Submission to the Senate Community Affairs Legislation Committee

Inquiry into the Inspector-General of Aged Care Bill

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Background

I was a senior public servant in the Commonwealth Department of Health for over 25 years. During this time I was the policy lead in a number of major legislation projects, including the *Medical Indemnity Act 2003*, the *Private Health Insurance Act 2007*, and the *National Health Reform Act 2011*, as well as a major re-write of large parts of the *Therapeutic Goods Act 1989* during 2008-10.

From 2019 to 2021 I worked as a senior adviser to the Royal Commission on the Quality and Safety of Aged Care (the Royal Commission).

Since retiring in 2021 I have written regularly on health and aged care issues for the *Croakey* and *Pearls and Irritations* online publications.

Introduction

The Royal Commission recommended (rec 12) the establishment of an Inspector-General of Aged Care to "investigate, monitor and report on the administration and governance of the aged care system... by:

a. conducting reviews on its own motion and/or at the request of the System Governor or the Minister or Parliament to ensure the quality and safety of aged care
b. reviewing regulator decisions on a systematic basis to ensure regulator integrity and performance
c. reviewing the performance of functions by the System Governor, the Quality Regulator, the Prudential Regulator and the Pricing Authority
d. monitoring the adequacy of aged care data collection and analysis
e. monitoring the implementation of the reforms recommended by the Royal Commission, and
f. reporting annually to the Australian Parliament on systemic issues in the aged care system and the extent to which the aged care system attains the objects of the new Act".

The Royal Commission also recommended (rec 98(2)) that the new Aged Care Act should provide that "if a complainant or a respondent is not satisfied with the Complaints Commissioner's handing of a complaint or the outcome, the complainant or respondent may refer the matter to the Inspector-General".

Finally, the Royal Commission recommended (rec 148) that:

1. The Inspector-General of Aged Care should monitor the implementation of recommendations and should report to the responsible Minister and directly to the Parliament at least every six months on the implementation of the recommendations.
2. The Inspector-General of Aged Care should undertake independent evaluations of the effectiveness of the measures and actions taken in response to the recommendations of the Royal Commission, five and 10 years after the tabling of the Final Report.

3. The Inspector-General of Aged Care should report on these evaluations five and 10 years after the tabling of the Final Report.

Issues with the Bill

The Bill before the Parliament fails to deliver on several of the Royal Commission recommendations. It does not provide for the Inspector-General to review the outcomes of individual complaints, and it does not provide for six-monthly reports on implementation of the Royal Commission's recommendations.

The Bill also imposes an inappropriate obligation on the Inspector-General to exclude some types of "sensitive information" from reports.

Review of complaints

The final report of the Royal Commission observed (vol 3B, page 511) that "no complaint mechanism will get it right all the time". It went on to state:

> "the Inspector-General should also be responsible for reviewing a complaint that has been dealt with by the Complaints Commissioner, upon application by a complainant or a respondent... the Inspector-General should have the power to affirm the original decision, or to set the decision aside and investigate or attempt to resolve the complaint" (page 512).

This view was put forward in recommendation 98(2).

On the basis of the evidence before it, and the submissions made to it, the Royal Commission formed the view that there was a need for a mechanism to review cases determined by the Complaints Commissioner. It also clearly considered conferral of this function on the independent Inspector-General it was recommending would not compromise the independence of the Inspector-General.

It is worth noting that the Commissioners coming to this view included Lynelle Briggs AO, a former Public Service Commissioner and departmental Secretary with an excellent understanding of public governance, and Tony Pagone KC, a retired judge who has served on both the Victorian Supreme Court and the Federal Court. They would have been well aware of the need for the independence of the Inspector-General to be above reproach.

However, the government has decided to reject recommendation 98(2). The explanatory memorandum to the Bill states (pages 19-20):

> "... [the Bill] envisage[s] a complaints management role different to that proposed by the Royal Commission, which recommended that the Inspector-General... serve as an escalation point for complaints considered by the proposed Complaints Commissioner role. Instead, the model this Bill puts into place maintains the independence of the Inspector-General by keeping them at arm's length from the bodies and activities which they oversee. In practice, this will see the Inspector-General maintain oversight of the complaints management processes across the aged care system to ensure that they provide a fair and transparent means of resolving concerns, rather than having an active role in considering individual complaints."

Unfortunately, the second reading speech sheds no further light on the government's decision.

It is difficult to see how reviewing individual decisions by the Complaints Commissioner could compromise the independence of the Inspector-General. If one of the objectives of the Inspector-

General is to review the operations of other government bodies, review of particular decisions by one of those bodies seems entirely consistent with the overall objective.

