



**Inspector-General of Aged Care:  
A Submission on the Exposure  
Draft of a Bill to Establish the  
Role of the Inspector General**

January 2023 | UTS Ageing Research Collaborative



### Acknowledgments

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# 1 Background

The 2021 Final Report<sup>1</sup> of the Royal Commission into Quality and Safety in Aged Care (the Royal Commission) recommended the establishment of an Inspector-General of Aged Care (Recommendation 12). The Australian Government's October 2022-23 Budget committed \$38.7 million over four years to establish an Inspector-General and associated Office. In December 2022, the Department of Health and Aged Care (DoHAC, the Department) released an Exposure Draft of a Bill to establish that role, together with a Consultation Paper. Comments are required by 27 January 2023.

The University of Technology Sydney Ageing Research Collaborative (UARC) is grateful for the opportunity to make a submission and offers the following Commentary. The focus is primarily on the Exposure Draft of the Bill (the draft Bill). UARC would welcome the opportunity to meet with the Department as necessary to clarify any matters it raises in this Commentary.

## 2 Preliminary Observations

Prior to addressing individual sections of the draft Bill, UARC offers the following observations on matters that have broader relevance to the effectiveness of the Inspector-General's role beyond the specific legislative provisions.

It is important to note at the outset that this role is not specifically about the enforcement of regulations. Although there is inconsistency and ambiguity in the current draft Bill, it is apparent that the primary purpose of the Inspector-General is to monitor, investigate and publicly report on systemic issues arising from the exercise of powers and the performance of functions and duties held by a range of bodies within the aged care sector by way of aged care laws and funding agreements. The proposed Inspector-General does not have the power to impose corrective orders, penalties or sanctions, but may make recommendations for policy and practice improvement.

### Good governance: Performance requirements of the sector and the Inspector-General

The Royal Commission proposed that an Inspector-General be charged with an oversight and monitoring role, with the objective of holding relevant bodies 'accountable for their performance'.<sup>2</sup> A foundational issue for the proposed legislation is what performance is required according to the rights, responsibilities and standards set out in aged care laws and aged care funding agreements. If the performance requirements are themselves weak or ambiguous, the Inspector-General role is simply another reactive and somewhat ineffectual measure.

It is essential that the reform of aged care laws, regulations and funding agreements is based on the principles of good governance, which ensure the equitable, effective, efficient and sustainable administration of public functions. Good governance encompasses such attributes as clear specification of functions and powers (legal responsibility and controllability), transparency, accountability, adherence to the rule of law and meaningful consultation. Hence, all reforms to the aged care governance structures need to establish clear and robust performance requirements for all relevant sector participants. Doing so will ensure that those entities know what is expected and can develop and deliver on plans to meet those requirements.

In turn, this would strengthen the effectiveness of the role of the Inspector-General.

*Accordingly, UARC argues that good governance principles must also be reflected in the legislation establishing the Inspector-General and in the role that position will play in relation to the aged care sector in general, as well as in its relationship with other agencies and bodies across that sector.*

As the Consultation Paper notes,<sup>3</sup> two further roles are also proposed – an Aged Care Complaints Commissioner and an Aboriginal and Torres Strait Islander Aged Care Commissioner. Their powers and functions should also be constructed according to the principles of good governance. Interaction between the Inspector-General and these roles remains subject to further consultation and decisions of Government.

## Significance of the attributes of the person appointed to the role of the Inspector-General

A further preliminary consideration is that while clear and sound drafting of the regulatory regime is a necessary condition for the effectiveness of the role of the Inspector-General in meeting the best interests of older Australians in need and the community as a whole, it is not, of itself, a sufficient condition.

While the legislation may remain unchanged over time, the various people appointed to the role of Inspector-General will have a material influence on how that role is undertaken. (By way of illustration, one need only reflect on the performance of the Australian Competition and Consumer Commission under the three Chairs appointed between 1995 and 2022.) Differing emphases on leadership and organisational culture of appointed persons can impact the effectiveness of the role in various dimensions, including approaches somewhere along the spectrums of:

1. expecting all agencies and other stakeholders to operate in strict compliance with aged care laws and funding agreements or contributing to their education and performance improvement;
2. cultivating a collaborative relationship across the aged care sector or adopting a more siloed approach to the exercise of the legal powers of the Office of Inspector-General;
3. being highly interventionist in a range of matters irrespective of their materiality or focussing instead on a small number of policy relevant issues; and
4. being pre-emptive in anticipation of issues arising or reactive and undertaking reviews only when pressed.

