Australian Government

Office of the Aged Care Commissioner

# Submission

# Productivity Commission Inquiry into Caring for Older Australians

**July 2010**

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# Inquiry into Caring for Older Australians

## 1. Introduction

The government's decision to ask the Productivity Commission to inquire into caring for older Australians comes at a time when various other elements of aged care are under review.

The accreditation process and the accreditation standards are but two components of the system that are under review. The government is also considering the implementation of recommendations arising from the report of the National Health and Hospitals Reform Commission and the likely impact on the structure of the health and aged care system for older Australians.

The Office of the Aged Care Commissioner (the Office) intends to provide some comments for your Inquiry that focus on the complaints management processes within the residential aged care sector, regulated by the Commonwealth Government.

More recently the Minister for Ageing, the Hon Justine Elliot MP, requested Associate Professor Merilyn Walton to conduct a review of the Aged Care Complaints Investigation Scheme (CIS) to identify areas of possible improvement to ensure the Scheme achieves best practice. Professor Walton provided her report to government in October 2009.

I understand that Professor Walton's report has been provided to the Productivity Commission for deliberation in the course of its Inquiry and in the making of recommendations arising from that Inquiry. Any proposed changes to the current complaint management arrangements will clearly be made in the context of the broader reform being considered. It is in relation to these matters that I make this submission to the Commission for its consideration.

Empowering health consumers is very important and one way to achieve this is to provide for their rights through legislation. Government policies and programs are established in order to meet community expectations and to meet the needs and desires of consumers and lobby groups. The regulatory regime in aged care is heavily outcome oriented and resident focussed. Within the aged care regulatory framework there is an obvious intersection and reinforcement between the user rights strategy, the Aged Care Commissioner, the Aged Care Standards and Accreditation Agency Ltd (the Agency) and the role of the Department of Health and Ageing (the Department), including the CIS.

Complaints processes serve a number of objectives, two of the more important aspects are openness and transparency and to act as a lever for continuous quality improvement. Contemporary accreditation processes require approved providers in the aged care sector to establish an internal complaints management mechanism and also to ensure access to the external complaints processes established by the Commonwealth; currently via the Complaints Investigation Scheme.

While a number of other objectives of complaints management schemes are important considerations, openness and transparency as well as quality improvement have been fundamental in influencing the considerations of this Office in preparing this submission. Additionally I have given consideration to the ISO Complaints Management Standards, including the expectation that complaints management organisations should provide consideration of matters at hand in a fair accessible, accountable, independent, effective and efficient way and at no (or nominal) cost.

## 2. Background

In late August 2005, the then Commissioner for Complaints, the Hon Robert Knowles AO, provided advice to the then Minister for Ageing, the Hon Julie Bishop MP, on changing the model for aged care complaints management by the Department. The model in existence then was the Aged Care Complaints Resolution Scheme (CRS).

The CRS was established on 1 October 1997 under the *Aged Care Act 1997* (the Act) and the *Aged Care Principles 1997* (the Aged Care Principles) to facilitate the resolution of complaints about Australian Government funded aged care services. It was based on the Alternative Dispute Resolution (ADR) Model — i.e. using processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them. ADR processes may be facilitative, advisory, determinative or, in some cases, a combination of these. The Commissioner felt that, at the time, rather than one national complaints management organisation, there were eight de facto separate bodies which lacked consistency and therefore credibility.

The Commissioner and the Department agreed that there were a number of factors that suggested the CRS needed improvement, including:

- perceptions of lack of independence;
- a complex management structure, involving oversight of the CRS by the Commissioner, national management of the CRS through the Department's central office and CRS staff reporting to departmental State and Territory Managers;
- rising costs of operation of the CRS as it was then constructed, particularly costs for mediation and determination phases;
- negative provider and consumer feedback, covering such aspects as lack of national consistency and clarity about case handling, blurring of complaints and compliance roles, uncertainty about assessment and negotiation activities, concerns about the time taken to deal with complaints, and the increasing complexity of cases;
- because of the way the CRS was constructed, and due to the process being driven by the complainant, there were numerous openings for vexatious or continuing cases; and
- considerations relating to the CRS's robustness to match the combination of a maturing aged care sector and more demanding consumers with higher expectations.

