



## Submission from the Aged Care Commissioner

### Re: Discussion Paper Aged Care Complaints Scheme

Thank you for the opportunity to make a submission on the proposed complaints management framework for the Aged Care Complaints Scheme.

I have largely confined my comments to matters relevant to the role of this Office rather than issues which will no doubt be covered in the submissions from others. We would appreciate an opportunity to be further involved as these reforms are developed. As Aged Care Commissioner I see it as part of my role to do whatever I can to ensure Australia has a top class aged care complaints scheme.

#### Role of the OACC

Under the new framework, it appears there are several points where it is proposed that there will be decisions examinable by this Office. As I understand it these include not only the decisions which are currently examinable (decisions not to investigate, to end an investigation, to issue an NRA or not issue an NRA, and the outcome of the investigation) but also where a matter has failed to be resolved using the alternative dispute resolution options (ADR) and the decision is made to take no further action. I note also that it appears to be proposed that the Aged Care Commissioner's jurisdiction should include "out of scope" decisions.

It also seems that, depending on what changes are made to the Aged Care Act 1997 and the Investigation Principles 2007, this Office's role in examining complaints about the Secretary's processes will include the Scheme's handling of complaints which have not been investigated.

I note the following for further consideration:

#### *Initial assessment/early decision making*

- It is unclear whether the intent is to give this Office jurisdiction to examine decisions by the Secretary to reject a complaint because it is out of scope. I would welcome more information about this.
- Neither is it clear whether the Secretary is retaining the power to decide at the outset not to investigate a complaint (or progress a complaint to ADR) in similar terms to those set out in s 16A.7 of the current Investigation Principles. This should be retained and continue to be an examinable decision under s 16A.21 (aa) of the Investigation Principles.
- The proposed criteria to be considered by Scheme Officers in determining the appropriate complaint pathway, are high level and subjective. While it is important to note that there is usually more than one appropriate resolution option, and flexibility is crucial, having more specific, transparent, guidelines, will assist decision makers and complainants, as well as this Office in examining decisions not to investigate and reviewing the process. Greater clarity around the process for assessing/triaging complaints will also assist all parties. It also might be useful to consider the use of expert advice in assessing complaints – for instance, where there are complex clinical issues some expert advice on whether there is a departure from expected standards and if so the extent/seriousness of the departure, will help to inform the decision on what pathway the complaint should take.
- The risk escalation criteria appropriately focus on outcomes but what about complaints involving serious near misses? Even where no one is harmed the complaint may highlight a serious error or systems issue with potentially significant consequences, and important

learning, which merits escalation.

- There is some inconsistency between the proposed criteria for dispute resolution, and the examples provided in the discussion paper. For instance, at page 12 (case study one), the document suggests that a matter might be referred for conciliation, although the issues have been assessed as having a 'consequence rating' of 4 and involving a major loss of choice/control. It is unclear if, and how, the proposed 'risk escalation criteria' will inform the decision of the Scheme as to whether a matter is appropriate to be referred to ADR.
- There is potential for disagreement between the parties and the Scheme regarding whether a complaint is in relation to a significant risk to the health or welfare of a care recipient or serious breaches of the Act. However, I note that given that most forms of ADR can only occur with the agreement of the parties, any complainant who feels that the issues are 'significant' and 'serious' can refuse to participate (the exception, approved provider resolution, is discussed further below).

#### *Referral for investigation*

- The investigation referral criteria appropriately include the three considerations of: public safety (risk), accountability (potentially serious breaches), and individual resolution. Educational value – that is, the potential for investigation of the complaint to result in wider service improvement (quality improvement) - could also be an important consideration.
- Again, having clear transparent guidelines will be helpful not just to the decision makers and the parties, but also to this Office in examining decisions not to investigate.
- As at the assessment stage, here too the use of expert advice on the extent of any departures from expected/reasonable standards, may also assist with robust decision making.
- *Decision to finalise a complaint without investigation and without agreement*
- It is proposed that the Scheme may decide to finalise a complaint where ADR has failed and the complainant is seeking an investigation. No doubt the Investigation Principles will be amended as necessary. As this is effectively a decision not to investigate, this will be an examinable decision that should be included in s 16A.21 of the Investigation Principles.
- I have been advised that under any amended principles, a decision not to process a complaint, and a decision not to refer a matter for investigation if unresolved after ADR, should “enliven” the same jurisdiction for the Aged Care Commissioner but I would be interested in discussing this further. It is important to consider what statutory flexibility the Commissioner will have in reviewing decisions not to investigate a complaint where ADR has failed and there may be a prima facie breach of the provider’s responsibilities.
- Further to this, questions arise as to access by the Commissioner to confidential information from failed conciliations (discussed further below)

#### *Referral to others*

- Under the current Investigation Principles, s 16A.10 provides that the Secretary may refer a matter to other organisations. Section 16A.12 of the Investigation Principles provides that where a matter is referred to another organisation, it is open to the Scheme to continue its investigation. Equally, it is open under s 16A.13 to end the investigation. If it is intended that a matter referred to ADR will be finalised if it is referred to another organisation, consideration should be given to whether it should be open for a complainant to seek examination of this decision if the processing of the complaint was finalised without their agreement.