*UARC underlines the importance of governments carefully considering the attributes of its appointees to the role, just as much as to the drafting of the enabling legislation.*

## Resourcing of the Office of the Inspector-General

A third preliminary matter of significance to the effectiveness of the role of Inspector-General, beyond the provisions in the legislation, is the level of resourcing that will be made available to enable the Inspector-General to perform their functions and exercise their powers effectively.

Section 9 of the draft Bill creates an Inspector-General of Aged Care and Section 12 establishes the Office of the Inspector-General of Aged Care as a listed entity for the

purposes of the finance law. The listed entity comprises the Inspector-General, staff who are Australian Government public servants (Section 36), other assisting persons who are government officers or employees (Section 37) and consultants (Section 38). However, the numbers of staff and other support persons, and the sufficiency of their salary levels to attract persons with the most appropriate knowledge, skills and attributes, are all matters that are dependent on the Budget decisions of the Australian Government (and Parliamentary passage of the Appropriation Acts).

Section 13 of the draft Bill requires the Inspector-General to prepare an annual workplan (having consulted with the Minister), but there is no guidance on how many reviews should be included in the workplan or other indication of the quantum of resources available to deliver that workplan. The only explicit reference in the draft Bill to the level of resourcing to be provided to the Inspector-General is in Section 15 where the Minister, in considering whether to require the Inspector-General to conduct a directed review, must have regard to the objects of the (proposed) Act, the Inspector-General's workplan, and whether the Inspector-General has sufficient resources to conduct the directed review (Section 15(3)(c)).

As noted earlier, the Australian Government's October 2022 Budget provides \$38.7 million over four years from 2022–23 to establish the Inspector-General of Aged Care and the Office of the Inspector-General of Aged Care as a Statutory Agency.<sup>4</sup>

*UARC would need to analyse a full break-down of initial and ongoing cost allocations for both personnel (numbers and levels) and capital before being in a position to make a judgement of their adequacy to effectively achieve the objects of the Act in relation to the functions of the Inspector-General.*

### 3 Section 3 (Objects) and Related Matters in Section 10 (Functions of the Inspector-General)

UARC supports the inclusion of a statement of objects for the legislation. There is scope to improve on the current drafting of that statement and on providing supportive drafting elsewhere in the draft Bill.

#### Reference to the ‘aged care system’

The current draft of Section 3 includes the term ‘aged care system’ on four occasions, though it is not used elsewhere in the draft Bill. The term is not defined in Section 5.

Use of this term in the draft Bill perpetuates a common misunderstanding amongst older Australians and the community in general that when people reach older ages, their needs should be met from services available under the ‘aged care system’. However, the services provided by this system are only a subset of the totality of services that are available to all older Australians, along with the wider community, from the marketplace or from informal and charitable sources. The two distinguishing features of this subset of services are that they are taxpayer subsidised and are subject to specific regulation that is additional to general consumer and related laws. As such, the availability of these subsidies is rightly subject to the older person meeting specific criteria of need for such taxpayer-funded subsidies – noting there is scope to tighten those criteria to limit the public funding to those most in need.

In contrast to references to the aged care system in Section 3, Section 10 of the draft Bill makes clear that the functions of the Inspector-General relate specifically to matters dealt with under aged care laws and aged care funding agreements, both of which are defined under Section 5. This approach has greater clarity.

