



Submission by the  
Commonwealth Ombudsman

**REVIEW OF THE AGED CARE  
COMPLAINTS INVESTIGATION  
SCHEME**

CONDUCTED BY  
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## BACKGROUND

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 Commonwealth Ombudsman has jurisdiction to investigate complaints about Australian Government agencies. It has no direct jurisdiction over aged care service providers but it does have jurisdiction over the Department of Health and Ageing (the Department), and its Aged Care Complaints Investigation Scheme (CIS), as well as over the Aged Care Commissioner (ACC). Last financial year the office investigated fifteen complaints about the CIS, and eight complaints relating to the ACC. There was some overlap between these two groups of complaints.

While the complaint numbers are not high in comparison to some of the other agencies, the number is significant given that the aged care complaints scheme is multi-tiered. In most cases the original complaint would have been made to the aged care provider, the CIS and then to the ACC. This office has a Memorandum of Understanding with the ACC under which we refer complaints to that office, where appropriate, before undertaking a consideration of the matter ourselves. Consequently, there will have been three opportunities for a complaint to have been addressed before it comes to our office. In some cases the Department may also have conducted further investigations as a result of its own consideration of the ACC's recommendation.

It is the general practice of the Commonwealth Ombudsman's office to refer complainants back to the original agency or existing alternative complaint mechanisms unless these opportunities have already been exhausted. Should the Commonwealth Ombudsman investigate, we have substantial powers to seek information and make recommendations but no power to substitute any decisions with our own. As a result we have an interest in ensuring that agencies' own complaints handling mechanisms are accessible and effective. In this regard we have addressed some concerns about access to, and other limitations on, the ACC which result in complaints, that might otherwise have been appropriately resolved using the expertise of the ACC, coming to our office.

## TERMS OF REFERENCE AND THEMES

We have addressed a number of the terms of reference below, including relevant case studies for information. Throughout our comments, we identified a number of themes relating to the effectiveness of the CIS, including:

- Expectations management: provision of information about scope and process;
- The need for a complaint resolution dimension as well as a regulatory role for the CIS;
- Limits on the accessibility and capacity of the ACC.

### ***Term of Reference 1: Whether the CIS provides natural justice to all parties involved***

This office has received complaints from both providers and family members of care recipients about the insufficiency of the opportunity to comment afforded to them by the CIS.

#### ***Providers***

Complaints from aged care providers have highlighted the need for care to be taken that all individual issues are put to them at the earliest opportunity. For example, in one complaint which involved an investigation of a range of issues, one issue regarding the call bell response time was concluded in the investigation report but had not been raised during the site visit. The complainant advised that relevant evidence could have been presented at the site visit to address the complaint. In another complaint a family member of a care recipient had provided further evidence (photos of a wound) at the ACC stage, but the photos were not shown to the provider for comment. Again the provider believed they could provide relevant information if afforded the opportunity to view the photos.

#### ***Age care recipients and their families***

Complainants who are care recipients or who act on behalf of care recipients (usually family members) are less experienced in investigative processes and/or less knowledgeable about the aged care complaints system than providers. It is our experience that they are generally not able to predict where the investigation process is going and are usually not in a position to anticipate the matters upon which they may wish to comment until these matters become apparent from the final report or are put back to them. Moreover they often do not identify the point in time which is their last opportunity to comment. In our view, some of the complaints that concern lack of opportunity to comment have their cause in poor explanation of the investigation process at the outset.

It is particularly important that the complainant be given an opportunity to comment on the issues that will be investigated by the CIS at the outset, as the matters that can later be examined by the ACC are limited to the issues investigated by the CIS and as a result this also restricts the capacity of the ACC to remedy any denial of natural justice regarding the identification of issues. In addition, the point in time at which they will be afforded their final opportunity to comment should be expressly pointed out to complainants and, due to the complainant's inability to predict what information they have that might be relevant, this should be after the CIS has received information from the provider.