Surveys and focus groups conducted by the Commissioner's office indicated that there were issues that needed to be addressed in the operation of complaints management.

In proposing changes to the complaints management model the Commissioner for Complaints discussed two options. An initial option was to establish an independent statutory authority. An alternative proposal was put forward after weighing up financial and other considerations. The following was proposed:

- Establishment of an investigatory model which incorporated some ADR elements — i.e. that there is a process for accepting a complaint on face value and inquiring into the issues involved, undertaking conciliation, where appropriate, with the aim of addressing the issue(s) affecting the care recipient and advising the complainant and the provider of the outcome.
- Maintaining a Commissioner's statutory appointment and changing the name of the complaints management body, in order to more clearly link it with aged care and to make it more consumer–friendly.
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- Creation of a Commission that would better integrate the existing Department's central office and state and territory complaints management staff under a common structure, with the staff responsible to a Commissioner who would report to the Minister and the Secretary.
- Provision for centralised intake (via oral, written or electronic contact and utilising an 1800 telephone service), assessment and referral for all contacts. The intake arrangements would cover:
  - *enquiries*: seeking information from the Commission;
  - *information calls*: including the capacity to receive anonymous information; and
  - *lodging complaints*: open and confidential.
- Following central intake and assessment, if the complaint was not able to be resolved locally and through ADR processes, investigation would be undertaken by state/territory teams of the Commission, either desk-based; or through site visits.
- On completion of each investigation, a decision would be made through an enforceable determination of whether a breach of approved provider responsibilities had occurred:
  - Thus, where the breach is minor, conciliate an outcome acceptable to both parties;
  - where the breach is more serious
    - the Commissioner would refer systemic issues, where identified, to the Department's compliance function in the relevant state/territory office for information and action, including possible referral to the Agency;
    - where a breach is substantiated that relates to the care of an individual, the Commissioner would seek remedial action from the approved provider via a Notice of Required Action (NRA) on issues within the complaint; and
    - where required actions are not satisfactorily implemented, the Commissioner would recommend compliance action to the Secretary.

In December 2005, the then Minister for Ageing, the Hon Julie Bishop MP, gave in-principle agreement to the proposal put forward. Subsequently, in 2006, Senator the Hon Santo Santoro, the then Minister for Ageing, announced changes to the Commonwealth's complaints management model. The Minister also announced that an Aged Care Commissioner would be appointed, replacing the Commissioner for Complaints.

The CIS commenced on 1 May 2007 and adopted some, but not all, aspects of the proposed model. Most notably, the model adopted was not independent of the Department, did not have a central intake function, and retained responsibility for the primary investigation of complaints within the Department. The experience of the Office is that, for stakeholders, there is a perceived lack of clarity in relation to the CIS's relationship with the Office of Aged Care Quality and Compliance (OACQC) and state/territory offices of the Department.

## 2.1 Role of the Aged Care Commissioner

The Aged Care Commissioner holds a statutory appointment and is independent of the Department. Staff employed in the Office are departmental employees. Section 95A-1(2) of the *Aged Care Act 1997* identifies the functions of the Commissioner as follows:

> *(a) To examine decisions that are made by the Secretary under the Investigation Principles and are identified by those Principles as being examinable by the Aged Care Commissioner, and make recommendations to the Secretary arising from the examination;*

*(b) To examine complaints made to the Aged Care Commissioner about the Secretary's processes for handling matters under the Investigation Principles, and make recommendations to the Secretary arising from the examination;*

*(c) To examine, on the Aged Care Commissioner's own initiative the Secretary's processes for handling matters under the Investigation Principles, and make recommendations to the Secretary arising from the examination;*

*(d) To examine complaints made to the Aged Care Commissioner about:*

*(i) The conduct of an accreditation body relating to its responsibilities under the Accreditation Grant Principles: or*

*(ii) The conduct of a person carrying out an audit, or making a support contact under those Principles; (but not a complaint about the merits of a decision under those Principles), and make recommendations to the accreditation body concerned arising from the examination;*

