> Australian government funded. Provider application and registration is free, but providers must pay for audit against the NDIS Practice Standards. 	<ul style="list-style-type: none"> Australian government funded. Cost recovery of some functions. 	<ul style="list-style-type: none"> Australian government funded. Cost recovery of some functions. 	<ul style="list-style-type: none"> Jointly funded by Australian and state and territory governments.
Entity type	<ul style="list-style-type: none"> Independent statutory authority Non-corporate Commonwealth entity 	<ul style="list-style-type: none"> Independent statutory authority Non-corporate Commonwealth entity 	<ul style="list-style-type: none"> Independent statutory authority Non-corporate Commonwealth entity 	<ul style="list-style-type: none"> Independent statutory authority Non-corporate Commonwealth entity 	<ul style="list-style-type: none"> Independent statutory authority Corporate Commonwealth entity
Accountability authority	<ul style="list-style-type: none"> The Commissioner 	<ul style="list-style-type: none"> The Commissioner 	<ul style="list-style-type: none"> National VET Regulator, also known as the Chief Executive Officer 	<ul style="list-style-type: none"> Executive Board 	<ul style="list-style-type: none"> Commission Board

	Aged Care Quality and Safety Commission	National Disability Insurance Scheme Quality and Safeguards Commission	Australian Skills Quality Authority	Australian Prudential Regulation Authority	Australian Commission on Safety and Quality in Healthcare
Enabling legislation and other key govt related details	<ul style="list-style-type: none"> Aged Care Quality and Safety Commission Act 2018 Statutory Agency under the Public Service Act 1999 Listed entity under enabling legislation 	<ul style="list-style-type: none"> National Disability Insurance Scheme Act 2013 Statutory Agency under the Public Service Act 1999 Listed entity under enabling legislation 	<ul style="list-style-type: none"> National Vocational Education and Training Regulator Act 2011 Statutory Agency under the Public Service Act 1999 Listed entity under enabling legislation 	<ul style="list-style-type: none"> Australian Prudential Regulation Authority Act 1998. APRA can engage staff under this Act - it does not engage staff under the Public Service Act 1999. Body corporate status but is prescribed as a non-corporate Commonwealth entity Listed entity under enabling legislation 	<ul style="list-style-type: none"> National Health Reform Act 2011 Statutory Agency under the Public Service Act 1999
Enablers for better practice	<ul style="list-style-type: none"> Grosvenor identified regulatory focus is shifting away from enforcement to changing the behaviours of regulated entities. Grosvenor developed a capability architecture comprised of 37 capabilities categorized into 4 groups – Strategic, Regulatory, Enterprise Wide and Engagement. Grosvenor identified uplift was required in all 37 identified 	<p>The NDIS Quality and Safeguards Commission’s regulatory approach is built on five principles:</p> <ul style="list-style-type: none"> Leading the way - communicating, anticipating, and proactively responding to support people with a disability. Building trust - sharing information in a transparent, confident, and effective way to protect and safeguard people with a disability. Keep learning – continuously investing in our development 	<p>ASQA is committed to best practice regulation based on three principles:</p> <ul style="list-style-type: none"> Continuous improvement and building trust – adopting a whole of system perspective and continuously improving performance, capability and culture to build trust and confidence in the regulatory settings. Risk based and data driven – managing risk proportionately and maintaining essential safeguards while minimising regulatory 	<ul style="list-style-type: none"> APRA employs a supervision led approach to identifying and responding to risks and vulnerabilities within the financial system. APRA describes its regulatory approach as forward-looking, risk-based and outcomes-focused – addressing potential problems before they adversely impact those it is tasked to protect, assisting in minimising regulatory burden and 	<p>ACQSHC describes itself as:</p> <ul style="list-style-type: none"> being an authoritative voice taking a strategic whole-of-system approach using evidence as a foundation for action harnessing national knowledge and expertise driving a quality improvement culture using data effectively reporting meaningful information publicly empowering consumer action

