# Submission by the Commonwealth Ombudsman

## Productivity Commission Inquiry – Caring for Older Australians

Submission by the Acting Commonwealth Ombudsman, Ron Brent

**August 2010**

## INTRODUCTION

The Australian Government has asked the Productivity Commission to undertake a public inquiry into Australia's aged care system, to develop detailed options for further structural reform to ensure it can meet the challenges facing it in coming decades. In particular, the Commission will be:

- examining the social, clinical and institutional aspects of aged care in Australia;
- building on the substantial base of existing reviews into this sector; and
- developing regulatory and funding options for residential and community aged care (including the Home and Community Care program).

The Commission has been specifically requested to:

- address the interests of special needs groups;
- examine the future workforce requirements of the aged care sector;
- recommend a path for transitioning from the current regulatory arrangements to a new system that ensures continuity of care and allows the sector time to adjust;
- examine whether the regulation of retirement specific living options should be aligned more closely with the rest of the aged care sector, and if so, how this should be achieved; and
- assess the fiscal implications of any change in aged care roles and responsibilities.

## BACKGROUND

The office of Commonwealth Ombudsman is established by the *Ombudsman Act 1976* to investigate administrative actions by Commonwealth agencies. The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action;
- fostering good public administration that is accountable, lawful, fair, transparent and responsive;
- assisting people to resolve complaints about government administrative action;
- developing policies and principles for accountability; and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

The Ombudsman's office received 37,468 approaches and complaints in 2009-10. As well as cases generated by complaints, the Ombudsman's office conducts investigations on an 'own motion' basis into wider systemic issues in public administration. The office has extensive investigation powers, but prefers to investigate with less formality and greater efficiency where possible. Given the nature

of the Ombudsman's role, the comments and observations in this submission relate to the issues the office has identified through the complaints it has received and issues identified in the office's broader outreach and systemic issues work. These observations might usefully inform the Commission's considerations of the aged care system.

This submission has been prepared by the Commonwealth Ombudsman's NSW office, which handles complaints about Health and Ageing portfolio agencies, in collaboration with the Indigenous Unit.

The Commonwealth Ombudsman established the Indigenous Unit in August 2007 to conduct outreach to Indigenous communities in the NT. The Unit is specifically funded to investigate and resolve complaints, identify systemic issues, provide feedback to agencies about implementation issues and work with key stakeholders to improve public administration in relation to the Northern Territory Emergency Response (NTER).

## CONTEXT

As In preparing this submission the Ombudsman notes the shift towards 'citizen-centred service delivery'- the idea that services should be delivered in the way that is most likely to give people what they need, not in the way that's most convenient for public servants or Governments.[1] This submission also reflects the Government's vision of a socially inclusive society, in which all Australians feel valued and have the opportunity to participate fully in the life of our society. Achieving this vision means that all Australians will have the resources, opportunities and capability to:

- Learn by participating in education and training;
- Work by participating in employment, in voluntary work and in family and caring;
- Engage by connecting with people and using their local community's resources; and
- Have a voice so that they can influence decisions that affect them.

[1] noted in *Ahead of the Game: Blueprint for Reform of Australian Government Administration, "*a world-class public service must meet the needs of citizens by providing high quality, tailored public services and by engaging citizens in the design and development of services and policy".

## SUBMISSION

This submission is arranged around questions identified in the issues paper rather than the terms of reference. Only the questions which can be answered on the basis of the Ombudsman's complaint experience have been addressed.

### 1. What the Commission has been asked to do

*(P.5.) Are there findings or recommendations from previous reviews of aged care in Australia that remain relevant? If so, of those that have not been acted on, which ones are most important?*

As the Commission will be aware, there has been a surfeit of inquiries and reviews into the state of aged care in Australia. Many of the past reviews have failed to provoke the reform they call for and to this extent this submission identifies some which should be revisited.

Complaint handling

The most recent review of relevance to complaints received by the Ombudsman was the *Review of the Aged Care Complaints Investigation Scheme*, prepared by Associate Professor Merrilyn Walton in October 2009 (Walton Review). The Walton Review considered all aspects of the Aged Care Complaints Investigation Scheme (CIS) and took up a number of matters raised by the Ombudsman in his submission of September 2009. We understand that there has been progress towards implementing some of the recommendations made in the review. However other recommendations, particularly those requiring changes to legislation, have not, to the best of our knowledge, been progressed at the time of writing.