*UARC’s proposed approach is that, while there are several means by which the inadequacies of Section 3 could be addressed, UARC’s preferred approach would be to replace the phrase ‘aged care system’ where used throughout Section 3 with the phrase ‘aged care laws and aged care funding agreements’. The lack of elegance of such drafting is ameliorated by its greater clarity.*

#### Reference to ‘facilitate positive change for older Australians’ and ‘making recommendations for improvement’

‘Positive change’ and ‘recommendations for improvement’ are value-laden terms, both stated in Section 3. The draft Bill provides no guidance on how any potential change should be assessed by the Inspector-General as to whether it is positive or makes an



improvement. Further, the positive change is only referred to in the context of older Australians (in totality, not just those in need), with no reference to its impact on the taxpayers who fund the service subsidies or on overall community wellbeing.

The statement in Section 3 is the only occasion in which the terms are used in the draft Bill. Nonetheless, they should be read in conjunction with Section 10, which specifies the functions of the Inspector-General, and Section 11, in relation to the independence of that role. The following paragraphs explain.

The draft Bill provides the Inspector-General with wide discretion in the development of annual workplans (though the Minister must be consulted – Section 13(3)), the selection of topics for review, and the making of recommendations in final review reports. In principle, this independence should add to the objectivity and credibility of review reports.

However, the Inspector-General will be exercising considerable judgement in both topic selection and the formulation of recommendations. The appointee will have, as their legislative guidance, that the object is to (1) drive accountability and transparency and (2) facilitate positive change for older Australians.

*UARC agrees that strengthening accountability and transparency is at the core of the Inspector-General's role. We agree with the Royal Commission that the principle of accountability means 'an aged care system that is open, honest and answerable to the community for the care it delivers'.<sup>5</sup> The draft Bill, in its entirety, must be consistent with the object of accountability.*

However, the second part of the object statement – facilitating 'positive change' – is clearly inadequate and provides no basis on which the Inspector-General can be held accountable for the topics selected or recommendations made. Should the Inspector-General look to the policies of the government of the day for guidance on what is positive and an improvement, to the Royal Commission, or to the reports of academics and other experts? While there are some procedural requirements that should temper any unmerited deviation from what is in the public interest, the final legislation should provide clearer guidance to the Inspector-General in the exercise of their judgement.

*UARC suggests that Section 3 comprise an objects statement similar to the first statement of the draft Bill but with less value-laden wording. In addition, the current draft subsections 3(a), (b) and (c) could also be omitted, given the more precise formulation of functions in Section 10.*

*A possible form of wording for Section 3 could be along the following lines:*

The objects of this Act are to strengthen accountability for, and transparency of, the functioning of aged care laws and funding agreements and their contribution to the provision of equitable, effective, efficient, sustainable, safe and quality care that is in the long-term interest of older Australians in need and the community as a whole. This is to be achieved by establishing an independent Inspector-General of Aged Care to monitor, investigate and publicly report on

the functioning of aged care laws and aged care funding agreements, including by undertaking independent reviews to identify systemic issues, evaluate actions and responses, and make recommendations that contribute to the achievement of the objects of the Act.

## Clarification required on oversight of the complaints management system

The October 2022 Budget provides \$9.9 million over two years from 2022–23 to establish the Aged Care Complaints Commissioner within the Aged Care Quality and Safety Commission (ACQSC) from December 2022. Section 3(b) of the draft Bill makes reference to the complaints management regime as being an object of the (proposed) Act:

*...to drive greater accountability and transparency of the Commonwealth's administration of the aged care system and facilitate positive change for older Australians, by: providing oversight of the Commonwealth's administration of complaints management processes across the aged care system.*

The Consultation Paper notes<sup>6</sup> the possibility of interaction between the Inspector-General and the Complaints Commissioner, but states that this remains subject to further consultation and decisions of Government.

Given the importance of complaints management processes in ensuring a strong regulatory regime, UARC discusses this matter in further detail as follows.

The term 'complaint management process' referred to in Section 3(b) has not been clearly defined in Section 5, nor does Section 10 explicitly include the nature and scope of the oversight as one of the functions of the Inspector-General. Without a clear definition and scope of what 'complaint management processes' entails, the term gives rise to ambiguity and uncertainty as to the role to be undertaken by the Inspector-General in complaints oversight.