	Aged Care Quality and Safety Commission	National Disability Insurance Scheme Quality and Safeguards Commission	Australian Skills Quality Authority	Australian Prudential Regulation Authority	Australian Commission on Safety and Quality in Healthcare
	capabilities. Gaps across capabilities varied, with the greatest gaps apparent in the Strategic and Enterprise-wide domains.	<p>and focused on building knowledge and learning new skills to help use evolve and improve.</p> <ul style="list-style-type: none"> • Bringing insight - using data, technology and collaboration to identify patterns, act early, understand what people with a disability need and influence the Scheme. • Staying connected – working together as part of the NDIS to learn, influence and adapt for regulatory impact 	<p>burden and leveraging data and digital technology to support those they regulate to comply and grow.</p> <ul style="list-style-type: none"> • Collaboration and engagement - focusing on transparent and responsive communication and implementing regulations in a modern and collaborative way, in partnership with the sector and stakeholders. 	<p>facilitating competition and innovation.</p> <ul style="list-style-type: none"> • APRA references leveraging and building on its distinctive strengths including its people and values; supervision insights; system-wide perspective; and strong suite of regulatory powers. • APRA commits to continuing to invest in delivering a modern and flexible working environment for its people to support hybrid working. 	<ul style="list-style-type: none"> • enabling and engaging clinicians • leading collaboration, cooperation, and integration • influencing funding, regulation and education • fostering use of safe digital technology and artificial intelligence • guiding transparency and accountability • supporting research and innovation • acknowledging and actively managing risk • embedding safety and quality into systems and processes • encouraging development of learning organisations • creating networks of excellence.

References:

Grosvenor, *Optimising capability to meet current and future challenges*, 16 December 2021

[ASQA Annual Report 2021–22](#) and [Australian Skills Quality Authority \(ASQA\)](#)

[APRA Corporate Plan 2022-23](#) and [Welcome to APRA | APRA](#)

[NDIS Quality and Safeguards Commission, High Level Regulatory Approach, 30 January 2023](#) and [Home | Making the NDIS safe \(easyread.com.au\)](#)

APPENDIX F - COMPARISON OF INTERNATIONAL HEALTH AND SOCIAL CARE REGULATORY SYSTEMS

	England	Canada	New Zealand (NZ)
System Overview	<ul style="list-style-type: none"> • Aged care is one component of a health care system comprising care needs across the lifespan rather than by age or disability. • Care delivery is moving to an integrated model. Collaboration across and between disciplines, providers and local government is an important driver. • Responsibility for delivery sits with local government to ensure tailored service provision. • Responsibility for regulation of health care standards rests with three separate entities <ul style="list-style-type: none"> – NHS England oversees Clinical Commissioning Groups (CCGs) and directly commissioned services (e.g., offender and military healthcare) and undertakes an annual review of all CCGs. – NHS Improvement oversees NHS foundation trusts and NHS trusts which provide secondary care Acute hospital care, Ambulance, community care (home visits, minor injuries and outpatients) and Mental Health care. 	<ul style="list-style-type: none"> • The phrase Long-Term Care (LTC) is used to include nursing homes and residences for senior citizens. LTC consumers include people over 18 with disabilities who require assistance with daily living. The majority of LTC occurs in the care recipients' homes. • The federal government is responsible for setting and administering national standards for the health care system through the <i>Canada Health Act 1984</i>. These standards are essentially operational and do not address standards for quality care. • Provincial and territorial governments are responsible for the management, organisation and delivery of health care services for their residents. All but one jurisdiction has legislation in place for LTC. • The regulation of LTC in Canada is under scrutiny, with calls for an agreed set of national standards, a senior-centric focus and a co-design approach to the delivery of care. 	<ul style="list-style-type: none"> • Aged care services are part of a broader health and disability services system, which focuses on quality citizen-centric outcomes. • Health and disability services may be owned by District Health Boards (DHBs) or private entities including NGOs, Māori and Pacific providers and may be not for profit or for profit. • The Ministry of Health (the Ministry) is responsible for funding, monitoring and performance and regulation of health and disability services including all those relating to aged care. Regulatory roles and responsibilities are spread across an additional five entities: <ul style="list-style-type: none"> – The Health Quality and Safety Commission (HQSC – see below) – The Aged Care Commissioner (see below) – Healthcert, an entity within the Ministry which administers and enforces legislation relating to reasonable levels of services in various facilities including rest homes and disability care homes. – Designated Audit Agencies, which undertake audits on behalf of the Ministry. – DHBs, which have responsibility, under NZ's <i>Public Health and Disability Act 2000</i>, for primary and secondary health service integration and delivery at the local level.

