



public interest
ADVOCACY CENTRE LTD

**Consumer protection:
a submission to the review of the
Aged Care Complaints Investigation Scheme**

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on Health Consumer Rights and Safety

PIAC has undertaken a considerable amount of work on patient and health care rights over its 27 years of operation. Much of this work has focussed on patient safety, complaints and investigation processes and the development of an Australian Health Consumers' Charter.¹

PIAC was central to the consultation process leading to the enactment of the *Health Care Complaints Act 1993* (NSW). PIAC also provided legal representation in the New South Wales Royal Commission into Deep Sleep Therapy (the Chelmsford Royal Commission) and was involved in related processes dealing with the specific issues at the Chelmsford Hospital, but also more broadly, about the handling of serious complaints about medical practice in NSW.

In the past six months, PIAC has made submissions to several health complaint related inquiries, including a response to the Consultation Paper on *Proposed arrangements for handling complaints and dealing with*

¹ See, for example, Carol Berry and Robin Banks, *A tool for healthcare improvement: Comment on the Draft National Patient Charter of Rights* (2008) Public Interest Advocacy Centre
<http://www.piac.asn.au/publications/pubs/sub2008030_20080307.html> at 28 August 2009.

*performance, health and conduct matters*², a submission to the Senate Community Affairs Committee Inquiry into the National Registration Scheme for health practitioners³, and comment on the exposure draft of the Health Practitioner Regulation developed in response to the Senate Inquiry.⁴

PIAC's response to the Terms of Reference

PIAC welcomes the opportunity to contribute to the review and evaluation of the Aged Care Complaints Investigation Scheme (CIS). PIAC notes the list of issues and questions in the Consultation Paper on which the review seeks interested parties to focus. In this submission, PIAC responds to the issues that are most relevant to consumers, from a consumer perspective, that is:

What can the CIS do better to meet the needs and expectations of residents, their families and aged care service providers?⁵

PIAC bases its comments on a framework it has applied in response to similar inquiries, as described above. The framework provides a list of principles by which the current scheme can be assessed. The premise of the principles and subsequent analysis is that the primary goal of the complaint system is to protect aged care consumers from providers that deliver services in a way that is unethical or harmful to the resident. In this submission, PIAC identifies improvements that establish roles for the CIS and provide practical outcomes for consumers.

The Consultation Paper states that 9000 complaints⁶, amounting to over one-third of complaints to the CIS, were not acted upon.⁷ This indicates that the CIS is either not assisting aged care consumers and their carers in understanding the role of the CIS (resulting in misdirected complaints), or the criteria for investigating a complaint is too restrictive.

In managing and establishing a complaints framework for an aged population group, the circumstances of residents of aged care services and their family carers should inform the framework and the administration of complaint processes. Unlike other health services, where the consumer has a choice of health provider, the resident in aged care may be in contact with an alleged abuser or neglectful service every day, all day. The resident is very unlikely to have the capacity to move to another facility, even if one is available. In these circumstances, complaint processes need be administered in a flexible way that supports and protects aged care consumers and their family carers.

Principles of good complaint management

PIAC submits that the Aged Care Complaints Investigation Scheme (CIS) should comply with the following principles:

² Peter Dodd, *Maintaining consumer focus in health complaints: the key to national best practice* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008112_20081124.html> at 28 August 2009.

³ Peter Dodd, *Enhancing the rights-based approach to health care complaints in NSW* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008121_20081212.html> at 28 August 2009.

⁴ Peter Dodd, *Putting healthcare rights to work* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009071_20090717.html> at 28 August 2009.

⁵ Department of Health and Ageing, *Consultation Paper Aged Care Complaints Investigation Scheme* (2009).

⁶ Ibid 3.

⁷ For comparison, the NSW Health Care Complaints Commission (HCCC) reports that 26 percent do not proceed to resolution: HCCC, *Annual Report 2007-2008*, (2008) 121.