The wording in Section 3(b) could suggest that the Inspector-General would oversee the processes by which the regulatory agencies resolve complaints about aged care services. This objective has two related issues. First, the Inspector-General's oversight of complaint management is procedural rather than substantive. The Consultation Paper further indicates that the Inspector-General's oversight of complaint management is confined to reviewing complaint archival data and extrapolating systemic issues from the data.<sup>7</sup>

*UARC is concerned that a narrow focus on the administration of complaint management processes offers little insight into underlying issues, which may impede the Inspector-General's ability to identify the systematic problems in the provision of aged care services or regulation of the aged care sector.*

Second, government agencies have discretionary power to choose how to manage complaints and the complaint resolution processes within their legal authority. Section 3(a) outlines the role of the Inspector-General as being to monitor, investigate and report on whether government agencies have exercised their power or performed their duties following the relevant aged care law.

It is worth noting that the scope of complaint oversight implied in the current draft Bill is much narrower than what was recommended by the Royal Commission. The Royal Commission proposed that the Inspector-General oversee complaints management at two levels – the oversight of individual complaints that have been dealt with unsatisfactorily by the Complaints Commissioner, and the oversight of complaints about the Quality Regulator itself and other government bodies.<sup>8</sup> This recommendation distinguishes the role of the Inspector-General from the proposed Complaint Commissioner, who is primarily responsible for administering complaints about Service Providers (currently known as the Service Provider Complaints System administered by the ACQSC). The Inspector-General is expected to be the safeguard of the Service Provider Complaint System (or the proposed Complaint Commissioner) and other Commonwealth administrative bodies, performing a role similar to the Administrative Appeals Tribunal – to provide an independent review of a wide range of complaints about administrative decisions made by the government bodies within the aged care sector. However, the safeguard function of the Inspector-General intended by the Royal Commission has not been addressed in the draft Bill.

In addition, the Consultation Paper notes<sup>9</sup> the possibility of interaction between the Inspector-General and the Complaints Commissioner, but states that this remains subject to further consultation and decisions of the Government. In the absence of a clearly defined scope of the Inspector-General's oversight and how it will interact with the proposed Complaints Commissioner, UARC cannot conclude whether the Inspector-General has the affordance necessary to identify systematic issues from the oversight of complaints management processes.

UARC underlines the importance of having a mechanism to monitor and review the complaint management processes and outcomes within the aged care sector, including dissatisfied complaint resolutions. It is common for Inspector-Generals to investigate complaints about the activities of government agencies; for instance, the Inspector-General of Intelligence and Security. The objective to oversee complaints about Commonwealth agencies within the aged care sector also aligns with Recommendation 12 of the Royal Commission and the draft Bill's overarching objectives – to drive greater accountability and transparency of government administration of the aged care sector. If Section 3(b) is replaced with the objective of overseeing complaints about government agencies, UARC proposes Section 10 of the draft Bill to include an investigation of complaints about Commonwealth agencies as part of the functions of the Inspector-General.

## Scope of the Inspector-General's functions, with reference to 'the Commonwealth's administration of the aged care system'

The objects of the (proposed) Act in Section 3 limit the role of the Inspector-General to only consider matters relating to 'the Commonwealth's administration of the aged care system'. This limitation is not carried through into Section 10, which sets out the functions of the Inspector-General.

Indeed, various parts of Section 10 explicitly avoid any such limitation in relation to aged care laws, though not to aged care funding agreements. To illustrate:

### *Aged care laws*

Section 10(1)(a)(i) provides that the Inspector-General can monitor, investigate and report on the exercise of powers, and the performance of functions and duties under aged care laws that are the responsibility of any and all parties, including providers.

The Inspector-General's scope is similarly unbounded in Section 10(1)(a)(iii) in relation to the operation of aged care laws.

Without excluding or limiting the scope of the above two sections, Section 10(1)(a)(ii) provides that the Inspector-General's scope also includes, in part, the Commonwealth's administration of aged care laws.

### *Aged care funding agreements*

However, the Inspector-General's scope in relation to aged care funding agreements does not extend to the non-Commonwealth parties (providers) to such funding agreements. Section 10(1)(a)(ii) refers, in part, only to the Commonwealth's administration of aged care funding agreements.