The Ombudsman considers that a comprehensive, accessible, fair and independent complaint handling and resolution scheme is critical to the aged care field and notes that after wide consultation the Walton Review set out a blueprint for a scheme of this nature. Complaints received by the Ombudsman demonstrate that:

- the existing CIS is focussed on prevention and improvement, but is not seen by complainants to adequately address past events that have affected either themselves or their relatives;

- the existing CIS is not seen by complainants as independent or able to provide them with sufficient opportunity to comment before a decision or recommendation is made;
- the time frame of 14 days for a person to appeal to the Aged Care Commissioner (ACC) against a decision of the CIS is too short.

Implementation of recommendations of the Walton Review would address these matters.

Indigenous specific concerns

Of key interest to the Ombudsman's Indigenous Unit is the Office of Evaluation and Audit (OEA) *Performance Audit of Aged Care for Indigenous Australians*, September 2009. OEA undertook the performance audit to access the overall efficiency and effectiveness of the mainstream and flexible programs funded by the Department of Health and Ageing (DoHA).

The Performance Audit identified a number of issues with the delivery of the aged care services to Indigenous Australians, and made a number of recommendations which the Ombudsman supports. They were that DoHA:

1. evaluate the Flexible Program in conjunction with a formal needs analysis to identify a formal process for monitoring changing levels of need;
2. ensure that formal authoritative Flexible Program documentation exists;
3. develop a performance framework that includes key performance indicators, within the service activity reports, that can assess the performance of the Flexible Program in meeting its intended objectives; and
4. develop a structured, ongoing capital replacement and improvement program for the Flexible Program.

Although DoHA notes in its response to the OEA report that 'the Department is implementing a number of initiatives to improve the quality of aged care services to Aboriginal and Torres Strait Islander people' and that 'these initiatives address several of the (OEA) recommendations', the Ombudsman's interactions with the DoHA suggest that the recommendations have not been implemented. It is therefore our view that the Commission should review DoHA's actions in relation to these recommendations. OEA found that program documentation to guide the operation of the Flexible Program was very limited and that DoHA found it difficult to provide key documents against which OEA could assess the program's progress and development. OEA identified the lack of formal and authoritative program documentation to be an important management weakness requiring early attention.

The Mainstream Program seeks to meet the needs of Indigenous Australians by funding a number of Indigenous aged care services and by using the population of Indigenous Australians aged over 50 when determining the aged care places allocated to regions. However, the OEA found that Indigenous Australians aged 50-69 are not counted in the national planning process, creating a gap in the overall number of places allocated.

The OEA noted that there are no Indigenous specific standards for ensuring the provision of appropriate aged care services. It was also found that the Aged Care Assessment Teams that assess an individual's eligibility for aged care services are seen as intrusive by some Indigenous Australians and this may result in a lower uptake of mainstream aged care services.

The concerns of the OEA echo those raised by the Aged Care Commissioner in her assessment of the death of an elder at Flexible Aboriginal Aged Care Service.[2]

The Commission may also like to consider the six monthly reports produced by the Coordinator General for Remote Indigenous Services. The first such report, covering the period July – November 2009, noted the lack of aged care infrastructure and the need for aged care transport solutions in remote Indigenous communities. The next report is due to be released soon.

[2] Ms Rhonda Parker, Aged Care Commissioner, in her report to the Minister for Ageing of 20 November 2008 on her assessment of matters referred by the Minister regarding the death of an elder at Tjilpi Pampaku Ngura (Docker River) Flexible Aboriginal Aged Care Service.

## 2. The current system

*P.13 The Commission invites comment and advice on the main strengths and weaknesses of aged care services – community, residential, flexible and respite care – as they are currently configured.*

Indigenous specific concerns

Complaints received by the Commonwealth Ombudsman suggest that the current aged care system for remote Indigenous communities does not adequately cater for the unique challenges faced by older people and carers in remote NT communities, with the result that many older people's care needs are not being met. It should be noted that there are significant differences in the provision of services between Remote Service Delivery (RSD) communities, Territory Growth Towns and other communities.

In light of those challenges, complainants have raised concerns with the Ombudsman about the complexity of the process for applying for aged care funding and its associated costs. They have advised this office that these difficulties dissuade organisations from providing aged care services in remote areas.