- **Transparency and accountability:** that any organisation or authority that affects the rights of individuals should have clearly defined powers and be accountable.
- **Separation of powers:** that there is a clear separation between the role of regulation of accreditation and standard-setting matters; the purchaser of services; and the role of assessment, investigation and prosecution of disciplinary and performance matters.
- **Independence, expertise and timeliness:** that investigation and prosecution should be carried out by an independent body that employs dedicated officers to carry out these tasks in a timely manner.
- **Free from perceived bias:** that there should be no potential for perception by consumers that the system is structured so that the service providers can protect their organisations and personnel at the expense of protecting the public interest and consumer safety.
- **Procedurally fair, open and transparent:** that the processes to determine serious matters of abuse and neglect should comply with the rules of procedural fairness and be conducted in an open and transparent manner. Written reasons should be provided for all decisions. Hearings should be open unless there is a compelling reason for them not to be. All parties including the complainant should have a right to request a review of a decision, which should be conducted at arms length from the original decision-maker.

These principles are to some extent embodied in the current Investigation Scheme. PIAC maintains that where a scheme embodies these principles, the positive characteristics of the scheme should be maintained or strengthened. Residents and their friends and family should not be subject to a reduction in the protection of their rights.

The following section examines the strengths and weaknesses of the CIS, as assessed against the principles set out above.

1. Transparency and accountability

The strengths of the current arrangements include the right of consumers to approach the Commonwealth Ombudsman for a review of complaint handling, and the CIS public reporting of statistical information about complaints.

Accountability of the CIS could be improved by:

- more extensive public reporting of results, including the naming of providers and a description of breaches;
- placing the scheme under the oversight of a Joint Parliamentary Committee; and
- statutory requirements to provide feedback to complainants with detailed reasons for decisions.

2. Separation of powers

A positive aspect of the CIS is that it is not formally linked to the Aged Care Standards and Accreditation Agency (the Accreditation Agency). The role of the Accreditation Agency is to improve performance outcomes and not to police Departmental rules.

However, the CIS refers complaints to the Accreditation Agency if the complaint identifies a systemic problem that can be acted on. The conditions and arrangements for referral of information to the Accreditation Agency should be standardised rather than the current ad hoc arrangement. Referral to the Accreditation Agency should not replace the investigation of a complaint and a recommendation to a service provider to rectify a problem.

De-identified information about the nature and number of complaints can be useful for the service provider and the Accreditation Agency to identify areas of improvement through the accreditation review process. This information could include data from the large number of complaints that are not investigated, which (based on 2007 data) amounts to nearly 40 percent of complaints to CIS⁸. Complaints that are not 'in scope' can still be a useful source of information for service providers wishing to improve their service.

3. Independence, expertise and timeliness

Independence

A significant weakness of the current CIS is the lack of independence of the agency from the Department of Health and Ageing (the Department), and the veto that the Department has over decisions reviewed by the Aged Care Commissioner (the Commissioner). Currently, the Department can confirm, vary, set aside or substitute a decision of the Aged Care Commissioner. PIAC recommends that the CIS should be a statutory body, independent from the Department, and that the Commissioner's decisions should be binding.

The powers of the Commissioner and the CIS should be strengthened to allow them to undertake or direct broader investigations, inquiries and reviews. Investigations of systemic issues or trends could be initiated where information from research studies, statistical information about complaints, or information from the media or public identify trends or recurrent concerns about particular providers or processes. The CIS should also have the power to undertake an investigation without naming an individual victim.

The CIS should be funded to undertake public information campaigns about the service processes and how to engage in the complaint processes. Relying on service providers to issue written brochures at the time a carer is in crisis and placing their friend or relative with a provider may meet procedural requirements for accreditation, but it does not achieve the outcome of ensuring residents and carers are aware of the complaint process. Such information needs to be delivered in an appropriate form and circumstance that ensure the information can be accessed and understood by consumers and carers.

Expertise

The model leaves the crucial decision of whether to investigate a complaint or not, and the initial assessment of a complaint, to dedicated trained officers. The areas listed in the Consultation Paper⁹ as aspects of training are encouraging, but could be complemented by ensuring officers have skills that support resolution of complaints with parties to avert the escalation of a complaint, and a knowledge of medical systems and legal frameworks within each State and Territory. Drawing on a workforce beyond nursing through seeking staff with backgrounds in policing and the law would also provide a stronger skills base for the organisation.