Natural justice by way of testing of conclusions about complaints with *complainants* is standard practice for our office as this allows us to be sure that nothing has been overlooked or that the complainant did not leave out important details when providing us with information. Some complainants have stated that they did not have sufficient time to comment on material, in particular when provided with a draft report.

***Term of Reference 2: Communication between the CIS, its investigators, family members, residents and advocacy groups who lodge complaints as well as the aged care providers and their staff. This should include considering the treatment of anonymous complaints***

***Role of the scheme, expectations management and referrals***

A prevailing theme in complaints to this office is that the CIS process does not meet the expectations of the complainants in resolving their particular complaint. As we understand it, the CIS is directed towards ensuring that breaches of the *Aged Care Act 1997* (the Act) and the *Aged Care Principles* (the Principles) are rectified by way of determining whether or not a Notice of Required Action (NRA) is necessary. This capacity for looking to broader solutions is a particular strength of the current CIS.

However, complainants are often seeking explanation, accountability or redress for a particular incident affecting themselves or their relative. While they may also be seeking assurance that the incident will not recur, the current process with its focus on whether or not there has been a breach of specified standards and whether that breach has been rectified does not offer complainants accountability for past incidents.

**Case Example 1**

*Complaint*

The complainant complained about a number of aspects of her mother's residential care, including medical matters such as decisions made by doctors regarding medical treatment, delays in arranging medical treatment and incorrect administration of medication; physical care, such as failure to provide oxygen and turn her mother at night to ease breathing problems; personal care, such as delays in toileting; slow staff response times; and failing to keep the family informed of their mother's condition.

The family considered that staff of the residence were not adhering to their mother's care plan. Eventually the family moved their mother out of the residence because they felt it was an unsafe environment. The family also claimed that tests arranged by them once their mother was at home indicated that her health condition differed from that of which they had been advised. The complainant's mother died about 5 weeks after she had been moved out of the residence. The complainant advised that the family had moved their mother out of her own home in order to pay for residential care in the genuine belief that they were doing so to achieve the best care for her, but instead they felt traumatised by the experience.

During this period the family had complained to the CIS and later to the ACC about the standard of care their mother had received and subsequently complained to this office.

While the complainant had initially hoped for merits review from the Ombudsman's office, she advised that her dissatisfaction also arose from the following process matters:

*Scope of investigation*

She had spoken at length to both the CIS and the ACC staff but it appears that they chose to investigate issues that they were interested in and not all of the issues she and her family had raised.

The complainant understood that they investigated only the matters put to them in writing but not the additional matters raised by telephone, had she known this at the outset, she would have put everything in writing.

She was not offered referrals about where to pursue her other issues by the CIS. Instead she was advised that, if dissatisfied, she could appeal to the ACC. However, that office also declined to deal with the issues.

*Outcome sought*

The complainant advised that her family sought an outcome that involved the residence being 'made accountable'; they had never had an acknowledgement or apology from the residence that what happened was wrong and hurtful to them as a family and especially to their mother. She could not accept that the Department had found there had been no breach of the residence's responsibilities.

This complaint demonstrates a number of issues:

**Role of the CIS**

The difference between what complainants are seeking and the current role of the CIS is an issue raised through our complaints. We understand from the CIS that it does, where possible, attempt to effect resolution along with its role of ensuring that any breaches of the Act or Principles are rectified. However this is not a formal part of the CIS role and there would not appear to be formal structures in place to support this aspect of its responsibilities. For example, we have not observed complaint resolution as part of any service offer to complainants. Rather, complainants appear to be treated as informants.

It is the view of this office that it would be preferable for the service offer made to complaints by the CIS to contain both a regulatory and a resolution dimension and that there be some formal support for a complaints resolution role.

**Remedies**

Any complaints resolution stream within the CIS should include consideration of remedies. We have seen a number of cases in which the individual complainant has not received an appropriate remedy. This is particularly the case where the complaint relates to a past event that is unlikely to be ongoing.