I would hope that the government received advice from appropriate governance experts before deciding to reject the recommendation. If so, the department should make this advice available to the Committee so it can be tested at a hearing. If there was no independent advice, I suggest that

> *the Committee should recommend to the Senate that the bill should not proceed until the government proposes amendments to give effect to Royal Commission recommendation 98(2).*

Six-monthly reviews of progress

The Royal Commission stated that:

> "There must be clear accountability for implementation. Implementation must be monitored constantly, reviewed regularly, and have the continuous backing of the Government" (vol 3B, page 933).

In that context it recommended that the Inspector-General should report at least every six months on the implementation of the recommendations.

So far the only comprehensive document setting out the government's reaction to the Royal Commission was the initial government response of May 2021. At that time the then government effectively withheld its position on many recommendations, which were "accepted in principle" or subject to "sector consultation".

While the Labor government which took office in May 2022 committed to implementing further measures, it did not provide a comprehensive account of its response to the Royal Commission recommendations.

Since then there has not been any government publication setting out progress against the recommendations – or, indeed, whether or not the current government is committed to any particular measure.

Interested observers have to trawl through the Department of Health's website to track progress of individual measures. They are left to assume that absence of the evidence of progress is evidence of the absence of progress.

This is highly unsatisfactory. The government should be accountable to the public for its response to the Royal Commission recommendations, and it is very disappointing that it has not taken the initiative to provide six-monthly reports on progress in the absence of an Inspector-General.

Now that the Bill to establish the Inspector-General has been introduced, it is remarkable that it does not include a requirement for the Inspector-General to produce six-monthly reports as recommended by the Royal Commission. This omission is all the more remarkable because the Bill does include at clause 28 a requirement for the Inspector-General to conduct the five- and ten-yearly reviews of progress envisaged in recommendation 148(2).

The government may argue that the Inspector-General could publish regular reports on progress under subclause 29(1) ("The Inspector-General may prepare a report on any matter relating to the Inspector-General's functions") or as part of its annual reports under clause 71.

While this is true, it does not justify exclusion from the Bill of a statutory duty to undertake six-monthly reports. The record of the last two years suggests that such reports will not be made available in the absence of a statutory requirement to do so.

I suggest that

> *the Committee recommend that the Senate amend the Bill to include a requirement for the Inspector-General to report, by 31 March and 30 September, on progress in implementing the Royal Commission's recommendations in the six months ending on the previous 31 December and 30 June. The requirement should apply for the period ending in 2031.*

Withholding of sensitive information from reports

Clause 26 of the Bill provides that "a draft review report or a final review report must not... include information that the Inspector-General is satisfied is sensitive information". Similar wording occurs elsewhere in the Bill in provisions dealing with other kinds of reports (clauses 29 and 71).

"Sensitive information" is defined (clause 5) as "information the disclosure of which would be contrary to the public interest because *[inter alia]* it would reasonably be expected to prejudice the commercial interests of any person or body".

Presumably any information likely to discredit an aged care provider could reasonably be expected to prejudice its commercial interests, and could not therefore be included in a report by the Inspector-General.

However, it is incorrect to assume that any prejudice to commercial interests is automatically contrary to the public interest. This is particularly the case for organisations such as aged care providers, delivering largely government-funded services to a vulnerable population. Information showing that a provider is failing to deliver appropriate care is likely to be prejudicial to its commercial interests, yet clearly in the public interest.

The provisions of the Bill are at odds with the regime set out in the *Freedom of Information Act 1982* (the FOI Act). That Act contains a conditional exemption from release for documents containing information on the business, commercial or financial affairs of an entity which if disclosed might unreasonably affect that entity in respect of its lawful business (section 47G).

Section 11A of the FOI Act requires the decision maker to grant access to a conditionally exempt document "unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest".

Section 11B sets out the factors favouring access to the document in the public interest, including whether access would "inform debate on a matter of public importance" or "promote effective oversight of public expenditure".

In other words, FOI decision-makers – often middle managers within the public service – are given the discretion to release commercial information if it would be in the public interest.

The Inspector-General of Aged Care – a far more senior position – should have a similar discretion.

Imagine if a review by the Inspector-General found that a lack of oversight by a government entity had allowed an aged care provider to get away with over-reporting the care time it had delivered, and as a result the provider had received a four-star rating when it ought to only have received two stars.

Releasing the name of the provider involved would almost certainly prejudice its commercial interests. But it is clearly in the public interest for users and potential users of services delivered by that provider to understand that it has not been providing the care time it had claimed.

I suggest that

the Committee recommend that the Senate amend the Bill to:

- *exclude from the definition of sensitive information material which would reasonably be expected to prejudice the commercial interests of any person or body*
- *include "adverse commercial information" as a new term, defined as material which would reasonably be expected to prejudice the commercial interests of any person or body*
- *allow the Inspector-General to include adverse commercial information in a report if the Inspector-General considers it would be in the public interest to do so.*