



## Submission to the Senate Economics References Committee inquiry into the Financial and Tax Practices of For-Profit Aged Care Providers

### Background context

As the Aged Care Complaints Commissioner (the Commissioner), my team and I are responsible for independently resolving complaints about Australian Government funded aged care services<sup>1</sup> and educating people about the best ways to handle complaints<sup>2</sup>. My functions as the Commissioner are set out in the *Aged Care Act 1997* (the Act) and the *Complaints Principles 2015* (the Principles).

Our objectives are 'Resolve, Protect and Improve'. This means: working to resolve aged care complaints in a timely and proportionate way that improves care and services; ensuring we take timely action on issues raised through complaints to ensure people receiving aged care are well cared for and protected; and working with the aged care community to learn from complaints and act on opportunities to improve care.

Our role is largely reactive. Although we also have an important education function<sup>3</sup>, our complaints work starts with concerns being raised by an individual or agency. Complaints and 'own initiative' processes are prompted by the receipt of a complaint or other concerning information about the care provided by a service to one or more people.

Anyone can make a complaint<sup>4</sup>. It is free. A complaint can be open (we disclose to the approved provider who has made the complaint), confidential (we do not disclose the complainant's identity except where we may need to do so to protect a care recipient) or anonymous (we do not know the identity of the complainant – although they may use a pseudonym so that they can receive feedback about the complaint).

All complaints are entered into our database and categorised in a number of ways such as 'health care', 'food and catering' and 'financial' matters. Each can be further categorised; for example, 'financial' matters can be sub-categorised into complaints about 'fees and charges', 'accommodation payments', 'financial statements' and others. Each complaint may comprise one or more specific 'issues', each of which is the subject of resolution action.

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<sup>1</sup> Complaints about retirement villages and Supported Residential Services (SRSs) are outside the Commissioner's jurisdiction.

<sup>2</sup> Prior to 1 January 2016 aged care complaints were managed by the Office for Aged Care Quality and Compliance within the Department of Health.

<sup>3</sup> The functions of the Aged Care Complaints Commissioner are set out in Section 95A-1 of the *Aged Care Act 1997*. One function is to educate people and develop resources about best practice in complaint handling and matters that arise from complaints.

<sup>4</sup> The majority of complaints are made by family members or representatives of care recipients.

If providers are unwilling to resolve complaints, we have the power to issue a 'Notice of Intention to Issue Directions'. Depending on the response, this may be followed by the issuing of a formal 'Direction' which clearly sets out action that the provider needs to take to comply with its relevant responsibilities under the legislation. If the provider still does not comply with a Direction I refer the matter to the Department of Health (the Department) for possible compliance action.

Together with the Department and the Australian Aged Care Quality Agency (Quality Agency) we share responsibility for the quality and safety of Australian Government funded aged care in Australia. In simple terms, my organisation manages complaints about the quality of aged care services funded by the Australian Government, the Department regulates and funds aged care services and undertakes compliance action, and the Quality Agency is responsible for managing the accreditation and monitoring of Australian Government funded residential aged care homes and quality reviews of home/community services.

From 1 January 2019, our organisation and the Quality Agency will join to form the Aged Care Quality and Safety Commission. From 1 January 2020, the Departmental functions related to the regulation of aged care will also move to the new Commission.

### **The terms of reference**

I note the terms of reference for the inquiry are the financial and tax practices of for-profit aged care providers, with particular reference to:

- a) the use of any tax avoidance or aggressive tax minimisation strategies;
- b) the associated impacts on the quality of service delivery, the sustainability of the sector, or value for money for government;
- c) the adequacy of accountability and probity mechanisms for the expenditure of taxpayer money;
- d) whether current practices meet public expectations; and
- e) any other related matters.

As Commissioner, I have limited access to information or reason to consider the tax practices of aged care providers. I am also not in a position to comment about the adequacy of accountability and probity mechanisms for the expenditure of taxpayer money. While I receive complaints about the provision of care and services by aged care providers, I consider these complaints within the framework of provider responsibilities as outlined in legislation or grant/funding agreements, not from the broader perspective of accountability and probity.