For example, in the above case study a number of issues were raised at the ACC level which had not been investigated by the CIS and, therefore, were not considered part of the examinable decision by the ACC. The ACC considered whether a recommendation that these matters be investigated should be made, but decided not to do so on account of the fact that the care recipient had since died.

Ongoing problems are readily addressed through an NRA and a focus on long term solutions, but this should not be at the expense of remedies such as apologies for

past errors, appropriate compensation for financial consequences of care providers' mistakes, and more generally accountability for actions in the past. As an aside we would note that one of the most powerful remedies which we have identified across all our complaint work is the apology. It is a cheap and easy response, yet often seen this as the most important element of any resolution of a complaint.

### ***Expectations management and referrals***

In the current scheme, the limitations on the investigations and possible outcomes achievable by the CIS do not appear to be made clear to complainants up front. As a result the complainants are disappointed by the outcomes.

In the case study above, the complainant had expected that all of her issues would be considered, but some of these related to the professional standards of medical practitioners and were not addressed by the CIS. The CIS report simply stated that these issues were beyond the scope of its investigation. The complainant advised that the only further referral she received was to the ACC whose report also simply noted the issues and stated that they were outside the scope of its examination.

In our view complainants need to be advised at the outset about the issues that will not be dealt with by the CIS and provided with referrals to relevant bodies where appropriate. In the above case study, this office referred the complainant to the State health care services commissioner, which in turn referred her to the medical practitioner's registration body in that jurisdiction.

### ***Explanation of process***

In addition, complainants need an explanation of the likely investigation process at the outset. Questions asked by the complainant in the above case study and in other complaints handled by this office, indicate that the complainants did not know how the investigation was going to proceed. For example, whether or not it was sufficient to provide information over the phone or whether this needed to be done in writing and in particular, at what stage(s) they would have an opportunity to comment.

### ***Advocates***

While not arising from the above case study, this office received a complaint early on in the life of the CIS about the role of advocates and the importance of dealing consistently with an advocate (rather than with the complainant / care recipient) where one is engaged and properly authorised.

Other complaints handling schemes have forums such as users groups for feedback from regular advocates and to disseminate up to date information. We are not aware of such a forum in respect of the CIS.

## ***Term of Reference 3: The adequacy of training provided to investigators to assist them in undertaking their role, including in investigative methods, reporting and communications***

### ***Training and performance indicators***

It is important that both the delivery of training and the setting of performance indicators for the CIS include a strong focus on complaint resolution. NRAs and identifying breaches of provider obligations are important but they should not drive the response at the expense of resolving the complaint amicably.

A particular feature of aged care complaints is that aged care recipients generally cannot readily move from one provider to another. As a result, most complainants will continue to reside with the provider about which the complaint is made. In these circumstances, it is critical that there be a training focus on resolving the problems between the two parties to ensure that care provision can be effective into the future.

### ***Interpreters***

This office received one complaint in which the CIS used a staff member of the care facility complained of to interpret during an interview with the care recipient. This incident raises questions about the complainant's privacy and also of the professional skill of the interpreter. Training should include sensitivity to the special vulnerability of care recipients either as complainants themselves or as persons in respect of whose care complaints have been lodged by others. Training about the proper use of interpreters should also be provided.

### ***Term of Reference 6: Adequacy of information collected and considered as part of the investigation***

See our comments regarding natural justice at term 1 and site visits at term 8.

### ***Term of Reference 7: The relationship between the CIS and the Aged Care Commissioner, the Aged Care Standards and Accreditation Agency Ltd, and other relevant bodies***

#### ***Limits on the capacity of the Aged Care Commissioner***

We have identified a number of issues, reflected in the complaints that come to us, that suggest the role of the ACC could be treated differently to improve the capacity for it to deal with aged care complainants who are not satisfied with their experience in the CIS.