Timeliness

Time limits should be mandated on the initial assessment and for each stage of the investigation of complaints.

4. Free from perceived bias

It is important that complainants perceive the CIS as independent from the aged care industry; otherwise consumers will be reluctant to use the scheme. This is difficult to achieve when the role of the Department is so closely connected with the industry. The Department selects and funds providers, encourages organisations to establish services, and has an ongoing relationship as the funding body.

⁸ Department of Health and Ageing, above n 5, 3.

⁹ Ibid 13.

In a capital-intensive service such as residential care, it is unlikely that the Department would welcome withdrawing licenses for beds from long-established services or even temporary closures. If services were to close due to poor service, the Department would experience difficulty finding alternative places. The Department could also face criticism of its decision to award licenses to a provider later found to be delivering poor service to such an extent that serious intervention is required.

Consumers of aged care services are not in a market place where they can exercise a great deal of choice; particularly those in need of a high-care bed. They have limited choice of providers since government controls the number of beds and their location; in effect, the Department removes control from the consumer by purchasing aged-care services on behalf of consumers in need of aged care. High demand for beds also means no or very little competition and choice for consumers dissatisfied with a service.

The general public needs confidence that decisions are made on behalf of residents and not industry, which is difficult when the CIS is not independent from the Department of Health and Ageing.

5. Procedurally fair and open

Form of complaints

The current provisions allowing oral and written complaints, as well as anonymous complaints, and maintaining confidentiality, should remain. These provisions enable the right to complain, particularly for consumers who lack capacity to resolve their complaints through local mechanisms. The flexibility of these arrangements is necessary, given the vulnerability of consumers who remain in the care of the service provider while the complaint is investigated.

Communicating investigation outcomes

The CIS currently provides a written response to complainants, and to the service provider, to advise the results of the investigation. A full description as to how the issues the consumer raised were dealt with provides guidance to practitioners, industry staff and managers to improve their level of service. The option of not informing the service provider of a complaint at the initial stages of investigation is also welcome, given the vulnerability of the client group.

This positive aspect of the CIS could be improved by mandating written responses that:

- provide written information at each stage of the investigation;
- give detailed reasons for the final decision; and
- set out the circumstances where the provision of a written response can be denied or deferred. This is preferable to the use of terms such as 'seek' to give written advice.

Consumer advocates

Resources should be available to provide consumers (and family carers) with access to assistance from advocates and legal advice. This helps to balance the relationship with a service provider who has access to legal resources and other professionals to help prepare their case.

Protecting complainants

Complainants should receive protection from intimidation (or other forms of victimisation) by the subjects of the complaint or other parties. The CIS should have the power to recommend sanctions or prosecution against anyone who intimidates a complainant. Consumers often, especially where the relationship is ongoing as in aged care, are reluctant to lodge a complaint against a provider because of fear of adverse treatment or retribution. Consumers will be even more reluctant to complain if there is no sanction imposed in respect of such retribution and/or intimidation.

Acceptance of complaints

It is of concern that nearly 40 percent¹⁰ of complaints made to the CIS are rejected and not investigated. Changes to improve initial management of complaints include:

- public information campaign to encourage appropriate direction of complaints, that explains the purpose of the CIS;
- acceptance of complaints about incidents that occurred up to five years prior, or at least an ability to apply for an extension of time. The current rejection of complaints that relate to matters more than one year old is unwarranted given the vulnerability of the client group. Time limits on complaints can be problematic when controversies become public and serious abuses came to light years after they occurred. In such circumstances, the CIS may wish to investigate past related abuses. While it is vital to ensure that the subject of a complaint can adequately respond despite the passage of time, a fixed time limit, such as one year, is unnecessarily burdensome on consumers.

Review process

Fourteen days to lodge an application to examine a decision is not sufficient and is out of step with common practice. A minimum of 28 days should be allowed for lodgment of a request for review of decisions.

All relevant parties, including notifiers, complainants and industry, should have a right to seek a review after every significant decision.

Conclusion

The current CIS has several positive aspects, including the flexibility to accept complaints in any form, and from any person; and the ability to keep the identity of the complainant confidential. The major concern about the CIS is that the body is not an independent statutory body and the Aged Care Commissioner lacks powers to ensure recommendations are binding.