The range of aged care programs and the difficulty involved in accessing these programs has resulted in communication-based complaints. It is the Ombudsman's experience that in some communities there is uncertainty about who residents should approach about aged care needs: the shire, the health clinic or the Commonwealth Government representatives stationed in the community. It is often difficult for complainants to navigate the aged care bureaucracy to determine their entitlements. This challenge is exacerbated for complainants who do not speak English, or who speak English as a second, third, fourth, or even fifth language, as is often the case in the NT.

Although residential aged care is viewed favourably by complainants in remote communities, we receive regular feedback that the focus on care and treatment in larger centres has meant that older people may be forced to leave their communities to be cared for, or alternatively, miss out on care as they find it too difficult to leave their communities. Elderly Indigenous people often elect to remain in their community with minimal or no services, rather than be away from their family, social networks and spiritual supports in their country.

Even where needs in a community have been identified, residents have raised concerns that there are delays in implementing care plans or building facilities that are necessary to meet those needs.

*P.13 Are the aged care services that older Australians require available and accessible? Are there gaps that result in a loss of continuity of care? Is there sufficient emphasis within the current system on maintaining a person's independence and on health promotion and rehabilitation? How might any inadequacies in the system be addressed?*

Availability of EACH packages

The Ombudsman's office has received complaints that suitable services have not been available in particular geographic locations. DoHA advises that it cannot require a provider to offer a package to a particular individual.

Indigenous specific concerns

The underlying theme in aged care complaints received by the Ombudsman Indigenous Unit is the inaccessibility and unavailability of aged care services, as the feedback above notes.

On the issue of accessibility, it has been reported to the Commonwealth Ombudsman that appropriate care could be delivered by members of the community, with the appropriate support from the Government. This is another avenue for skills development and employment for remote communities which offer few other options.

| Case study |
| --- |
| We received a complaint on behalf of Mr A, who was living in a remote Indigenous community with no aged care facilities. The health facilities in this community can only be accessed by walking or by private vehicle, as there is no public transport. Mr A was living with a group of other elderly people in improvised dwellings, without water or electricity, in order to be closer to health services. Although the health care workers were visiting the complainant and others living in this way, the Ombudsman's office is not aware of any proposal to develop an aged care facility in the community. |

*P.13 Should there be a greater emphasis on consumer-directed care in the delivery of services, and would this enable more older Australians to exercise their preference to live independently in their own homes for longer with appropriate care and support?*

Aged care recipients as service consumers

Consistent with the *Blueprint for Reform of Australian Government Administration,* this office submits that, when assessing and developing aged care programs, the emphasis should be on the individual's needs and interests and access to programs

Through investigating complaints we have observed that the process by which people access aged care - including the manner in which the fees, bonds and any entitlements are assessed - is very complex and often sidelines the intending or current aged care recipient. Complaints to our office indicate that not only are the care recipients themselves often not consulted when they might have been, but that systems leading to decisions affecting care recipients provide no avenue for their input.

Case study

The complainant (Mr B) was a resident of an aged care facility. On entry Mr B was classified at the lowest rating. No Commonwealth subsidy was payable at this classification level and Mr B was not required to pay a fee. The following year the facility reviewed the classification without reference to Mr B and gave him a higher rating. Mr B was not advised of this outcome until DoHA wrote to him saying that he was now required to pay an income-tested fee for his care. He disputed the rating, but was advised that neither the CIS nor the ACC could consider his complaint.

The next year the facility returned Mr C to the lowest rating, which supported his view that the intervening rating had been incorrect and he complained by email to the Ombudsman.

In response to our enquiries, DoHA initially advised us that the CIS could not review the ratings because they were a matter between aged care providers and DoHA for the purpose of determining subsidies and they did not concern the health, safety and well-being of residents. We argued that the rating was an administrative decision that had a direct effect on the cost of the service to the care recipient, and that a person ought to be able to seek review of an unfavourable rating.

On reconsideration, DoHA advised that it was possible to view the classifications as decisions about the amount of service to be provided to a person, and from this perspective the CIS could investigate such decisions to see if a person was being over-serviced or under-serviced. DoHA undertook that it would treat future complaints about classifications from residents in this way.

Complaints to the Ombudsman indicate that there are other barriers to aged care recipients effectively questioning decisions that affect the quality, nature and cost of the care that they receive. These include:

- the complexity of the assessment processes and cost structures;
- the short timeframe for appeals from decisions of the CIS to the ACC mentioned in our reference to the Walton Review above;
- the CIS being directed towards regulatory rather than complaint resolution outcomes, often leaving the complainant's dispute with a provider unresolved or without redress;
- some systems intended to protect aged care recipients not being subject to review or applying only in limited circumstances. For example, a person can appeal to the Administrative Appeals Tribunal (AAT) about an ACAT assessment that results in a limitation on their approval as a care recipient, but if a provider successfully argues to DoHA that the person requires a different level of care, despite their being no limitation on the ACAT assessment, the person does not have recourse to the AAT;
- financial disincentives for aged care recipients wishing to leave care services with which they have been dissatisfied;
- aged care recipients being afraid of being asked to leave a residence if they make a complaint.