#### ***The fourteen day time limit***

Under the *Investigation Principles 2007* a complainant must apply to the ACC for examination of a decision of the CIS within 14 days of being told by the Secretary of the CIS decision. This is a short timeframe compared to most complaint schemes, and is a particular problem in the context of aged care complaints. In this context complainants who are in residential care are more likely than the general population to be frail and reliant upon others for assistance with correspondence; carers who are spouses of a similar age to care recipients may also face access barriers; complainants may need time to discuss the matter with the care recipient or other family members or to obtain advice from other sources; or they may be simply over-stretched by the care recipient's needs and find it very difficult to meet a 14 day time limit.

Complainants to our office include those who have missed the 14 day time limit. Two changes would address this issue. Firstly, an extension to a period no shorter than 28 days. This is a more common timeframe for seeking review in other areas of administrative law. For example, it is a common time frame for applications to the Administrative Appeals Tribunal and similar review bodies. Social Security recipients have even longer timeframes in which to seek review by the SSAT. Secondly, a discretionary power to allow appeals outside this timeframe in exceptional circumstances. This discretionary power could be limited to a further specified time period, but we would recommend that the limitation rather be in terms of exceptional circumstances.

#### High rejection rate of ACC recommendations

We note that in 2007–08 almost 25% of ACC recommendations were rejected and currently the figure is in the order of 13%. Were it to occur, we would consider such a high rate of rejection of recommendations made by this office to be a matter for concern. The ACC is a specialist body, with experienced staff which is capable of investigating and receiving new evidence. This would suggest that the rate of rejections of ACC recommendations should be very low. Given that the ACC offers complainants an independent examination of the CIS decision the value of which is undermined by a high rejection rate, it is important that this be considered further.

#### Reasons for rejection of ACC recommendations

Following the previous point, we are concerned that we have not always been able to identify sound reasons for the rejection of ACC recommendations. In our view the recommendations of an independent expert review body should be accepted unless there is a good reason not to do so. On occasions the rejection would appear to have been based on no more than the taking of a different view of the same facts, rather than an identified error, new information or other probative reason.

In the case of process reviews conducted by the ACC (as opposed to examination of CIS decisions) there would not appear to be any obligation on the Department to respond to the recommendations at all. As the ACC has no capacity to publish reports or recommendations, there is no public accountability for the Department's response to ACC recommendations. In the case of the Ombudsman's office, the capacity to publish reports is critical to our capacity to deliver accountability in administrative decision making.

#### Only care recipients and their representatives can apply to the ACC

Only care recipients themselves or their representatives (and of course, providers), can apply to the ACC. In the case of aged care complaints, it is sometimes a concerned independent party who will lodge a complaint about care within a facility. We consider it important that interested third parties should have the capacity to test a CIS decision through the ACC. We do not see evidence in the CIS cases we deal with of an undue number of third parties lodging complaints or pursuing complaints, and to the extent that this does occur, we would expect that it would be relatively rare for these cases to be pursued through to the ACC. On this basis we do not foresee an undue increase in workload. This approach would provide assurance for aged care recipients unable to protect their own interests, and without appropriate representatives who can act for them.

#### Responses to commentaries on best practice

The ACC has a clear role to provide commentary on best practice. In providing reports the ACC will frequently be able to draw lessons that relate to best practice. On the other hand, there is no formal requirement for the Department to respond to such commentary. This lack of response points directly to concerns as to whether the valuable input from the ACC on best practice issues is being exploited as effectively as it could be.

#### General comments

The ACC is an independent statutory position but its staff, equipment and resources are provided by the Department. The principal reporting line is to the Departmental Secretary who can (and does) reject recommendations and, in the case of comments on process issues, does not need to provide reasons. The only subject of the ACC's role is aged care complaints and therefore the sole focus of the position is its relationship with the Department. These factors can have a significant impact on the

character and contribution of the role both in substance and, more importantly, in appearance.