Nonetheless, the complaints I receive about the financial practices of aged care providers do provide a valuable window into the concerns and experiences of consumers of aged care. Consequently, we hold information that may be relevant when the Committee considers whether current practices meet public expectations. I have restricted my submission to information that addresses this term of reference (d).

The terms of reference indicate that this inquiry is only about the practices of 'for-profit aged care providers'. The information outlined below relates to complaints about providers of residential aged care and home care. Complaints data about other aged care programs such as the Commonwealth Home Support Program and Multi-Purpose Services has not been included. This is either because we were unable to extract data by provider type or because the number of complaints is too small to be statistically meaningful.

The proportion of for-profit providers differs between residential care and home care: on current public information it appears that nearly **40%** of residential aged care places are provided by for-profit providers. In contrast less than **12%** of consumers of home care receive their care from for-profit providers (Tables 11 and 5, [2016–17 Report on the Operation of the Aged Care Act 1997](#)). In the data and discussion below, we have classified the remainder of providers simply as

not-for-profit. This group includes community based, religious, charitable and government (state, local and territory) providers.

Further information about complaints in the 2016-17 financial year (FY) can be found in my most recent annual report. We also regularly publish National Quarterly Bulletins, which contain interesting complaint data. Both can be found on our website at [www.agedcarecomplaints.gov.au](http://www.agedcarecomplaints.gov.au). The 2017-18 financial year to date (FYTD) information below is based on data up to 30 May 2018.

It is also important to note that there are a range of variables that may account for the difference in complaints numbers and complaint types between providers. As a result, I cannot draw any definitive conclusions about a link between our complaints data and the broader financial practices of for-profit providers. As I said earlier, what I can say is that the information gives useful insight into consumer concerns and experiences and issues that are emerging.

#### **d) Whether the financial practices of for-profit aged care providers meet public expectations**

##### *Residential aged care*

Complaints can raise one or more concerns (issues). It is common for there to be multiple issues within a complaint. In the FYTD, we have received complaints raising more than 9,600 issues about residential aged care. While most of these issues relate to clinical care, 457 relate to financial concerns. The majority of these (61 %) involve for-profit providers. In the 2016-17 FY, we received complaints raising more than 8,700 issues. Of these, 410 related to residential aged care and financial matters. Again, most of these (59 %) involved for-profit providers.

In relation to what the issues were about: in the FYTD, three of every four financial complaint issues involving for-profit residential care providers were either about fees and charges or communication about fees and charges. Most of the remaining financial complaint issues were about accommodation agreements or payments (refundable accommodation deposits or bonds). When looking at not-for-profit providers, the range and breakdown of the financial issues complained about is similar.

Complaints about fees and charges were the 10<sup>th</sup> most complained about area in residential aged care in the 2016-17 FY, and the ninth most complained about area in the FYTD. This includes for profit and not for profit providers. As noted earlier, most residential aged care complaints are about clinical matters such as medication administration and management, falls prevention and post falls management. Also very common are issues relating to communication and consultation and personal care.

Many of the complaints we receive about fees and charges are about 'additional fees'. These are a type of fee for 'other care and services' which are in addition to the services that providers are required to provide under the *Aged Care Act 1997* (the Act). In the FYTD we have received complaints raising 55 issues about additional fees. In the 2016-17 FY we received 80. The majority (generally just over three of every four) relate to the practices of for-profit providers. It should be noted that not all providers charge additional fees – so the percentage attributable to for-profit providers does not necessarily mean that consumers are disproportionately complaining about them – it may simply mean more for-profit providers charge additional fees.

Additional fees generally fall into two types. The first are often called capital refurbishment or asset replacement fees. These are usually charges for refurbishment type work that often provides limited benefit to the consumer themselves. The second type are fees for extra care and services, often provided in a bundle, that a consumer can access whilst living at the service. Simple examples might be alcoholic beverages, direct phone lines, access to Foxtel in a

consumer's room, wine and cheese evenings, high tea, greater choice of meals, hot breakfasts or trips to the theatre.

Consumers are raising a range of concerns with us including the extent to which they have genuine choice in choosing to pay additional fees for services that they may not want or may not be able to use; their ability to renegotiate as circumstances change; whether they are being offered the fees on a take it or leave it basis; the information provided about what they are agreeing to and whether they are paying for things that are already funded in other ways or for things they, or their family member, will derive no individual benefit from.