These matters will be discussed in more detail under the heading "*Who should pay and what should they pay for?"* and "*What role for regulation?"*

While it would seem trite to warn against "ageism" in the context of aged care, we also note that complainants to this office have expressed disappointment at the way they or their relative has been treated by the aged care system. We commonly hear comments that reflect frustration that their relative has been treated as someone whose entitlement to care is somehow not legitimate, such as, "my father has been a tax payer all of his life!". Others complain that people will talk to them about their aged relative in that relative's presence without addressing them, "but my mother has all of her faculties, she just isn't mobile", or that processes have occurred without consulting the relative, such as "the Department says that their officer went to the nursing home to look into the matter, but I have asked my mother and no-one has spoken to her".

<u>Indigenous specific concerns</u>

Complainants have expressed concerns about how Government collects information regarding elderly health needs in Indigenous communities. Complaints speak of a failure to properly consult with communities. They also tell us that it is important for Government departments which are developing policies and programs for Indigenous communities to visit them in person in order to identify and discuss the specific needs of *each* community. When visiting communities it is essential that culturally appropriate communication and interpreters are utilised.

In the Ombudsman's experience, Indigenous communities can differ widely and one model is unlikely to be widely applicable. To ensure adequate aged care, services must be tailored in response to (rather than applied to) the unique needs and circumstances of each community and accommodate the differences between RSD communities, Territory Growth Towns and other communities.

*P.13 Comments are also invited on the current system (and possible alternative arrangements) for providing services to people with special needs, including those living in rural and remote locations, those with culturally and linguistically diverse backgrounds, Indigenous Australians, veterans, the older homeless, older people with a mental illness, those with a disability, and other special needs groups, such as gays and lesbians.*

People with special needs

Through our outreach, the Ombudsman's office is aware of concerns about issues faced by gay and lesbian people in the aged care context. Many of these issues are set out in *Dementia, Lesbians and Gay Men*.[3] The case studies in the paper afford a reminder that people with special needs in the field of aged care are often experiencing 'double disadvantage', the first layer of disadvantage being ageism.

Indigenous specific concerns

Even where the facilities in an Indigenous community have been identified as being insufficient to deliver the necessary care services, that there can be delays in developing alternate ways to deliver the services that are required. These delays in turn can give rise to health and safety issues, as elderly people are left to live in inadequate housing, with overcrowding is a major issue.

Again, clear and appropriate communication is a concern, and is essential as programs are developed and rolled out. The Ombudsman has commissioned research on effective communication and engagement with Indigenous Australians

[3] Alzheimer's Australia paper 15, October 2009, prepared by Heather Birch

which we expect to be in a position to share with the Commission and other interested bodies from September. Our complaints investigators have identified the importance of agencies using interpreters, culturally appropriate communication and the effectiveness of pictorial communication. We are currently preparing a public report on agencies' use of interpreters.

## 3. Objectives of the aged care system

*P.15 How effective has the aged care system been in addressing (its) objectives? What changes, if any, should be made to the objectives? What are the implications of such objectives for any redesign of the current system?*

Need for clear standards

As an integrity agency, the Ombudsman's comments principally concern accountability and the first two objectives which are to:

- guarantee an acceptable standard of care
- provide accountability and transparency.

In our view these objectives are inter-dependent. Any guarantee of an acceptable standard of care needs to:

- clearly specify that standard
- provide a process by which people can complain about perceived failures to meet that standard
- provide for the fair investigation of those complaints
- afford a remedy in the individual case
- rectify any systemic issue
- clearly explain the reasoning applied.

We are concerned that the wording of several of the standards in the *Quality of Care Principles 1997* is so broad or aspirational as to be difficult to apply with certainty.

For example, *Schedule 2, Accreditation Standards, Part 1, Item 1.6, Human resources management* says 'There are appropriately skilled and qualified staff sufficient to ensure that services are delivered in accordance with these standards and the residential care service's philosophy and objectives'. State-based laws set minimum carer to child ratios for child care services, yet there is no clear minimum staff to aged care recipient ratio.