If the ACC is to be both truly independent and perceived as such emphasis must be given to those things that impact on independence. Its resources should not be subject to Departmental control, it should have a clear direct line of reporting to the Minister and to the public and consideration should be given to whether it should pick up more of the CIS role.

### ***Relationship between the CIS and state/territory-based health complaints commissioners***

We have identified areas where the relationship between the CIS and state-based health complaints commissioners has not been effective. There are both areas of overlap and gap. Each agency needs to make accurate referrals to the other with certainty about how referred complaints will be handled. Where the Commonwealth Ombudsman has such jurisdictional issues with other complaint bodies, we will often develop a memorandum of understanding to clarify the way that complaints are handled and how jurisdiction overlaps will be resolved. We suggest that it would be appropriate for the CIS and ACC to develop memoranda of understandings with state/territory-based health complaints commissioners.

### ***Changes to the registration of health professionals***

Similarly, we note the moves towards a national registration scheme for health professionals. Any outcome from this review of the CIS should accommodate the potential changes to the health registration scheme and the interaction between any complaint regime under that scheme with the CIS.

### ***Term of Reference 8: The processes, practices and the timelines of responses to complaints to the CIS when compared to similar investigatory bodies.***

#### ***Expectations management and appropriate referrals at intake stage***

As set out at terms of reference 1 and 2, this office is of the view that expectations management, including an explanation of the investigation process, its potential outcomes, the issues to be investigated and referrals to other agencies that might deal with issues that are beyond the scope of the CIS should be undertaken at the outset of the process.

#### ***Support for complaints generally at intake stage***

The aged care complaints system is closely related to general health complaints matters and other areas of government process such as the aged care assessment process. Given the complexity of the arrangements and the different pathways and opportunities for complaints, it is important that complainants be given maximum support in identifying where their complaints should be lodged, when they can be lodged and how best they can be pursued. The case study below highlights where better advice to the complainant about the likely outcome of his complaint would have been of assistance.

### **Case Example 2**

The complainant's parents had sought assessment for a Community Aged Care Package. He complained that the providers were asking for financial information, speculating that this was in order to channel his parents into certain more expensive service options. Both the CIS and ACC considered the complaint. The complainant then complained that the CIS and ACC investigations were biased towards the provider because they had looked at the provider's copies of policies and procedures and had not given enough weight to his parents' actual experience.

We noticed however that there were impediments to any CIS or ACC investigation finding a breach of any rules relating to the concern of the complainant at that time. In part this was because the most relevant Principles would not apply until the providers actually undertook the conduct that the complainant apprehended they might. In the absence of this, the CIS and ACC could only measure the conduct against rules which appeared to the complainant less relevant to his complaint.

However, this limitation on the capacity of the scheme to consider the complaint was not conveyed to the complainant at the outset of considering his complaint.

### **Site visits**

Site visits are not always carried out when appropriate. We have noted a number of occasions on which issues have come to us that would have been easily resolved by a site visit.

While it may be a question of resources, we consider that site visits are sometimes overlooked when they would be a key to effective resolution of the complaint. The case study below highlights one such example.

### **Case Example 3**

The complainant complained that her wheelchair bound mother fell out of bed because the bed railings had not been secured properly. Her mother was age 93 and required a hip operation as a result of the fall. The CIS investigation consisted of two teleconferences with the complainant, a teleconference with the provider and a review of the documents provided by the provider. The CIS conclude that the complainant's mother must have wriggled out of the bed and that there had been no breach of the provider's responsibilities.

The complainant considered that it was not possible for someone to wriggle out of the bed if the railings were up. She said there was insufficient space for anyone to do this and her mother's mobility was very limited. However, the CIS had not viewed the bed for itself.