	England	Canada	New Zealand (NZ)
	<ul style="list-style-type: none"> – The Care Quality Commission (CQC) plays a key role in regulating home, residential and community care providers (see below). 		<p>DHBs focus on inclusive service delivery and eliminating health disparities among population groups.</p> <ul style="list-style-type: none"> – Chief Ombudsman, which examines and monitors the condition and treatment of people detained in health and disability facilities.
Key regulatory bodies for aged care	<p>The CQC regulates health and adult social care providers operating under the NHS and in the independent sector. The CQC:</p> <ul style="list-style-type: none"> • registers and assesses providers against national standards of quality and safety • regulates and inspects providers against the standards • enforces compliance with the care quality standards using a range of powers • publishes information about the performance of health and social care services and engagement with key stakeholders. <p>Several Government funded organisations participate in the quality process alongside the CQC, namely:</p> <ul style="list-style-type: none"> • the Social Care Institute for Excellence (promotes and communicate best practice) • the National Institute for Health and Care Excellence (responsible for creating the quality standards) • Skills for Care (assists providers with their workforce), and 	<ul style="list-style-type: none"> • The Ministry of Health regulates government run LTC homes under the Long-Term Care Homes Act 2007. Inspections are carried out under the auspices of the Ministry. Despite a risk-based approach, 2020 performance reports indicate inspections generally occur with notice and in response to critical incidents and complaints. Reliance on the mandatory reporting of critical incidents and complaints to drive site visits does not enable proactive risk management. • Providers from the for-profit sector are not subjected to the same scrutiny. A study in the Canadian Medical Association Journal of all LTC homes in Canada highlights evidence to suggest that for-profit homes deliver inferior care across a variety of outcome and process measures. • National level data is captured in the Home Care Reporting System (HCRS) managed by the Canadian Institute for Health Information. Information contains demographic, clinical, functional and resource utilization information on clients served by publicly funded home care programs in Canada. Data is provided by 	<p>The HQSC is an independent body responsible for:</p> <ul style="list-style-type: none"> • providing advice to the Minister on how quality and safety in health and disability support services may be improved. • leading and coordinating improvements in safety and quality in healthcare • identifying key health and safety indicators to inform and monitor improvements in safety and quality • reporting publicly on safety and quality, including against national indicators • sharing knowledge about and advocating for safety and quality. • The Aged Care Commissioner is supported by a team within the Health and Disability Services Commission. The Commissioner's role is to: • advocate for quality health and disability services on behalf of older people – in their home, primary care, community care, care home, or public/private hospitals. • provide oversight of the aged-care sector. • make statutory decisions on complaints and formal investigations into older people's health and disability services, to protect their rights under The Code of Health and Disability Services Consumers' Rights.