Similarly, *Schedule 3, Residential Care Standards, Part 3, item 3.6, Fire, security and other emergencies* stipulates, 'Management and staff are actively working to provide an environment and safe systems of work that minimise fire, security and emergency risks'. One might expect fire security and emergency standards to require specific

measures, rather than being capable of being met by a demonstration that management and staff are working towards a safe environment and systems.

Complaints to this office demonstrate that unclear, aspirational standards can undermine public confidence in accountability processes.

| Case study |
| --- |
| Mrs C approached us about the outcome of an investigation into her complaint about the standard of care her father received in an aged care facility. One of her concerns related to the management of a blackout at the facility due to an electrical storm. She advised that staff in the dementia unit had lit candles as there were insufficient electric torches. Mrs C expressed dismay that each person handling her complaint decided that there had not been a breach of the relevant aged care standards. The reasons given included that there was a critical operations policy document in place at the time of the blackout, staff emergency training occurred at 6 monthly intervals, that mobile oxygen tanks had been available and that no injuries had occurred during the blackout. However, the reasons also took into account events occurring after the blackout. These included that more torches had subsequently been purchased, an emergency generator had been sourced and that staff had been counselled about the use of the candles, which was not endorsed practice. Mrs C said that she was pleased to hear about the improvements, but felt that the outcome did not acknowledge what she saw as a failure to provide an acceptable standard of care at the time of the blackout. |

Indigenous specific concerns

As the OEA identified, there are currently no Indigenous aged care quality standards. The Indigenous Flexible Aged Care Program operates outside of the *Aged Care Act 1997* and does not have to comply with the mainstream aged care quality standards. The importance of such standards has been identified by the Government. On 22 September 2008 the Minister for Aging announced the Government's detailed plan to improve the long-term quality of aged care for Indigenous Communities. This plan includes 'an independent set of quality standards applied to flexible Aboriginal aged care services in remote and very remote communities'.[4] Almost two years later these standards still do not exist and Indigenous aged care services continue to operate without quality standards.

[4] The Hon, Justine Elliot MP, Minister for Aging, Media Release, '*Quality standards for Aboriginal aged care*' 22 September 2008.

## 4. Who should pay and what should they pay for?

*P.20 Under the current system, have differences in user charges for aged care services led to problems or distortions in the demand for services? How appropriate are the current accommodation user charges in residential care (including the regulatory restrictions on accommodation bonds for high care residents)? Do accommodation bonds act as a disincentive to access appropriate care? What has been the effect of allowing payment for extra service? What changes, if any, should be made to user contributions to the cost of accommodation for residential care?*

Relationship between bonds and low care entry

The Ombudsman's office has received complaints from families who claim to have been persuaded by care providers to agree to enter their aged relative into a care facility as a low care recipient, when the family believed that high care would have been more appropriate. These cases may stem from a lack of high care places or be the result of financial incentives. In each case, the families claimed that low care was offered following disclosure of assets (such as the care recipient's home) and that the difference between the costs of low and high care, in particular that high care recipients are not required to pay an accommodation bond, was not explained to them.

| Case study |
| --- |
| Mrs D's mother had been approved for high level residential care by an Aged Care Assessment Team (ACAT). Mrs D had been told a high care bed was available in the residence of her mother's choice. However, after disclosing her mother's financial assets, Mrs D was told that the high care bed available was a 'concessional' bed and her mother's assets exceeded the allowable amount for that bed. The only available place was a low care bed, but Mrs D would need to have the ACAT assessment varied to enable her mother to enter at low care.<br><br>While Mrs D was worried that her mother might not receive the care she needed if she entered the home as low care, she also understood it was possible for her mother to be reassessed as a high care resident during her stay in the residence due to the 'ageing in place' policy. As the family had looked at a several residences, Mrs D felt the opportunity for a good placement might be lost. She asked the ACAT assessor to reassess her mother as low care and her mother entered the home as a low care recipient. |

In a similar complaint, a family said they were persuaded that, despite an ACAT assessment for high level care, their mother really only required low care. They entered their mother into the residence as a low care recipient and borrowed money to pay the bond, because the global financial crisis had diminished the value of their mother's assets following their assessment. On discovering that high care recipients are not required to pay a bond, the family complained to DoHA. In response, DoHA agreed with the residence that the aged care recipient was 'borderline' between requiring low and high care, and at the time of entry required only low care, despite the ACAT assessment. DoHA advised that the ACAT assessment was not the only source of evidence of the care required by a person at the time of entry, the point at which it is decided whether or not a bond is payable. In this case the residence relied upon notes it had made while the care recipient had been resident for respite care. The complainants subsequently withdrew their mother from the facility and entered her into a different facility as a high care recipient.

