



Submission by the
Commonwealth Ombudsman
Inspector-General of Aged Care Bill 2022

Submission by the Commonwealth Ombudsman, Iain Anderson

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Introduction and summary

1. The Office of the Commonwealth Ombudsman (the OCO) welcomes the opportunity to make a submission to the Community Affairs Legislation Committee's inquiry into the Inspector-General of Aged Care Bill 2023 (the Bill) and the Inspector-General of Aged Care (Consequential and Transitional Provisions) Bill 2023 (the Consequential Bill).
2. The OCO's submission seeks to:
 - draw attention to key considerations for establishing oversight bodies
 - outline the interactions and overlap between the OCO and the proposed Inspector-General of Aged Care (the Inspector-General)
 - note that the United Nation's Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) also applies to aged care facilities.

Background

3. The purpose of the OCO is to:
 - provide assurance that the agencies we oversee act with integrity and treat people fairly
 - influence systemic improvement in government administration.
4. We aim to achieve our purpose by:
 - independently and impartially reviewing complaints and disclosures about government administrative action
 - influencing government agencies to be accountable, lawful, fair, transparent, and responsive
 - providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

General comments on establishing oversight bodies

5. The recommendation of the Royal Commission into Aged Care Quality and Safety to establish the Inspector-General was one element of a group of measures to improve transparency and oversight of the aged care sector.¹
6. Generally, before establishing a new oversight body, consideration should be given, in consultation with the relevant existing oversight bodies, to whether existing oversight arrangements apply or could be effectively applied. Utilising existing frameworks helps overseen entities understand their obligations and therefore facilitates effective and efficient oversight. Also, in the context of budget constraints, leveraging an existing oversight body is a lower-cost option than establishing a new one.

¹ *Final Report: Care, Dignity and Respect* (Final Report: Volume 1, March 2021) 217-218.

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Interactions between OCO and the Inspector-General

7. Several agencies form the ‘ecosystem’ of oversight of the aged care sector – Table 1 refers.

Table 1: Oversight bodies with jurisdiction concerning aged care

AGENCY	PURPOSE
OCO	To provide assurance that Australian Government entities and prescribed private sector organisations act with integrity and treat people fairly; and influence enduring systemic improvement in government administration.
Aged Care Quality and Safety Commission (ACQSC)	To protect and improve the safety, health, wellbeing and quality of life of people receiving Australian funded aged care.
Independent Health and Aged Care Pricing Authority (IHACPA)	To promote efficiency and increase transparency in the delivery and funding of public health and aged care services across Australia.

8. It will be important for the entities within the aged care sector understand the jurisdiction of each oversight body. It will also be important for each oversight body to understand where their jurisdictions interact or overlap with other bodies’ jurisdictions.

9. The Bill gives effect to the following overlap and interactions:

- The OCO would have oversight over administrative actions of the Inspector-General,² as well as continued oversight of the ACQSC, the IHACPA and the Department of Health and Aged Care – Figure 1 refers. Administrative actions subject to OCO oversight could include, for example, how the Inspector-General conducts its investigations or undertakes its reporting or monitoring functions.
 - The Inspector-General would have jurisdiction over entities that the OCO has not been empowered to oversee, namely aged care providers.

Figure 1: Hierarchy of oversight

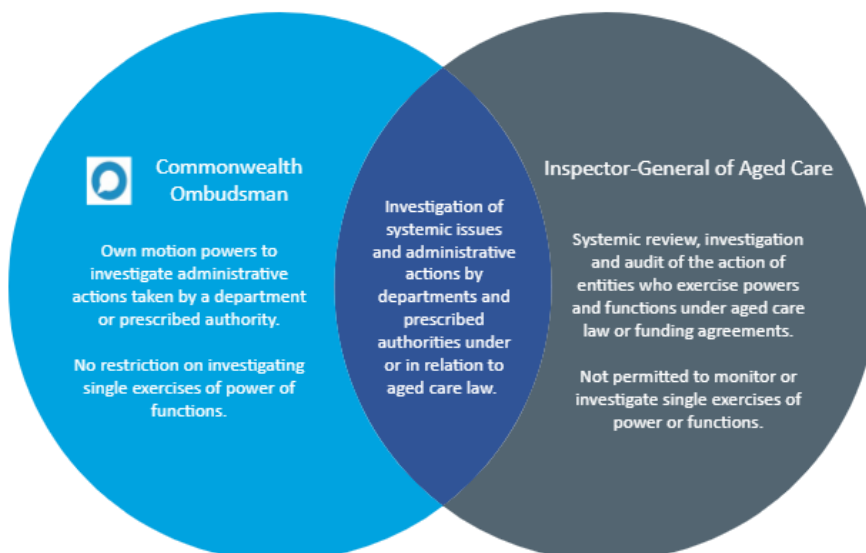


² Clause 12 of the Bill establishes the Inspector-General. Once established, the Inspector-General would fall within the definition of a “prescribed authority” for the purposes of paragraph 5(1)(a) of the *Ombudsman Act 1976* and would thus fall within the oversight jurisdiction of the OCO.