*(e) To examine, on the Aged Care Commissioner's own initiative:*

*(i) The conduct of an accreditation body relating to its responsibilities under the Accreditation Grant Principles: or*

*(ii) The conduct of a person carrying out an audit, or making a support contact under those Principles; (but not a complaint about the merits of a decision under those Principles), and make recommendations to the accreditation body concerned arising from the examination;*

*(f) To advise the Minister, at the Minister's request, about matters relating to any of paragraphs (a), (b), (c), (d) and (e);*

*(g) The functions (if any) specified in the Investigation Principles.*

In creating this role, the government for the first time saw fit to additionally establish a review mechanism for complaints about the conduct of the Agency (excluding accreditation decisions) and/or the conduct of its assessors.

## 2.2 Differences in function between CRS and CIS

The CRS was established to improve the effectiveness of the complaints process. The legislative amendments resulted in changes to the role of the Aged Care Commissioner and the relationship with the CIS. The notable changes were:

- The Commissioner no longer had a role in determining complaints. Under the CRS, the Commissioner for Complaints had a role to manage the Complaints Resolution Committees; to sit on Determination Review Panels and make recommendations in relation to decisions of the CRS to cease dealing with a complaint, or not to accept a complaint. Approved providers were required to implement the Commissioner's determinations or face compliance action from the Department. Under the CIS arrangements, the Commissioner may only make recommendations when considering an appeal of a decision of the CIS or a complaint against the Secretary's processes.
- The Commissioner no longer has the role or the capacity to report on the CIS's performance. Under the CRS, the Commissioner for Complaints had a legislative task to oversee, analyse and report on the performance of the CRS. This was achieved through an annual reporting process. The Commissioner also attended regular consistency/management meetings and issued standard Practice Minutes to the CRS.

## 2.3 Focus Groups

As a part of ongoing quality assurance measures both the Office of the Commissioner for Complaints and the Office of the Aged Care Commissioner conducted focus groups with relevant stakeholders.

The Office of the Aged Care Commissioner conducted focus groups during April and May 2008. The Commissioner and senior staff met separately with consumer and advocacy groups, and approved providers in four States.

The focus groups were instituted as a way of facilitating feedback to the Office as part of our commitment to continuous improvement. While the primary aim of the focus groups was to obtain feedback in relation to the Office, many of the participants wished to provide feedback related to the operation of the CIS and other services.

I think it is useful to provide this feedback to the Inquiry as it may assist the Commission in its considerations on the strengths and weaknesses of the current arrangements. It should be noted up front however, that these focus group comments are framed within a 2008 timeframe. It involved consultation with 95 industry and consumer representatives. Many of the criticisms raised about the CIS and the Office have been addressed or considered in a broader policy review context.

***Approved Providers***

Positive

- On the whole, approved providers felt that the investigation officers from the CIS fulfilled their roles appropriately.

Negative

- All providers were critical of the CIS's ability to accept anonymous complaints. Specific difficulties expressed were:
    - ❖ Management of persistent and repetitive complainants on the same or a similar matter.
    - ❖ Some anonymous complaints are made by ex-staff members, who may be acting in a retaliatory fashion.
    - ❖ All of the providers felt that while the ability to make an anonymous complaint is to protect complainants, the process was abused. Providers were also critical that they did not have the same rights in relation to anonymous complaints.
    - ❖ One of the most significant problems associated with anonymous and confidential complaints is that providers generally were not able to be made aware of the precise information that the CIS was seeking – for example the approved provider is asked to provide general information rather than information specific to the care of Mr(s) X, which may have clarified the position and assisted in a less time consuming investigation and the formulation of a more accurate decision.

- All providers commented on the denial of natural justice associated with aspects of the CIS's investigation processes.
    - ❖ The providers expressed dissatisfaction with the failure of some investigators to disclose the nature of a complaint under investigation, at the time of a site visit. As a result, providers were unable to respond effectively to the matter and may supply the investigators with too much or too little information in their attempt to address the issue. Some providers felt that these instances were then used as a fishing expedition rather than an investigation of a specific issue.