While there may be few cases in which better evidence than an ACAT assessment is available, the complaint demonstrates an avenue whereby the system of assessment by independent ACAT members (whose training and experience could be expected to result in consistent outcomes) might be undermined and give rise to inequities.

Accommodation bonds amounts

Once it has been decided that a person requires low care, an assessment of their assets is undertaken usually by Centrelink or the Department of Veterans' Affairs as delegate of DoHA. While there is a right to appeal to the AAT within 28 days of a decision about a person's assets, it would seem that few take this option. One complainant to this office missed the time frame because she was making further inquiries at Centrelink during the period. We note that the usual time frame for appealing decisions made by Centrelink under the Social Security law to the Social Security Appeals Tribunal is 13 weeks. It would be reasonable for Centrelink and Veteran's Affairs customers to expect that they have a similar appeal time frame for decisions about assets made under the *Aged Care Act 1997*.

While there is no maximum bond amount as such, there is a minimum amount of assets that must be left with a care recipient after paying the bond, currently $37,500. Most complainants to this office have been charged the maximum permissible bond that the formula allows.

We believe there is a value in the Commission asking aged care recipients whether they believe $37,500 is too low an amount for them to retain. In particular it would be instructive to know whether aged care recipients are afraid to spend it, given their

unknown life expectancy, health needs and the low level of their pension or other income after the payment of daily and income tested fees. Are they relinquishing private health insurance, not accessing aids that might improve their quality of life or relying on relatives to purchase these?

Expenditure which may improve quality of life, and which may not have been anticipated, includes accessing email services. Aged care recipients may increasingly want to maintain their independence through the use of technology, but this is expensive. This office has been contacted by aged care residents using email for instance, which enables the hearing impaired to readily access to our services.

It is our understanding that fixed retention amounts, currently $307.50 per month, are deducted from the bond for a period of 5 years and retained by the residence, as is interest earned on the bond. Yet some bonds are substantially larger than the amount likely to be retained through retention amounts and interest earned. Currently the balance is released to the person's estate on their demise. Aged care recipients should be asked what they think about being unable to access the balance of their own funds in the latter days of their life.

Complexity and disclosure of costs of aged care

Other complaints to our office have demonstrated the difficulties involved in the full disclosure of costs, given the complex rules relating to the cost of aged care.

| Case study |
| --- |
| The complainants had entered their father into an aged care facility. Within days the family decided that they were not satisfied with the care service and wanted their father to leave the facility. They sent an email to the manager of the facility giving notice within 14 days of the date of signing the resident agreement. They believed that this meant the agreement would become void and their father would be liable only for fees and charges payable for the period he was in the residential care service, which was less than 14 days. However, the residence asked that they pay over $9,000 which comprised 3 month's fees, interest and retention amounts from the bond. While this is permissible under the *Aged Care Act 1997* for any period of care of 2 months or less, it was not clear under the resident agreement that the fees and charges accruing within the 14 day cooling off period included the 3 months fees payable where a stay has been less than 2 months. |

*P.20 How might the public and private exposure to the financial risks associated with aged care costs be best managed? Should it be a mixed model with a dominant*

*taxpayer funded component (as currently applies), or a system that relies more heavily on consumer contributions underpinned by a financial safety net? This could involve additional or alternative mechanisms such as greater reliance on private savings (including reverse mortgages) or the introduction of private long-term care insurance or a social insurance scheme. If an additional funding mechanism is considered appropriate, should it be for all aged care costs or for particular components of aged care costs?*

Reverse mortgages

The Ombudsman's office would advise caution in respect of the use of reverse mortgages or similar finance products. The risks of reverse mortgages are often poorly understood by consumers and rely upon variables, such as life expectancy and the state of the economy that can be very hard to predict.

Intergenerational equity among taxpayers

We note that the discussion paper states that commentators have questioned the appropriateness of requiring current taxpayers to subsidise the costs of caring for older Australians under a 'pay-as-you-go' system, particularly given the projected increase in aged care needs over the next 40 years.

