

PARLIAMENTARY INQUIRY QUESTION ON NOTICE

Department of Health and Aged Care

Senate Standing Committee on Community Affairs Legislation Committee

Inquiry into the Aged Care Bill 2024 (Provisions)

03 October 2024

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Regulatory Mechanisms (Chapter 6)

Spoken

Hansard page number: 34-35

Senator: Anne Ruston

Question:

Senator RUSTON: Okay. Sorry, I'm jumping around all over the place a bit here, but in terms of the regulatory mechanisms contained in chapter 6, what are the explicit powers of the commissioner?

Ms Metz: That chapter picks up the powers in the Regulatory Powers (Standard Provisions) Act. To give a general overview of the powers of the commissioner, they relate to monitoring and investigation. There is a specific power relating to entry of premises without warrant or consent, where someone's safety is at risk. That's a very limited power. Then there is the ability to enter into enforceable undertakings, issue infringement notices and seek injunctions. Then there are the notice provisions that the commissioner outlined earlier today.

Senator RUSTON: I want to understand the differences between the powers as they apply to the new act and the existing powers. This may be more than a quick answer to a question, but what powers are new and what powers are contained in the existing legislation—if any?

Ms Metz: To broadly answer that question, those are existing powers in the current framework. They apply differently to the registration conditions and obligations. The structure means that each of those obligations—now very clearly, because they have a civil penalty attached to them—are now subject to those chapter 6 powers. So it's a clarification of the framework and a much clearer pathway from each of those conditions and obligations through to the regulatory powers than we currently have in the current Aged Care Act, because, largely, those provisions in the Aged Care Act at the moment evolved over time in response to particular issues. They may have civil penalties attached or they may not, or they may operate in different ways. So it's just streamlining the process and making it very clear where the commission has powers to act.

Senator RUSTON: You don't have to answer this next question now; I'm happy for you to take it on notice. I'm keen to understand where powers have been changed, increased or removed, just to get some clarity. I understand entirely what you're saying about evolution over time, but I would be really interested to understand where those powers will change from now to what will occur under the new act. Thank you.

Answer:

The Aged Care Bill 2024 outlines the regulatory powers of the System Governor, Aged Care Quality and Safety Commissioner and Complaints Commissioner as related to their functions.

These powers range from standard powers under the Regulatory Powers Act, as well as introducing new powers and strengthening, streamlining and making more flexible the Aged Care Quality and Safety Commission's (Commission) current monitoring, investigation, and enforcement powers.

Current framework

Where a provider fails to remedy non-compliance the Commission can take enforceable regulatory action, using the range of tools available to it, as is appropriate in the circumstances depending on the nature of the non-compliance and the likelihood of harm to the safety, health, wellbeing and quality of older people.

Such actions could include, but are not limited to:

- issuing a notice requiring provision of information or for steps to be taken to remedy the non-compliance
- obtaining an injunction
- accepting an enforceable undertaking
- issuing an infringement notice
- applying to a court to impose a civil penalty on the provider
- restricting the payment of subsidies
- revoking or suspending the existing allocation of places.

Where necessary, the Commission may also undertake orderly removal of the provider from the sector, with the Commissioner able to revoke or suspend their approval as a provider.

The Commissioner can also issue banning orders for individual workers.

A limitation of the current approach is that the legislation prescribes many different monitoring pathways and enforcement actions that can only be taken in certain circumstances, which can sometimes limit the ability of the Commission to take a nuanced and holistic approach.

New framework

Consistent with the recommendations of the Royal Commission into Aged Care Quality and Safety, the Aged Care Bill 2024 will include additional powers, and other provisions, that will ensure the Aged Care Quality and Safety Commissioner (and the Complaints Commissioner, where appropriate and relevant to its function) can take strong action where providers of aged care fail to meet their conditions of registration and obligations. These powers and other provisions include:

- new powers for the Commission to:
 - vary registration, including to change or add conditions of registration in response to non-compliance.
 - expand the types of entities or persons that can be given banning orders to current and former providers, aged care workers and responsible persons, which will prohibit or restrict those entities and persons from being involved in the delivery of funded aged care services.
 - enter and search approved residential care homes without a warrant or consent where there is an identified risk to the health, safety or wellbeing of an individual accessing funded aged care services.
 - obtain information and documents.
- a new offence provision designed to protect whistle-blowers, in addition to a protection from administrative liability supplementing existing protections against civil or criminal liability and contractual remedies.
- an overarching statutory duty on providers, certain responsible persons and aged care digital platforms in addition to any existing duties (for example under common law or work, health and safety legislation) with civil penalties where the duties are breached.

Existing regulatory powers are also continuing and have been strengthened where necessary to ensure they are sufficiently flexible to enable the Commission to address risks to older people pro-actively and effectively. The Aged Care Bill 2024 enables the Commission's continued use of:

- injunctions
- enforceable undertakings
- infringement notices, to be issued to registered providers in relation to certain civil penalty provisions
- notices in response to all types of non-compliance or possible non-compliance, which have been streamlined into two notices only (a *compliance notice* and a *required action notice*)
- suspension or revocation of a provider's registration
- civil penalties for non-compliance, where providers have clearly and consistently failed to comply with conditions of registration and obligations in Chapter 3 of the Aged Care Bill 2024.

All these measures will form part of the new regulatory model, which is a key feature of the Aged Care Bill 2024, and will strengthen protections for older people in Australia and underpin broader aged care reforms.

The regulatory tools and powers that provide an escalation pathway to more serious regulatory action are to be used in a manner consistent with procedural fairness.

Enforcement action is not intended to be linear in its application and the Commission will have the flexibility to select the most appropriate risk proportionate enforcement response: this may be enforcement action or advice, an investigation, or support for a compensation case. This will allow the Commission to address risks to older people proactively and effectively.