- ❖ Providers were concerned about minimal positive feedback from the CIS in relation to the progression of complaints and what could be learned from the process.
- ❖ The providers were concerned that they were not afforded an opportunity to provide feedback in response to the possible findings of the CIS. Many described instances where they had had a site visit and shortly after received a notice that they were in breach of their responsibilities, without the option to respond.
- ❖ Some providers expressed a belief some investigators from the CIS had come to a view before visiting the facility and were biased Some stated that they were made to feel "guilty until proven innocent" and staff were made to feel threatened. This was highlighted as an issue particularly in instances where the staff themselves had been traumatised by the incident under investigation.
- ❖ There was some discussion from providers about the miscommunication of outcomes. Some providers said that the investigator may relay one view of the outcome of a site visit but the finalisation letter advises a different outcome.

- Providers expressed a view that minor complaints could be better resolved using a conciliatory approach rather than one based upon investigation.
- Another common concern expressed by providers related to compulsory reporting. While providers fulfil their obligations under the Act by making reports of prescribed matters, the CIS has, at times, used the report to find the provider in breach of their responsibilities. The providers felt this was contrary to the legislative intent. This is similar to situations where a provider adopts good practice in relation to medication management and records errors in an effort to identify trends, educational requirements, and opportunities to enhance existing practice, and is found in breach based on documents intended to address their commitment to continuous improvement.
- Providers commented on the difficulties associated with conducting investigations into alleged assaults involving staff. Complications which arise include the involvement of union representatives in the process and the resultant impact on morale. Providers also explained that it was damaging to the team environment, in that it could set staff members against each other.
- The providers were critical of the statement of reasons provided by the CIS generally associated with the non specificity of the statement. This made it difficult for providers to identify the precise deficiency in their service delivery.
- There was significant feedback from providers surrounding the duration of investigations by the CIS. They reported difficulties when the investigation is focussed on the time at which the alleged incident occurred and did not consider the present circumstances. Some providers spoke about the time taken to finalise a complaint and their experience where a resident has passed away prior to the finalisation of a complaint due to the length of the investigation.
- Some providers felt that there were occasions where a complaint should have been referred to a more appropriate body. One example given was where the complaint lodged was about a medical practitioner, however the provider was found in breach and an NRA was issued.

***Consumers***

- Consumers openly questioned the effectiveness of the CIS's site visits. Some raised concerns that providers were aware of an impending visit and so prepared beforehand.
- Some consumer representatives raised issues associated with miscommunication with the CIS. In particular, their concerns related to poor capturing of complaint issues

and/or a lack of clarity about the issues being lodged. This was primarily related to instances where complaints were lodged via telephone.

- Attendees criticised the finalisation letter sent at the conclusion of the CIS's investigation on the basis that it did not outline the complainants appeal rights clearly. The statement "provided you have exhausted all the Department's processes" was also highlighted as misleading. It was suggested that the CIS include a copy of this Office's brochures with the finalisation letter to provide further information.
- Participants indicated that a fear of retribution, as well as the emotional drain of having to make a complaint and follow the process, were disincentives and kept many from actively pursuing a complaint.
- Attendees expressed concern surrounding the length of time taken by the CIS in conducting and finalising their investigations. It was reported that, in some instances, investigations have taken over 12 months to complete. There was also criticism about the length of time it took to receive the CIS's subsequent decision.
- All participants criticised the absence of follow-up information after cases were referred to other organisations, such as the Agency or a professional Board. Participants advised that once a matter is referred, the complainant is only advised that the matter had been referred, not the end result. People explained that they were left feeling as though the matters raised have not been resolved.
- Some participants suggested that, in order to enable consumers to make an informed decision about entering care, the names of facilities that had NRAs issued to them should be published.
- A number of attendees raised concerns in relation to the satisfaction surveys issued by the CIS. It was thought that this was not a transparent practice and that the statistics should be collated and reported by the Commissioner.
- Some attendees expressed a view that the statistics compiled and released by the CIS lacked transparency and the ability to be translated into meaningful figures.
- Participants made comments about problems with natural justice associated with the CIS's processes, including:
  - ❖ Some participants expressed a belief that the CIS was biased towards service providers and accepted their evidence without performing a critical analysis.
  - ❖ All participants expressed concern that they were not privy to the evidence given to the CIS by the provider. As a result many believed there was not enough context to the decision the CIS had reached.
  - ❖ Participants were dissatisfied with a lack of process which allowed them to provide feedback on the CIS's recommendations.
- All attendees criticised the CIS's lack of communication during the investigation process. All participants agreed they had received an acknowledgement letter; however, further contact regarding their case did not occur for some time and often this only occurred at their instigation.
- Some participants considered that the actions required through an NRA were merely a slap on the wrist and not in proportion to the issue complained about or the breach found.
- Many attendees felt that their complaint had not resulted in an improved outcome. Some people believed that providers would initially comply with instructions but would then revert to "their old ways."