	England	Canada	New Zealand (NZ)
	<ul style="list-style-type: none"> Healthwatch teams (operate at a local level, representing consumers and members of the public in the oversight of quality care). 	provincial or territorial ministries of health and regional organisations including regional health authorities and community care access centres.	
Best practice enablers	<p>Four strengths in the English system:</p> <ol style="list-style-type: none"> Intelligence, data sharing and data analytics – Feedback channels are supported by data sharing so people don't need to repeat themselves. Technology and people capabilities combine to optimise insights from hard data and soft intelligence to identify heightened risks of a poor provider culture going undetected. Real time updates in performance data build trust in the regulator and data analytics enables risk management in terms of forecasting potential risks. Consumer centric focus - Regulation is driven by people's needs and experiences, focusing on what's important to people and communities when they access, use and move between services. Collaboration - A shared culture of quality improvement is enabled through collaborative quality improvement programs in which staff develop ideas for improvement based on their experience and provide peer-to-peer learning. Collaboration is also identified as an important enabler for change management. 	<p>A 2021 white paper recommended four areas of capability to achieve world's best practice in the delivery and regulation of aged care. These four areas are summarised below.</p> <ol style="list-style-type: none"> Good governance - Optimised aged care requires national standards for quality care, standardised accountability metrics and data (including the measurement of quality, safety and seniors' satisfaction) and a national legal mandate legal mandate for consistent regulatory authority for the investigation, compliance and enforcement for all aged care providers. The inclusion of qualitative insights in performance management is a significant shift away from purely quantitative outcomes such as waiting times. Integrated system partners - An integrated model of care incorporates all system partners including interdisciplinary health and social care providers connected through standardised procedures, service agreements that reflect the quality standards, joint training and shared information systems. Systems which enable data sharing to reduce duplication of effort and automated reporting are attributed to 	<p>Four strengths in the NZ system:</p> <ol style="list-style-type: none"> Cultural competencies - Building cultural competencies to ensure respectful, appropriate relationships and engagement with Māori and Pacific consumers, communities and providers enables place-based solutions to improvements in care quality and service delivery. Centralised case management system - The Ministry maintains and administers the Provider Regulation and Monitoring System (PRMS). Both audit and clinical data is stored in the PRMS with data uploaded by DHBs, auditors and providers. This enables system and provider oversight with multiple sources providing valuable intelligence. Health Ageing Strategy - An overarching vision for older people in New Zealand frames the desired outcomes and signs for success for all stakeholders. The strategy supports sector leadership, change management and helps to clarify successful aged care outcomes. Data sharing - A centralised case management system ensures consistency in the way in which data is supplied and facilitates intelligence gathering and risk management. Collaboration with other stakeholders in the health system to support New Zealand's health and research

	England	Canada	New Zealand (NZ)
	<p>4. Workforce planning - Strategic workforce planning includes identifying the capabilities, aptitudes, skills and qualifications required to enable the CQC to deliver better practice regulation. Relevant planning informs career progression, succession planning and professional learning and development.</p> <p>5. Active community provider relationships - Active development and nurturing of constructive relationships enables intelligence gathering and identifies the demand for place-based needs across health and social care providers. Additionally, such relationships build awareness of how different disciplines integrate their care.</p>	<p>reducing the regulatory burden for providers, whilst increasing sector visibility.</p> <p>3. Person centric care experience - On-going plans or care journeys designed in collaboration with the older person and care providers to suit individual needs and preferences and to enable seniors to age in place, with access to care in their community.</p> <p>4. Workforce planning - Strategic planning to uplift people capabilities through targeted learning opportunities, succession planning and leadership development.</p>	<p>strategy is intended to enable innovation and improvement in the aged care sector.</p>