I have written to the Department a number of times about how additional fees are being charged by providers and the concerns being raised in complaints.

In September 2016, the Department published on its website guidance for providers on the appropriate charging of additional fees. In particular this indicated:

- that fees charged for 'other care or services' must be agreed beforehand with the resident;
- the resident must derive a direct benefit from the fee; and
- the resident must receive an itemised account of how the fees are being used.

In April 2017, an aged care provider filed a motion in the Federal Court, seeking the court's adjudication as to whether their Asset Replacement Charge (ARC) was a charge they could lawfully impose under the Act. On 2 March 2018, the Federal Court declared that the ARC was prohibited under the Act.

On 27 March 2018, the Department of Health updated its additional fees webpage to reflect the Federal Court decision. In summary, the webpage states:

- aged care legislation sets out a complete scheme of the fees and charges that aged care providers can charge care recipients;
- 'asset replacement charges', 'capital refurbishment fees' and 'security deposits' are not allowed under aged care legislation; and
- providers who have charged or are charging 'capital refurbishment fees', 'asset replacement charges', 'security deposits' or similar fees should cease charging these fees and refund amounts already charged.

A number of providers have since written to us and advised us that they will no longer charge asset replacement or capital refurbishment type fees and that they will refund past and present care recipients. We have seen a reduction in complaints about this type of financial complaint issue.

We are continuing to receive complaints raising consumer concerns about how the second type of additional fees are being charged. As noted earlier, these complaints are commonly about consumers being charged for a bundled package of additional care and services when their low functional level (for example limited mobility or advanced dementia) means they cannot use or benefit from many of the elements of the package. Or where the bundle includes services, or a level of service, they may not want. Sometimes these types of fees are being charged on what appears to be a mandatory 'fee for entry' basis. In other words if consumers want a place in a particular service, they must agree to pay for the bundled package of additional fees or look for somewhere else.

In the majority of complaints about additional fees, we have been able to work with providers to achieve good outcomes for individual consumers. Often the fees are renegotiated and/or reduced or removed. The information consumers are given about the additional fees may be

changed or made clearer. In general terms though, there is reluctance from some providers to change their broader fees practices and policies. We have, on occasion, had to pursue formal complaint resolution processes and issue Notices and Directions. In the FYTD, taking into account both for-profit and not-for-profit providers, we have only been able to quickly resolve to the satisfaction of the complainant around 40% of issues raised about additional fees.

### *Home care*

In the FYTD, we have received complaints that raise more than 1,600 issues about home care. This includes 747 issues relating to financial matters, with 38 % of these about for-profit providers. In the 2016-17 FY, 465 financial issues were raised with us about home care providers. Of these, nearly 18 % involved for-profit providers. As noted earlier, for-profit providers only account for around 12 % of the home care market so their smaller share of home care complaint issues may be related to this.

In the FYTD, one out of every two financial complaint issues relating to for-profit providers has been about fees and charges or communication about fees and charges. Most of the remaining financial complaint issues were about statements, reimbursements and the management of finances. When looking at not-for-profit providers, the split and type of financial complaint issues raised with us is similar.

Fees and charges have been the most complained about area in home care in both the 2016-17 FY and the FYTD. To put this in a broader context, complaints about help at home (which includes the Commonwealth Home Support Program) now make up 20-25 % of all complaints and in the current FYTD are growing at about nine per cent a quarter.

Some of the growth in complaints about financial issues may be as a result of significant reforms in the home care area in recent years, in particular the introduction of a consumer directed care model and, most recently, the allocation of packages to consumers rather than providers. Under these reforms, providers are required to plan for care in partnership with the consumer, provide monthly statements of expenditure, and consumers can change providers more readily. It may be that increased expectations by consumers and greater transparency of the financial arrangements has prompted questions and given rise to increased awareness of people's rights and therefore complaints where people believe these rights have not been observed.

Of note, about 83 % of financial complaint issues relating to for-profit home care providers are able to be resolved quickly to the complainant's satisfaction. This is similar to the rate for not-for-profit providers.

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