- Some participants considered that CIS investigators had inadequate knowledge of legislation - particularly in relation to financial matters. They also felt that the burden of proof was different for complainants and providers and expressed a view that documentary evidence did not cover all circumstances.

General Feedback

- Participants did not clearly understand the roles, differences and overlaps, between the various regulatory organisations involved in aged care in Australia (the CIS, the Agency and the Commissioner).
- Some participants suggested it may be worthwhile to trial a 21 day appeal timeframe.

## 3. Analysis of Activity

Since the establishment of the Office of the Aged Care Commissioner the trend has been for the Office to receive appeals in relation to approximately two per cent of decisions made by the CIS. Complaints about the CIS's handling of complaints under the *Investigation Principles 2007* are significantly less.

The following information is provided to allow the Commission to gain some insight into the scope of the review processes administered by the Commissioner.

| | Appeals | | ACC recommendation | | | DoHA decision | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Received | Finalised | Confirm | Vary | Set aside | Total advice | Accept all | Accept some | Reject |
| 2008-09 | 142 | 125 | 62 | 47 | 16 | 125 | 103 | 3 | 9 |
| | | | | | | | | | |
| | | | | | | | | | |

| | Complaints: CIS only | |
|---|---|---|
| | Received | Finalised |
| 2008-09 | 19 | 19 |
| | | |
| | | |

***Related issues***

During the examination of an appeal, process issues that are not directly part of the appeal process are sometimes identified and are brought to the attention of management as related issues as part of a quality improvement focus. These best practice issues are often repeated within and across jurisdictions. Not all related issues carried a recommendation, however best practice comments are predominantly associated with administrative practices. Examples are provided in the following table.

| Related Issues: CIS appeals | |
|---|---|
| 2008-2009 | 2009-2010 |
| Statement of Reasons | Statement of Reasons |
| Record keeping | Record keeping |
| Referral to Agency when there is no breach | Provision of information |
| Confidentiality | Investigation process |
| Conduct of an Investigation | Natural Justice |
| Notification of informant | Confidentiality |
| | Timeliness |

**Ministerial Requests**

During the 2008-2009 financial year the Minister requested the Commissioner undertake two investigations. Those investigations produced recommendations which were accepted in-principle by the Minister. The Commissioner did not receive any Ministerial requests during the 2009-2010 financial year.

## 4. Current complaints management: discussion

This Office has noted and reported on a range of issues during the evolution of the CIS and provided written and oral submissions to the review conducted by Professor Walton. The issues discussed with Professor Walton related directly to the review's terms of reference and were based on discussions with stakeholders and the experience and views held by the Office. The following issues are among the matters raised with Professor Walton, many of which are currently being addressed by the OACQC:

- *The need for CIS to provide natural justice to all parties*
- *Inadequate statement of reasons*
- *Perceived lack of communication between CIS and all parties*
- *Poor investigation of complaint issues, including the burden of proof and the adequacy of information collected*
- *Risk-assessment framework used for the escalation of complaints*
- *Adequacy of access to clinical, conciliation and investigative expertise*
- *Follow-up of NRAs*
- *Perceptions of bias*
- *Critical incident debriefing and its relationship to burn out and staff turnover*
- *The adequacy of training provided to investigators*
- *Relationship between CIS, Agency, Office of the Aged Care Commissioner and other relevant bodies*
- *Timeliness in handling matters under the Investigation Principles.*

I note that Professor Walton has addressed these matters in her report; however, I would be willing to expand on the views of this Office should the Commission consider this would further assist in its consideration of this matter.