APPENDIX G - REGULATORY BEST PRACTICE PRINCIPLES AND CAPABILITIES

Regulatory best practice principles - comparison table		
Australian Government's Regulator Performance Guide (the Guide) principles of best practice <i>The Commission is one of 12 health portfolio agencies which operate and report under this Framework</i>	Organisation of Economic Cooperation and Development best practice principles for the governance of regulators <i>Referenced in TORs</i>	Grosvenor report key capabilities for world leading regulatory practices for care quality <i>Deliverables of internal capability review undertaken by Commission</i>
Continuous improvement and building trust	Role clarity	Visible, strategic leadership
Risk based and data driven	Preventing undue influence and maintaining trust	Outcomes focus
Collaboration and engagement	Decision-making and governing body structure	Good governance
	Accountability and transparency	Advanced systems and data management
	Engagement	Transformation and change management
	Funding	Strategically planned and executed external communications
	Performance evaluation	Agreed standards of care and safety and a performance framework

Australian Government's Regulator Performance Guide - Principles of best practice

1. **Continuous improvement and building trust** - Regulators are expected to continuously improve how they do their work. This means better matching regulatory treatments to the risk, so people can trust the system they regulate. This principle encompasses regulators:
- Seeking to improve how they exercise their powers and deliver their legislated functions, while remaining flexible and responsive to changing circumstances.
 - Embedding methodologies to understand the costs, impact and outcomes of regulation and collect evidence of this at a system-wide level, using insights to support and drive improved outcomes
 - Taking a whole-of-system perspective, building, and maintaining collaborative relationships with other regulators to develop a shared understanding of respective roles and responsibilities and identify gaps and areas of overlap.

The Guide states that in practice, commitment to continuous improvement and building trust means:

- Having a well-defined, communicated and embedded organisational values and culture that articulate the type of regulator and regulatory posture they seek to adopt—such as through the development of cultural or values statements.
- Actively building staff capability, including ensuring staff have relevant knowledge of the regulatory craft and the industry they regulate, and have the capacity and are empowered to identify and implement improved practices.
- Having transparent external accountability processes encouraging procedural fairness, accessibility and responsiveness that builds public trust and confidence in the performance of their regulatory functions—such as easy to access and transparent complaints and feedback handling procedures, and, where appropriate, publishing processing times.
- Holding themselves to account through internal accountability processes that foster a culture of continuous improvement and reflection—such as holding rigorous ex-post reviews of regulatory actions to identify learnings and explore opportunities for improvement, and regular reviews of operating procedures.
- Undertaking regular and independent performance reviews and taking ownership of and respond to recommendations of external reviews of their performance, such as those conducted by the Australian National Audit Office.
- Providing clear information about the rationale for compliance costs and actively engage with stakeholders to identify solutions to avoid or reduce unnecessary costs.
- Seeing guidance from the Department of Finance on the application of user charging (cost recovery) arrangements, ensuring these align with the Australian Government Charging Framework (for more information see RMG 302 – Australian Government Charging Framework under Tools and templates).
- Taking broad perspective of the regulatory environment, including conducting environmental scans and considering best practice examples from other jurisdictions and regulatory systems.

Australian Government's Regulator Performance Guide - Principles of best practice

- Identifying and minimising duplication and harmonise activities with other regulators to achieve better regulatory outcomes, including establishing clear operational scopes, sharing intelligence and producing common guidance where appropriate, providing clarity, and reducing the overlapping compliance burden on business and individuals.
- Actively sharing learnings and insights by participating in communities of practice, engaging with other regulators and stakeholders to reflect on best practice and lessons learned, including failures.

2. Risk based and data driven - Regulators are expected to identify risks, prioritise and respond to them. In doing so, regulators should minimise the impact of the regulations, but not at the expense of why they are regulating. This principle encompasses regulators:

- Taking a risk-based approach to operational policy development, administration, compliance and enforcement activities, and are informed by data, evidence and intelligence. A risk-based approach allows a regulator to properly assess the risks of non-compliance and respond in a proportionate way to the harm being managed. Tolerances may be deliberately tight where there are, for example, risks to human life. Strategic management of risk can also improve efficiency by prioritising resources to the areas of highest risk, and increase compliance by focusing limited resources on the areas of the greatest risk of non-compliance. It can also reduce the overall compliance and cost burden by minimising Government intervention where the risks are relatively low.
- Leveraging data and digital technology to help regulators better understand and manage risks. This requires building capability and having the right infrastructure to support effective data use and digital literacy. Regulators should also consider opportunities to collaborate with other regulators and across Government entities to use existing data and digital solutions to minimise regulatory burden and cost.
- Considering where compliance could be streamlined and, where appropriate, consider the business practices of regulated entities, allowing them to adopt innovative approaches to meet their obligations.
- Continually monitoring the environment they operate to ensure regulatory approaches keep pace with changes in technology, industry practices and community expectations, and effect change accordingly.