The complainant was unable to pursue the matter further with the ACC as she missed the 14 day time limit for applying for review because the notification of the CIS decision arrived during the Christmas period. Although the ACC later agreed it could look at aspects of the complaint under its jurisdiction to review the process by which a complaint was handled, by this time the complainant had decided not to pursue the matter in order to focus on her mother's current care needs.

In addition to the site visit issue, this case study highlights the importance of effective resolution at the CIS level wherever possible due to the fact that complainants are often either care recipients themselves or the carers of care recipients and are therefore particularly vulnerable to review fatigue and impediments to access such as the 14 day time limit on applying for review of examinable decisions by the ACC.

#### ***Quality of reasons for decisions***

In our view a clear, plain language presentation of reasons for decisions is critical to any complaints scheme. Some complainants have referred to an 'accusing' tone in investigation reports. On examination, this appears to be the result of the use of adversarial language such as that 'allegations' were 'unproven'. Some complainants have inferred from this that the authors did not believe them.

A common feature of complaints to this office is that complainants state they do not understand how the circumstances applying to the care recipient could not have amounted to a breach of the rules. In many of these cases, the relevant rule against which the conduct has been measured is not explained in the CIS or the ACC report and it is left to this office to fill the gap for the complainants.

The reasons should, where relevant, include the issues complained of; an explanation of the rule(s) against which the conduct of the provider was measured; the process by which the investigation was conducted; the evidence that was taken into account; any findings of fact drawn from that evidence; and the reasons for the conclusion.

#### ***Examinable decisions and process reviews***

The timeframes for appeal to the ACC differ depending on whether an applicant seeks review of an examinable decision or whether they are complaining about the process by which their complaint was handled. However, it would appear that complainants do not understand the difference between the two types of review and may require more support and explanation.

#### **Case Example 4**

The complainant's mother had died in residential care and she had complained to the CIS about the standard of care received. She was dissatisfied with the response and appealed further to the ACC. On receipt of the ACC response she found that it did not cover matters that had concerned her about the way in which the CIS had conducted its review.

The ACC then advised that she had not specifically indicated that she wished to complain about the process in her original letter to it. However, as there was no time limit for process complaints it was still possible to make an application.

#### ***'Review fatigue' facing complainants***

Aged care complaints are characterised by a strong element of 'review fatigue'. While we see this issue arise in other areas of complaint it is not surprising that it is particularly prominent in aged care complaints. This is both because of the age and frailty of complainants, and because of the stress and the traumas that representatives of complainants are so often already confronting.

We are concerned that legitimate and important complaints are not pursued to the point of effective resolution as demonstrated by case study 3 in this submission. This

can result both in ongoing tensions and care inadequacies for individual care recipients, and in systemic issues going unresolved.

There is often little that can be done to avoid the circumstance where a complaint may be rejected in the CIS and a complainant may not have the capacity or willingness to pursue the matter to the ACC or the Ombudsman. Nevertheless we believe that through a strong focus on supporting complainants, and making processes as simple as possible, there could be an improved level of complaint resolution. Some of the process issues above are relevant here, but it is also important that attention be focused on the literature that is provided to complainants, the advice that is conveyed over the phone and practical impediments such as short timeframes for applications and opportunity to comment.

## **CONCLUSION**

The above issues and case studies provide a brief overview of our impression of the aged care complaints scheme. It goes without saying that this office sees only the cases complained of and will be unaware of much of the positive work done by the CIS and ACC. We would not want any of the comments above to be seen as a reflection on either the skills and experience nor the commitment of the complaint investigators we deal with.

We would also note that the current complaints scheme embodies significant reforms on the earlier scheme. Many of these reforms are critical to achieving positive outcomes for complainants and for systemic improvements in service delivery in aged care along with identifying and rectifying matters of serious concern. The move away from mediation towards investigation has been a positive step. At the same time, as noted above, we would see benefits in ensuring that the shift away from mediation is not seen as a rejection of individual complaints resolution as a legitimate dimension of the scheme.