While we acknowledge the sentiment, we do not think it is a helpful contribution to the question of aged care funding, not just because it assumes older Australians do not or have not paid tax and that their taxes have not in the past been used for the benefit of others, but because it discourages community engagement with ageing. In doing so, it may marginalise aged care as the need of a particular demographic bulge.

*P.20 What are the minimum benchmark levels of care in each of the service areas and how should they be adjusted over time to meet changing expectations?*

Benchmarks, like objectives, should be clear and measurable rather than aspirational. They should be applied to both mainstream and flexible aged care programs. Public reporting should be conducted against these benchmarks in a way that is accessible to the communities in which services are being delivered. We note that the reports of the Aged Care Standards and Accreditation Agency are accessible through its website.

## 5. What role for regulation?

*P.22 Is the current level and scope of regulation and its enforcement appropriate? What impact does the regulation and its enforcement have on older people, their carers (including access to, and quality of, care) and providers (including their business models and size of their operations)?*

Current enforcement options

Many of the aged care complaints to the Ombudsman's office evidence dissatisfaction with the outcome of the investigation of complaints taken to the CIS or the ACC. In our view this is principally because the CIS and ACC investigate complaints from a regulatory perspective. They consider whether or not there has been a breach of the aged care standards (some of which are very broadly worded), and whether any breach warrants the issuing of a *notice of required action*. Complainants, on the other hand, seek acknowledgement of or redress for past events, or the resolution of an issue which is personal to them.

For example, were the CIS to decide that there had been a failure by a care facility to properly explain the fees required under a resident agreement, it would consider whether the facility had changed its procedures to ensure that the problem did not recur and, if not, issue a notice of required action to ensure the procedure changed. However, we understand that the CIS would not be able to provide an appropriate remedy to the individual, for instance by requiring the facility to charge a different fee provided that the fee was lawfully charged under the *Aged Care Act 1997* in the individual case. The care recipient would need to approach a court under contract law if the care facility would not agree to remedy the matter. Owing to the inherent vulnerabilities of care recipients and their lack of access to funds, it is unlikely that a care recipient will take legal action. Consequently this type of issue goes unremedied.

Similarly, there is no remedy for a lapse in service provision which has subsequently been rectified as in the case study of Mrs C's complaint about the blackout on page 14. A consumer who experiences a failure in services in another arena might expect to be offered a discount, a replacement product or an abatement of rent or charges. It would seem that, in the aged care field, customers may be taken for granted, as there are significant disincentives to changing providers, such as cost, access and the stress of disruption to care.

Should the multi-tiered complaints process recommended by the Walton Review be implemented, we suggest that consideration be given to providing a suite of remedial options for investigated complaints. The current complaints scheme has not provided

the type of resolution mechanism required in circumstances where there will be an ongoing relationship between the facility and the care recipient.

| Case study |
| --- |
| The complainant's father and another resident had raised some concerns during a general meeting of the care facility. They felt that the manager was rude to them in response. The complainant said that the following day the manager had spoken to each of them separately in their rooms and they felt that this was bullying in response to the incident at the meeting. The manager said she spoke 'sternly' to the residents but had not treated them with disrespect.<br><br>The CIS decided that there had been a breach of the requirement to respect the dignity of care recipients, but that this had been rectified and no further action was required. Both the facility and a resident's family appealed to the ACC. The facility argued that there had been no breach of the requirements and the resident's family argued that there should be further action taken.<br><br>The ACC decided that there was insufficient objective evidence of the conversations to establish that a breach had occurred. |

This case shows how the current complaint process, while meeting regulatory needs, placed the parties in an adversarial position. The process did not address the perceptions of the parties, which was likely to continue to affect their ongoing relationship. Addressing these matters is important to the way residents feel in a care facility that is essentially their home.

In our view, the complaints system should include a process focussed on resolution of complaints of this type and we note that this is recommended by the Walton Review.

*P.22 Are the rights of aged care consumers adequately protected and understood? Are complaint and redress mechanisms accessible, sufficient and appropriate for all parties?*

As noted above, the Walton Review provides a comprehensive review of the aged care complaints investigation scheme. The Ombudsman made a submission to that review and submits that the recommendations from the Walton Review should be considered by the Commission.

As stated, the Ombudsman has particular concerns about the 14 day time limit for appeals from decisions of the CIS to the ACC. Aged care recipients and their families usually need to consult others when deciding whether or not to appeal and this time period is shorter than the usual time period allowed for appeals in other jurisdictions, usually 28 days. In one instance complained of to this office, the notice of the CIS

decision was sent to a complainant family on Christmas Eve and the family missed the 14 day time limit to lodge an appeal.