The Guide states that adopting a risk based and data driven approach means regulators:

- consider the risks, cost effectiveness and impact of regulatory action, both before and after the regulatory action has commenced
- maintain a compliance and enforcement strategy that articulates the regulator's approach to risk and how this informs decision-making, publishing where appropriate
- focus on risk culture, build staff understanding of regulator's approach to risk and how it flows to day-to-day decision making
- build staff and organisational data capability and digital literacy, drawing on expertise to support effective use, including regulatory technology (RegTech) solutions
- use intelligence and data, including data points such as enterprise size, to inform a risk-based approach to compliance and enforcement
- actively monitor and plan for risks of market changes and new business models that may have flow-on effects for operations, including those on the edge of, or just outside, a regulator's legal objectives, functions and role

Australian Government's Regulator Performance Guide - Principles of best practice

- modify their regulatory approach to encourage voluntary compliance where appropriate and focus compliance and enforcement activity where risks and impact of harm are greatest
- commit to publish the data they hold and share data across regulators where permitted and appropriate
- take into account the cumulative burden of regulations, including the impact on smaller businesses and sole traders, when establishing and implementing processes
- seek to achieve their objectives while ensuring that economic outcomes, such as impacts on competition, innovation and growth, are explicitly considered in implementation
- are receptive to diverse views about implementation of regulation, while ensuring the integrity of the regulatory system.

3. Collaboration and engagement - Regulators are expected to be open to feedback on how they regulate and be clear with the public on why and how they regulate.

This principle encompasses regulators:

- Being transparent, open and responsive to feedback on how they operate, engaging in genuine two-way dialogue with stakeholders and the broader community on their performance. Transparency in process supports community trust by demonstrating a regulator's priorities and integrity. Regulators should clearly communicate regulatory processes and be transparent about the decision-making criteria.
- Having genuine consultation processes in place to ensure that stakeholders are engaged in essential decisions that involve them, with critical information shared in a timely way. Best practice regulators embed processes to provide the public with opportunities to provide feedback on operational regulatory design, including co-design of solutions where appropriate.

The Guide states that in practice, demonstrating collaboration and engagement means regulators:

- engage genuinely and regularly with stakeholders, including regulated entities, other regulators and the community, including on the development of and reporting against meaningful performance measures
- seek out real time stakeholder feedback to inform regulatory decisions, and loop back in a timely way on outcomes
- offer a range of consultation mechanisms to ensure small businesses, sole traders and the wider community are able to easily engage and provide feedback
- establish processes that enable meaningful and timely stakeholder engagement by providing early notification of operational changes
- provide guidance and information that is relevant, clear, concise and easily accessible to help regulated entities understand their obligations and responsibilities to encourage voluntary compliance
- are transparent in their decision-making and, where possible, provide reasons for regulatory decisions or share anonymised compliance or enforcement 'case summaries'
- implement innovative approaches in considering regulatory or policy issues such as 'regulatory sandboxes'.

References:

[Regulator Performance Guide](#)

[Principle 1: Continuous improvement and building trust | Department of Finance](#)

[Principle 2: Risk based and data driven | Department of Finance](#)

[Principle 3: Collaboration and engagement | Department of Finance](#)

OECD Best practice principles for the governance of regulators

- 1. Role clarity:** An effective regulator must have clear objectives, with clear and linked functions and the mechanisms to co-ordinate with other relevant bodies to achieve the desired regulatory outcomes.
Role clarity is essential for a regulator to understand and fulfil its role effectively.