**Comparisons with the Ombudsman Model**

The CIS and the OACQC more generally, have often referred to this Office as being 'like' an ombudsman's office and point to the effectiveness of ombudsman offices as adequate mechanisms for review. The comparison is misleading.

The Commonwealth Ombudsman has all the powers of a Royal Commission. They can:

- compel attendance at an interview
- administer an oath or affirmation
- compel the production of documents
- report to the Parliament directly.

This Office does not have any of these powers. The only similarity between the Commonwealth Ombudsman and the Commissioner is the capacity to make recommendations, and that both are offices of review. The Commissioner has none of the levers necessary to influence the quality of administrative decision-making by the CIS and any influence depends on the "relationship" existing between the Office and OACQC at a particular point in time.

Additionally, it should be noted that the Office is dependent on the Ageing and Aged Care Division, Department of Health and Ageing, for funding, and must approach the Department every time it requires an appropriation. It has been raised with this Office that the issue of financial dependency may continue to raise concerns about the perception of independence of the Office and reduce public confidence in its functioning. .

# 5. Complaints management options

## 5.1 The preferred model

An efficient and effective complaints mechanism is an important element in the accountability framework for the provision of aged care services. The optimal way to meet the expectations of stakeholders is to deliver a complaints management system that is clearly independent and transparent, meets natural justice requirements, attempts to resolve complaints simply and inexpensively at the local level within a entity that provides a nationally consistent policy and administrative framework.

Currently well over 200,000 Australians live in residential aged care facilities. With the ageing population, this will only increase. If we add respite and community care, it becomes clear that there is a need for a robust and respected complaints management system to achieve compliance and quality improvement objectives effectively.

It is our view that the ability to achieve this is maximised through an independent mechanism.and process. This Office therefore supports the approach and recommendation put forward by Professor Walton via Model Four in her Report (see page 81ff and 104 – *Review of Aged Care Complaints Investigation Scheme October 2009*) with one caveat (see attached structure adapted from Walton 2009). Such a body would determine complaints and be subject to review of its administrative decision-making processes by the Commonwealth Ombudsman.

The body could be established as a one stop shop for people with complaints in the aged care sector with a capacity to refer matters directly to:

- relevant Health Service Commissioners (HSC) in relation to hospital complaints,
- AHPRA in relation to complaints about health care professionals
- relevant police authorities and/or coroner.

In creating this entity consideration could be given to broadening its capacity to (a) deal with complaints about other Commonwealth funded aged care organisations and /or programs. (i.e. Aged Care Assessment Teams, Home and Community Care Program) and (b) provide education and information to a range of industry and consumer organisations (to maximise

its quality improvement commitment). Additionally, consideration could be given to the establishment of a discrete conciliation arm within the Office much along the lines of current state-based HSC offices in Australia.

An appeal mechanism from an independent complaints management process that relies on the Commonwealth Administrative Appeals Tribunal (AAT) as the main determinative means has two major flaws in respect of the aged care publicly funded services sector – time delays and costs.

To minimise this, I would suggest that the independent complaints body uses an internal review mechanism that is set up to be separate from the operations of the initial assessment and subsequent investigatory mechanisms of that body. Its primary function would be to review decisions of the entity that a relevant party may reasonably disagree with.

Access to AAT appeal routes should then be available for dissatisfied parties.

Funding should be via parliamentary appropriation with concomitant accountabilities and reporting.

## 5.2 Alternative models

If it were considered too expensive or administratively burdensome to establish an independent entity, then this Office would support the Walton Model 3 and 2 in that order. My only amendment to Model 3 (consistent with our suggestion to our preferred Walton Model 4) would be to add an internal review mechanism to minimise costs and delays for appellants.

You will note the suggestion that in Model 2, this Office is given determinative powers (rather than recommendatory).

**AGED CARE COMPLAINTS COMMISSION** (adapted from Walton)