It has been the Ombudsman's experience that aged care recipients do not feel comfortable complaining about their care. Elderly people living in a residential aged care facility are often particularly aware of their vulnerability and fear repercussions. Consequently, the Ombudsman regularly receives aged care complaints indirectly via family members or friends.

Complainants have made comments which indicate a perception that the current system is not sufficiently independent of DoHA or the aged care industry. They feel that the word of the provider is taken over their own. In part, this is a function of the regulatory focus of the process. As a sanction is potentially available as a consequence of finding that a breach has occurred, the CIS and ACC only decide that there has been a breach where the evidence positively establishes this to be the case. The provider is given the benefit of the doubt and complainants see this as bias. A greater dispute resolution focus may assist in this regard. However, as pointed out in the Walton Review, the location of the complaint scheme within DoHA is unhelpful to this perception.

We also suggest greater coordination between aged care and clinical health care complaint handling processes. There should be early advice to consumers about how their complaint is best handled across these jurisdictions.

Indigenous specific concerns

There is currently no requirement to provide a complaint and redress mechanism under the flexible aged care program. Although the Ombudsman does have jurisdiction to take complaints relating to it, in our view there should be mechanisms for redress within government agencies. Clients and their families should be made aware of these.

In the NT the Ombudsman has observed a lack of accessible complaint mechanisms for government agencies servicing Indigenous communities. This is compounded by a lack of awareness amongst Indigenous people of their right to complain. Complaints to this office, except those gained through direct outreach visits, are almost non-existent. We are conducting research to identify if this arises from a lack of awareness, willingness or some other reason. We believe there is a need, for ongoing and strategic effort to improve access to complaint mechanisms for Indigenous people.

Over 1000 complaints have been received through outreach since the creation of the Ombudsman's Indigenous Unit in 2007. Prior to its formation, very few Indigenous Australians complained to this office. While reinforcing the value of outreach, this result also suggests that there are likely to be many communities and individuals for whom services are inadequate, but complaint mechanisms have not been appropriate to capture that feedback. The Commission should therefore consider recommending that the CIS conduct regular outreach to ensure that their complaint service is accessible. The accessibility of complaint mechanisms for Indigenous and non-indigenous Australians is yet another area where the gap must be closed.

*P.22 Do current regulatory arrangements act as a disincentive to older Australians wishing to move to more suitable accommodation (such as eligibility for the age pension and the imposition of stamp duty on the sale of property)?*

We refer to our comments under section 4 '*Who should pay and what should they pay for?'*

## 6. Roles of different levels of government

We note that the roles of each level of government are undergoing change and that ACAT assessments have previously been conducted by State-based services. In the light of our comments in relation to ACAT assessments and aged care costs, we consider that if the cost of aged care to the consumer continues to be linked to their care needs, an independent process by which those care needs are assessed should be retained. Training, support and peer review or similar processes should be available so that ACAT assessments are consistent. The result of an assessment should continue to be amenable to merits review.

## 7. A workforce to care for the elderly

*P.26 What are the key issues concerning the current formal aged care workforce, including remuneration and retention, and the attractiveness of the aged care environment relative to the broader health and community care sector?*

In remote Indigenous communities there is a lack of aged care workers. Training should be provided to local community members to address the difficulties associated with attracting aged care workers to remote communities. Complainants have indicated that there are community members willing and able to care for the elderly in many Indigenous communities, but that these individuals require government support to do so.

*P.26 Are there unexploited productivity and efficiency gains in the aged care sector? Where such unexploited gains are seen to exist, what policy changes are needed to support their realisation? How might technology be used to enhance the care of older Australians? Are there any impediments to technological developments that could ease workforce demand or enable higher levels of support?*

The *Ahead of the Game: Blueprint for Reform of Australian Government Administration* promotes innovative and increased use of technology by government agencies. However, the Blueprint does not address the access limitations associated with technology-reliant service delivery for disadvantaged groups who do not have access to computers or the internet.

Although the Ombudsman is not position to comment on 'productivity or efficiency gains in the aged care sector', it has been the Ombudsman's experience that there is very little ability to engage with technology-intensive services in Indigenous communities. There is very limited access to internet and even to phone services in many communities. When considering the appropriateness of technology-reliant programs, the needs of Indigenous communities should be considered.

## 8.Transition issues

The Ombudsman makes no submission on section 8 of the issues paper.