The regulatory powers and other functions to be carried out to achieve the regulators objectives should be clearly specified in the establishing legislation and be appropriate and sufficient to achieving objectives.

Regulators should not be assigned conflicting or competing functions or goals (without) clear public benefit in combining these functions and where the risks of conflicts can be managed effectively.

 - “Structural separation of conflicting functions is generally ideal, but if this is not possible separating teams and their reporting lines.
 - There may be limited cases where the assignment of potentially conflicting functions is desirable.... functions that generate a strong intelligence base that can readily inform regulatory activities”
- 2. Preventing undue influence and maintaining trust:** It is important that regulatory decisions and functions are conducted with the upmost integrity to ensure that there is confidence in the regulatory regime.
Where legislation empowers the Minister to direct an independent regulator, the limits of the power to direct the regulator should be clearly set out.

The principal responsibility for assisting the executive to develop government policy should sit with the responsible executive agency and the regulator should have a formal advisory role in this task... and there should be specified mechanisms for regulators to contribute to the policy-making process.
- 3. Decision making and governing body structure for independent regulators:** Regulators require governance arrangement that ensure their effective functioning, preserve its regulatory integrity and deliver regulatory objectives of its mandate.
The OECD identified three main governance structures for independent regulators:

 - Governance board model – Strategic oversight with regulatory decisions delegated to CEO and staff
 - Commission model – The Board makes make regulatory decisions
 - Single member regulator – an individual makes substantive regulatory decisions and delegates other decisions to staff.

“ ...the great majority of independent regulators in OECD countries have a board (or a Commission), and that a board is considered a more reliable for decision-making as collegiality is expected to ensure greater level on independence and integrity”

“Where a single-member decision maker is chosen it is important to consider the interaction between the role of the regulatory decision maker and the role the CEO or equivalent.

OECD Best practice principles for the governance of regulators

- 4. Accountability and transparency:** Businesses and citizens expect the delivery of regulatory outcomes from government and regulatory agencies, and the proper use of public authority and resources to achieve them.
Regulators are generally accountable to three groups of stakeholders: ministers and the legislature; regulated entities and the public.

The role of members of the governing body who are appointed for their technical expertise or industry knowledge should clearly be to support robust decision making in the public interest, rather than to represent stakeholder interests.

“Information and access to appeal processes and systems should be made easily available to regulated entities by regulators. Regulators should establish and publish processes for arms-length internal review by significant delegated decisions (such as those made by inspectors).
- 5. Engagement:** Good regulators have established mechanisms for engagement with the stakeholders as part of achieving their objectives. The knowledge of regulated sectors and the business and citizens affected by regulatory schemes assist to regulate effectively.
- 6. Funding** - The amount and source of funding for a regulator will determine its organisation and operations. It should not influence the regulatory decisions and the regulator should be enabled to be impartial and efficient to achieve its objectives.
Funding levels should be adequate to enable the regulator, operating efficiently, to effectively fulfil the objectives set by government... [and]
Funding processes should be transparent, efficient and as simple as possible.
- 7. Performance evaluation:** Regular independent external reviews of regulators should be arranged by the government, legislature or the regulator itself, in addition to any internal reviews.

It is important that regulators are aware of the impacts of their regulatory actions and decisions. This helps drive improvements and enhance systems and processes internally. It also demonstrates the effectiveness of the regulator to whom it is accountable and helps to build confidence in the regulatory system.

Reference:

[The Governance of Regulators | OECD Best Practice Principles for Regulatory Policy | OECD iLibrary \(oecd-ilibrary.org\)](https://oecd-ilibrary.org/publications/the-governance-of-regulators_9b3b3b3b)

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Visible, strategic leadership: Generates a collective culture for continuous improvement to optimise care outcomes for consumers. Relies on nurturing relationships and strategic partnerships. Instils public confidence and trust in the integrity of the regulator.

