

MEMORANDUM OF UNDERSTANDING

and

COMPLAINT HANDLING PROTOCOLS

between

COMMONWEALTH OMBUDSMAN

and

AGED CARE COMMISSIONER

The Ombudsman and the Commissioner have reached the understandings set out in this document and endorsed the protocols set out in this document. They have done so on the basis that they and their staff members should, unless required to act otherwise by law or by the particular circumstances of a matter, act to further those understandings and in accordance with those protocols.

Interpretation

In this document:

"Ombudsman" means the Commonwealth Ombudsman whose office was established by s 4 of the *Ombudsman Act 1976*

"Commissioner" means the Aged Care Commissioner whose office was established by s 95A.1 of the *Aged Care Act 1997*

"Principles" mean the Investigation Principles, Accreditation Grant Principles or any other Principles established under the Aged Care Act which refer to the Commissioner

"Secretary" means the Secretary, Department of Health and Ageing

"Staff member" in relation to the Ombudsman or the Commissioner means any person employed or engaged under contract to provide services to the Ombudsman or Commissioner and any person to whom the Ombudsman or Commissioner has delegated powers or functions or authorised to take action

Description of offices

The Ombudsman has the functions set out in s 4(2) and s 5 of the Ombudsman Act, being the investigation, following a complaint or on the Ombudsman's own motion, of actions taken by Commonwealth agencies that relate to a matter of administration, including actions taken by persons classed as Commonwealth service providers, and also has functions related to the Ombudsman's other capacities and under other legislation.

The Ombudsman has powers under the Ombudsman Act, including powers:

- to make preliminary inquiries
- to request or receive information from any person
- to require persons to provide information or documents or to require persons to attend and answer questions
- to provide an agency head or Minister with evidence of misconduct
- to cease an investigation for reasons specified in s 6 of the Ombudsman Act
- to make comments and suggestions to any person following an investigation
- to make a report and recommendations to an agency, to inform the Prime Minister of such a report and to report to the Parliament
- to make a statement or disclose information in the public interest.

The Aged Care Commissioner is a statutory appointment and is independent of the Department of Health and Ageing and the Aged Care Standards and Accreditation Agency. The Commissioner's functions are set out in s 95A-1(2) of the *Aged Care Act 1997*. These are outlined further in the *Investigations Principles 2001*.

The Commissioner's main areas of responsibility include:

- dealing with complaints about the Secretary's processes for handling matters under the *Investigation Principles 2007* and the conduct of accreditation bodies relating to their responsibilities under the *Accreditation Grant Principles 1999*, or the conduct of persons carrying out audits or making support contacts under those Principles
- examining decisions made by the Secretary and mentioned in s 16A.21 and 16A.22 and to make recommendations to the Secretary in relation to these examinations
- undertaking its own investigations
- the provision of advice to the Minister for Ageing on those matters and other functions set out in the *Investigation Principles*.

The Commissioner may examine a complaint in a manner that the Commissioner considers appropriate and may refuse to examine a complaint under circumstances described in s 16A.27(3).

The Aged Care Commissioner and delegates are 'representatives' for the purposes of the *Accountability Principles 1998*. Part 2 of the *Accountability Principles* sets out the responsibilities attributed to approved providers and the representatives' access to premises and documents as well as other functions.

Understanding

The Ombudsman and the Commissioner note and understand that:

- there may be actions in relation to which a complaint may be made to either of them – specifically, about an action of a Commonwealth agency or officer (including the Secretary) or a person identified as a Commonwealth service provider that is also an accreditation body or which is conducting an audit or making support contacts
- there may be occasions when, for good reason, it is necessary for the Ombudsman or the Commissioner to depart from this understanding and the protocols
- the Ombudsman may investigate the actions of the Commissioner following a complaint or on the Ombudsman's own motion. Those investigations may relate to the Commissioner's roles under the Principles or to the Commissioner's general administrative functions
- the Ombudsman would generally be inclined to give considerable weight to the expertise and special statutory role of the Commissioner in deciding whether to investigate a specific matter. While making a decision in each case on its merits, the Ombudsman may, therefore, be less inclined to investigate a matter where the Commissioner has conducted an examination or provided advice on a matter arising under the Principles
- a person voluntarily providing information requested by the Ombudsman or relevant to an investigation by the Ombudsman has access to extensive protections against criminal or civil consequences or the loss of legal professional privilege. The Ombudsman may issue a notice requiring information or documents or that a person attend and answer questions.

In furtherance of that understanding, the Ombudsman and the Commissioner agree that, to the extent lawfully possible and appropriate, they and their staff members will cooperate to enable matters to be dealt with in the most efficient and effective way, in accordance with the protocols below.

Protocols

Contact arrangements

The Ombudsman and the Commissioner agree that they will each provide the other with the name and contact details of at least two staff members who will have primary responsibility for liaison under these protocols. They will each inform the other of any change in the relevant staff members or their contact details.

As a general principle, substantial contacts on behalf of the Ombudsman or the Commissioner will be made by a nominated contact in one agency to a nominated contact in the other agency. Other staff members may communicate with a nominated contact where the matter is less significant.

Information exchange

The Ombudsman and the Commissioner agree that they will inform each other of any significant change in law, policy or administrative practice that may affect their roles and interactions. They agree that, where possible, they will each consult the other in advance of any such change.

The Ombudsman and the Commissioner agree that they will, on request, each make available to the other information about their processes and policies that may affect their roles and interactions. This information would include, for example, an indication of the response that the Ombudsman or Commissioner may have to a specific matter.

Subject to the requirements of the *Privacy Act 1998* and safeguards related to the release of protected information under the *Aged Care Act 1997*, the Ombudsman and the Commissioner agree that their staff members may generally assume that it is consistent with their duties to disclose to a staff member of the other agency that a person has made a complaint or is the subject of a complaint that may be able to be made or that may have been made to the other agency.

Where the Ombudsman is investigating an action of the Commissioner or that is related to the functions of the Commissioner, the Commissioner agrees that the Commissioner's staff members may disclose information requested by the Ombudsman's staff members unless there is a good reason to do otherwise, in which case the Ombudsman may consider whether to issue a notice.

General positions

Unless there is reason to do otherwise in a specific case, the Ombudsman expects his staff members to advise a person who has made a complaint that could have been made to the Commissioner that he or she should complain to the Commissioner.

Unless there is a reason to do otherwise in a specific case, the Ombudsman expects his staff members, when considering a complaint about a matter that has been examined by the Commissioner, to give appropriate weight to the Commissioner's examinations and conclusions. To facilitate that, the Commissioner expects staff members, if approached by Ombudsman staff members in relation to a matter, and unless there are reasons that warrant a different approach in a particular case, to provide copies of reports or related or similar documents that explain the Commissioner's involvement and conclusions.

Where a person who has made a complaint to the Commissioner asks about further complaint options, or where the Commissioner considers it appropriate, the Commissioner expects staff members to inform the person that he or she may complain to the Ombudsman.

Consultation

The Ombudsman and the Commissioner agree that, where possible, any issues arising out of this document or their dealings with each other should be resolved by negotiation in good faith.

Effect on operations

Nothing in this agreement should be read or taken to suggest or permit either the Ombudsman or the Commissioner to do other than discharge their statutory functions in a lawful, independent and impartial way.

Signed

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John McMillan
Commonwealth Ombudsman

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Rhonda Parker
Aged Care Commissioner

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dated

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