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- The Inspector-General would conduct systemic reviews, audits, investigations of ACQSC, IHACPA, aged care areas within the Department of Health and Aged Care and aged care providers. Clause 10(2) of the Bill would prevent the Inspector-General from monitoring or investigating individual complaints about those entities with respect to them exercising their powers or performing a function or duty under an aged care law. The resolution of *individual* complaints would continue to be managed initially by the entities themselves. The OCO would continue to have oversight of the administrative actions of these entities in handling those complaints.³
- There is manageable overlap between the OCO's functions and the Inspector-General's proposed functions. Paragraph 5(1)(b) of the *Ombudsman Act 1976* (Ombudsman Act) provides for the OCO to undertake own motion investigations of administrative actions undertaken by a department or a prescribed authority. This could include investigation of systemic issues arising from the exercise of powers or functions under aged care law by relevant departments and prescribed authorities. Clause 17(1) of the Bill provides for the Inspector-General to conduct reviews on its own initiative in relation to functions referred to in clause 10(1)(a) to (d) of the Bill. Clause 10(1)(a) of the Bill relevantly provides for the systemic review, audit and investigation of entities that:
 - exercise powers or perform functions and duties under an aged care law
 - the Commonwealth's administration of an aged care law or aged care funding agreement
 - the operation of an aged care law or the performance of obligations and
 - the exercise of rights by the Commonwealth under an aged care funding agreement.⁴
- The Inspector-General and OCO would have overlapping obligations to report misconduct by Commonwealth officials should sufficient evidence come to light during an investigation or review.⁵ This overlap is limited and manageable.

Figure 2: Functional overlap between the OCO and the Inspector-General



³ Clause 10(2) of the Bill would not permit the Inspector-General to monitor and investigate only a single exercise of a power or a single performance of a function or duty, under an aged care law.

⁴ Clause 10 of the Bill.

⁵ Clause 27 of the Bill and subsection 8(10) of the Ombudsman Act refer.

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10. Limited overlap in roles between OCO and the Inspector-General is preferable to a gap in oversight, as it would at least partially mitigate the risk of systemic issues falling between the cracks. The Bill's information sharing provisions would facilitate OCO and the Inspector-General's management of overlapping jurisdictions. Specifically, the Bill would enable the Inspector-General to disclose protected information⁶ and draft review reports and related documents⁷ to OCO officers. Section 35A of the Ombudsman Act provides a general power for the Ombudsman to disclose information in the public interest. Specifically, the Ombudsman can disclose information if he or she is of the opinion that such disclosure would be in the interest of any department, prescribed authority or person, or otherwise is in the public interest.⁸ Practical detail on information sharing, complaints and how matters could be transferred between the OCO and Inspector-General could be set out in a memorandum of understanding as necessary.
11. The Bill overrides secrecy provisions in other legislation⁹ to enable protected information, documents or things to be provided to the Inspector-General when required.¹⁰ To preserve OCO's independence, the Bill carves out the Ombudsman Act from this provision. This may not be necessary, as OCO is outside of the Inspector-General's jurisdiction; the Inspector-General would have no power to issue a notice to provide information to the Ombudsman.¹¹

Implementation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment (OPCAT) in the aged care context

12. All Australian governments are required under the OPCAT to ensure that all places where people may be deprived of their liberty are subject to regular preventive visits by appropriately qualified independent entities as part of the National Preventive Mechanism (NPM). While the Australian Government has stated publicly that Australia's initial focus in implementing OPCAT will be on primary places of detention, which were identified as not including aged care facilities, Australia's obligations under OPCAT are not limited to primary places of detention (which is not terminology OPCAT uses) and do include aged care facilities if people may be deprived of their liberty in those facilities.
13. While the Report of the Royal Commission into Aged Care Quality and Safety is silent on OPCAT, it does call for urgent action to stop the use of unsafe and inhumane restrictive practices in residential aged care that restrict a person's free movement and impact their liberty.¹²
14. The Government has given the role of Commonwealth NPM (responsible for visiting places of detention under the control of the Commonwealth) to the OCO. At some point the OCO will therefore need to consider what oversight role it should play under OPCAT with respect to aged care facilities – which is an existing responsibility the OCO has, albeit not a responsibility it is currently resourced to carry out. Similarly, State and Territory NPMs are

⁶ Clause 64(10)(a) of the Bill

⁷ Clause 23(2)(d) of the Bill

⁸ Section 35A of the Ombudsman Act is subject to exceptions (e.g. s35A(3)(b)).

⁹ Clause 53(3)(c) of the Bill

¹⁰ Clause 44 of the Bill

¹¹ Clause 10 of the Bill limits the Inspector-General's remit to matters concerning aged care law and funding agreements. OCO is established by the Ombudsman Act and operates outside of aged care law.

¹² See for example, *Final Report: Care, Dignity and Respect* (Final Report: Volume 1, March 2021) pp 68 and 93.

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actively considering what oversight role they should play with respect to aged care facilities. The responsibilities of the Commonwealth and State and Territory NPMs with respect to aged care may overlap with the responsibilities of the proposed Inspector-General or other oversight bodies under aged care law (e.g. ACQSC).

15. It is therefore desirable that, in proposing to create the Inspector-General, consideration should be given to:

- whether the Commonwealth's oversight role in aged care means that aged care facilities are wholly or partly under the control of the Commonwealth
- if so whether the Commonwealth NPM should play the entirety or just part of the role of NPM for aged care nationally¹³
- whether any such Commonwealth role for aged care should be played by the OCO (which is the current legal position)¹⁴
- or whether alternatively the proposed Inspector-General (or another oversight body such as ACQSC) could also be appointed as part of the Commonwealth NPM specifically with respect to aged care.¹⁵

16. In considering this issue, Health should consult with both the OCO and AGD, noting that AGD is the policy owner for OPCAT.

¹³ That is, the Commonwealth could work in conjunction with State and Territory NPMs. This may be preferable given States and Territories play a role in regulating aged care facilities, including specifically that the use of restrictive practices in aged care is typically authorised by State and Territory legislation.

¹⁴ This is the position in some comparable jurisdictions (e.g. New Zealand), but not others (e.g. United Kingdom). In discharging its function, OCO may engage experts to assist with visits. For aged care this could include staff of the Inspector-General or staff of ACQSC. This option would not require further legislative amendments.

¹⁵ This option would require additional legislative amendments.