Outcomes focus: Entails a holistic model of care that relies on several levers including:

- monitoring prudential, quality and safety compliance and using multiple sources to generate system and individual insights
- identifying and managing risk, drawing on capabilities related to investigations and intelligence gathering
- provider motivation to demonstrate excellence, supported by clarity around the outcomes, consistent application and review of standards, enabled by regulatory support
- empowering consumer voices which focus outcomes on meeting community/consumer needs.

Good governance: Requiring organisations to clearly define strategic directions, including their roles, objectives and interaction with other entities, to deliver on their mission:

- reflects a pragmatic approach to prosecutions and enforcement with appropriate guidance and conformance with the deployment of all tools in the regulatory toolkit
- contributes to an internal values-based culture, builds partnerships characterised by empathetic, respectful stakeholder engagement

Advanced systems and data management: Recognising data as an asset with the ability to combine and interrogate qualitative and quantitative information and visually represent findings, preferably in real time, which includes:

- data is integral to evidence-informed decision-making, risk management and intelligence
- where there are longitudinal datasets and/or data sharing arrangements to build out datasets, data analytics enable early identification and pre-emptive interventions to ensure safety and quality service/care delivery
- systems and data integration are augmented by workforce capabilities, such as data analytics and visualisation.

Transformation and change management: Enabled by strategic use of behavioural insights; sector knowledge to inform differentiated planning for communications, sector education, learning and development and functional agility, including organisational resilience.

Strategically planned and executed external communications: The key to building trust and confidence in regulation and entail:

- building awareness and understanding of the regulator's role to drive equity of public access to quality care and services
 - leveraging the use of multiple channels and modes of communication to meet diverse audience needs
- proactive management of issues in the media manages public perceptions of both the regulator and quality care.

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Agreed standards of care and safety and a performance framework: Reflect a relationship between accreditation, regulation and ISO systems for quality and risk management and are reinforced through regular reviews and updates to standards, processes and procedures with input from across the system for ongoing improvement and quality assurance.

Reference: *Optimising Capability to Meet Current and Future Challenges, Grosvenor Public Service Advisory, December 2021, p9-11*

APPENDIX H - GLOSSARY

ACQSC	Aged Care Quality and Safety Commission
ACSQHC	Australian Commission on Safety and Quality in Health Care
Advisory Council	Aged Care Quality and Safety Advisory Council
APRA	Australian Prudential Regulation Authority
APS	Australian Public Service
ASQA	Australian Skills Quality Authority
BAU	Business as usual
CHSP	Commonwealth Home Support program (CHSP)
Commission	Aged Care Quality and Safety Commission
CQC	Care Quality Commission (United Kingdom)
Department	Department of Health and Aged Care
DoHAC	Department of Health and Aged Care
ELG	Executive Leadership Group
ICT	Information and communications technology
LGBTIQ+	Lesbian, gay, bisexual, transgender, intersex, queer, and other sexually or gender diverse
MOU	Memorandum of Understanding
NLG	National Leadership Group
NDIS Commission	NDIS Quality and Safeguards Commission
NATSIFACP	National Aboriginal and Torres Strait Islander Flexible Aged Care Program
NPP	New policy proposal
OECD	Organisation for Economic Co-operation and Development
PBS	Portfolio Budget Statement

PSPF	Protective Security Policy Framework is the Australian Government's protective security framework that all government agencies must comply with across security governance, information security, personnel security and physical security.
QAMG	Quality Assessment and Monitoring Group
QA	Quality Assurance
RBTIS	Risk-Based Targeting and Information Sharing tool – this enables improved risk profiling, risk identification and information sharing across all regulatory functions of the Commission.
SES	Senior Executive Service
SIRS	Serious Incident Response Scheme