With a similar limitation on the Inspector-General's scope, Section 10(1)(a)(iv) refers to the performance of obligations and the exercise of rights by the Commonwealth under an aged care funding agreement, but not to the performance of obligations and the exercise of rights by the other parties to those agreements. However, it may well be the conduct of those other parties which clearly demonstrates the need for reform.

There is a follow-on consequence in that, under Section 10(1)(b), the Inspector-General is unable to monitor, investigate and report to the Minister and Parliament on systemic issues relating to matters that do not fall under Section 10(1)(a).

*UARC is unable to conclude the intended scope of the role of the Inspector-General from the interplay of Sections 3 and 10 of the draft Bill.*

*UARC proposes that the Inspector-General should be empowered to identify and make recommendations that would better align the functioning of the aged care laws and funding agreements with the intended objects of the Commonwealth subsidising certain*

*services to older Australians in need and with the interests of the community as a whole. Accordingly, UARC considers that Section 10 of the draft Bill should be rewritten to accord with the objects set out in Section 3, as proposed by UARC in an earlier section of this Commentary.*

## 4 Section 19 (Draft Review Report)

Section 19(5) requires that 'A comment on a draft review report must be made in writing'. Such a provision reinforces the transparency of the process and is supported.

However, this could be read as preventing the Inspector-General from also conducting public hearings on the draft report. This would be unfortunate, particularly for public consultation on systemic issues that have come to the attention of the Inspector-General and on which that person is conducting a review. As is evidenced by the procedures adopted by the Productivity Commission (and provided for in its enabling legislation), public hearings can add considerable benefit to public debate on broader policy issues and assist in reaching a full understanding of the consequences of matters proposed in the draft report.

*UARC notes that the current wording of Section 19(5) is not exclusive of comments also being transmitted in other forms. Thus, in the absence of any rewording of the section to allow for public hearings, it may be possible for the requirements of the section to be met provided any participants to a public hearing also make their comments in writing to the Inspector-General. This is a matter for legislative drafting.*

*UARC reinforces that all aspects of the draft Bill must operate to advance the governance principles of accountability and transparency. To that end, there should be careful consideration of the justification for providing multiple opportunities for bodies to receive and respond to preliminary findings and draft review reports, particularly where such processes are hidden from public scrutiny. UARC agrees with the Royal Commission's observation that both secrecy and openness are policy choices and calls for a preference in favour of transparency.*

## 5 Section 24 (Reviews of Implementation of Aged Care Royal Commission Recommendations) and a Related Matter in Section 10 (Functions of the Inspector-General)

A function of the Inspector-General is to monitor, investigate and report on the Commonwealth's implementation of the Aged Care Royal Commission's recommendations (Section 10(1)(d)). Section 24 requires that there be two reviews and sets out the requirements and timeframes for each of the reviews.

A first issue is the implicit assumption in Section 10 that all recommendations of the Royal Commission should be implemented. In practical terms, this is not possible for the several recommendations where the two Commissioners put forward separate propositions.

A second issue is that the powers of the Inspector-General in the draft Bill could be strengthened by amending Section 24(1) by inserting the phrase to evaluate, as follows in bold:

*24(1) The Inspector-General must conduct 2 reviews ~~of~~ **to evaluate** the implementation by the Commonwealth of the recommendations of the Aged Care Royal Commission.*

Of particular importance is that, in UARC's view, several of the recommendations are contrary to good public policy, and the Commonwealth's response rightly rejects them or intends instead to address the underlying issue in another way. The wording of Section 24(2)(a) accommodates this situation in that it refers to the Inspector-General's reviews being required to consider 'the measures and actions taken by the Commonwealth in response to the recommendation'. However, this wording is not carried through to Section 24(2)(b), which requires each review to address 'the effectiveness of those measures and actions in implementing the recommendation', when clearly the Commonwealth's response is to not implement the recommendation – either in its form as proposed by the Royal Commission or at all.

*UARC's proposed approach is that this issue can be resolved by a rewording of Section 24(2)(b) which inserts the phrase in bold below:*

*(b) the effectiveness of those measures and actions in implementing **the Commonwealth's response to the recommendation.***

# References

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