PIAC submits that the following changes are required to meet the best practice model for complaint-handling processes:

1. an independent statutory body is responsible for the initial assessment of notifications/complaints, the conduct of investigations and the prosecution of disciplinary and serious performance matters;
2. the accreditation agency and the setting and maintenance of standards remain separate;
3. the CIS and the Aged Care Commissioner have the power to make binding decisions and not be overruled by the Department of Health and Ageing.

PIAC is concerned that there is not enough flexibility in the CIS to allow it to undertake resolution of complaints that do not warrant an investigation but require immediate attention, even if they are out of scope or older than 12 months. The large percentage of complaints that fall within this category also indicates a lack of awareness among those accommodated with, working in and caring for older people in the industry.

While major reform is required to establish independence there are several changes that could be made to the scheme that are relatively simple to achieve, but will improve the practice of the CIS, particularly by establishing timeframes, improving written reports and changing time limitations for submission of complaints and reviews.

¹⁰ Ibid 3.

Recommendations

Recommendation 1: Transparency and accountability

That the Aged Care Compliant Investigation Scheme:

- a) *make statistical data about complaints, including a description of the type of breaches and the naming of service providers, available to the public on a quarterly basis;*
- b) *report to a Joint Parliamentary Committee;*
- c) *have its statutory requirements strengthened to ensure it provides feedback to complainants with detailed reasons for decisions.*

Recommendation 2: Create an independent organisation

That the Aged Care Compliant Investigation Scheme:

- a) *legislation be amended to create a statutory body independent from the Department of Health and Aged Care;*
- b) *be granted powers that ensure that review decisions of the Aged Care Commissioner are binding and not able to be overturned by the Department of Health and Aged Care;*
- c) *be granted powers to allow it to undertake or direct broader investigations, inquiries and reviews;*
- d) *is provided with sufficient funds to undertake public information campaigns about the scheme; and how to engage in the complaint processes.*

Recommendation 3: Expertise

That the Aged Care Compliant Investigation Scheme improve training of CIS staff by including modules on helping complainants resolve complaints that will not be investigated by the CIS; and to improve their knowledge of medical systems and legal frameworks within each state and territory.

Recommendation 4: Timeliness

That the Aged Care Compliant Investigation Scheme meets mandatory time limits for initial assessments and each stage of the investigation of complaints.

Recommendation 5: Form of complaints

That the Aged Care Compliant Investigation Scheme maintains the current provisions of allowing investigation of complaints:

- a) *that are communicated orally or in writing;*
- b) *that are anonymous; and/or*
- c) *where the complainant wishes his/her details to remain confidential.*

Recommendation 6: Communicating investigation outcomes

That the Aged Care Compliant Investigation Scheme:

- a) *must provide written responses, including a full description as to how the issues raised were dealt with, to the complainant and the service provider;*
- b) *must provide written responses to the complainant at each stage of the investigation, including detailed reasons for decisions;*
- c) *formalise the circumstances where the right to a written response can be denied or deferred.*

Recommendation 7: Consumer advocates

That the Aged Care Compliant Investigation Scheme be provided with funds to provide consumers and their family carers with access to assistance from independent advocates.

Recommendation 8: Protecting complainants

That the Aged Care Compliant Investigation Scheme be granted powers to recommend sanctions or prosecution against anyone who intimidates or otherwise victimises a complainant or a witness in support of the complaint.

Recommendation 9: Acceptance of complaints

That the Aged Care Compliant Investigation Scheme:

- a) be funded to conduct a public information campaign to encourage appropriate direction of complaints, that explains the purpose of CIS and what it investigates;*
- b) accept complaints of incidents that occurred up to five years prior, or at least an ability to apply for an extension of time past the current 12-month time limit;*
- c) be permitted to investigate complaints that do not name an individual at risk.*

Recommendation 10: Review process

That the Aged Care Compliant Investigation Scheme and the Aged Care Commissioner:

- a) accept lodgement of requests for reviews of decisions up to 28 days following the decision;*
- b) accept applications for review of decisions from all relevant parties (being parties affected by the decision), including notifiers, complainants and industry, after every significant decision.*