### *Supported resolution*

- I note that this is by agreement and therefore the review rights only kick in if the matter is unresolved and the complainant seeks reassessment and the complaint is renewed.
- Nonetheless, where a complainant has concerns about the manner in which their complaint was finalised via supported resolution, it may be open for the complainant, depending on the nature of any amendments to the Investigation Principles, to bring a complaint to this Office pursuant to s 16A.26(1)(a). Such complaints may raise issues such as a failure by the Scheme to properly advise the complainant that their complaint would be finalised if they chose to proceed via supported resolution. Other issues might be raised if, in processing a fresh complaint in circumstances where supported resolution failed, the Scheme fails to carry over all previous complaint issues to the new complaint.
- The referral criteria might also include: where the approved provider has not previously been aware of, or had an opportunity to address the complaint, and, make it clear that where complainants are very vulnerable (eg mental capacity, physical health issues, at risk of repercussions) supported resolution is not appropriate.
- Good fact sheets and information will assist all parties, and providers will need guidance on time frames. (I would also note that offering consistently good, well informed, and trained, advocacy support will assist with the successful implementation and use of all the ADR options).

### *Approved provider resolution*

- NZ experience suggests the success of this will depend on high levels of provider engagement. Also some of the referral letters to providers may need to be quite directive as to what action the Scheme considers necessary to achieve resolution (for example: a meeting. or a written response for someone who feels unable to meet, and/or providing advocacy support).
- NZ experience also suggests that requiring the approved provider to report to the Scheme, and giving the Scheme the ability to investigate if it is not satisfied with the providers response, provides an important safety net for the complainant and an incentive to the provider to effectively resolve the complaint. Tight timeframes, which are clearly specified with a formal process for requests for extensions, are also necessary.
- As with supported resolution, the referral criteria should include: where the approved provider has not previously been aware of, or had an opportunity to address the complaint, and, make it clear that where complainants are very vulnerable (eg mental capacity, physical health issues, at risk of repercussions, the relationship has completely deteriorated, recently bereaved) referral is not appropriate.
- Also, complainants should be asked their views on an approved provider referral and these should be considered in making the decision to refer a matter to the approved provider for resolution.
- Advocacy support should always be offered to the complainants.
- Again, good fact sheets and information will assist all parties, and providers will need guidance on time frames and best practice complaints handling. The latter could also involve assisting providers to learn from each other by showcasing good practice/anonymous case study examples of those who respond well to complaints and have good complaints handling systems.

- In relation to the proposed review rights, further consideration should be given to whether it is necessary for approved providers to have the right to appeal a decision by the Scheme to commence an investigation, in circumstances where the Scheme is not satisfied with the approved provider's report. This may result in delay and double handling if the approved provider is also able to appeal the decision to investigate the complaint, in addition to retaining their existing rights to appeal an adverse outcome of that investigation.
- Potential OACC complaint issues include: where approved provider referrals have been unsuccessful, and an investigation follows, the delay in commencing the investigation may be perceived by complainants as being unsatisfactory. It may also make evidence gathering more difficult due to the increased passage of time. A complainant who considers their complaint raises significant issues may wish to appeal a decision to refer a matter to the approved provider, especially if the Scheme permits the provider a significant amount of time to prepare a report. The decision to refer a matter to approved provider resolution without the agreement of the applicant, if it is not a decision that the Commissioner can examine, should be, at minimum, open to internal review by the Scheme.
- Further to this, depending on the amendments which may be made to the Investigation Principles, it is possible that a person might bring a complaint to the Aged Care Commissioner pursuant to s 16A.26(1)(a) of the Investigation Principles about the process by which the Secretary identified the matters which were to be referred for approved provider resolution. For instance, a complaint could be brought by an approved provider who felt that the Secretary was failing to refer suitable matters.
- Consideration should be given to whether the referral criteria should be incorporated into the amended Investigation Principles (or whatever replaces these). On one hand, it may be easier for the Commissioner to process complaints if the criteria applied are well known and set out in the Principles. On the other hand, incorporating the criteria into the Principles may lead to a less flexible process.

#### *Conciliation and mediation*

- Depending on the amendments which may be made to the Investigation Principles, it is possible that where a matter is not resolved at conciliation, but is finalised without referral to investigation, a person might bring a complaint to the Aged Care Commissioner pursuant to s 16A.26(1)(a) of the Investigation Principles about the Scheme's handling of the complaint.
- It appears from the discussion paper that the Scheme's conciliator will be in the position of having to advise the parties during the conciliation, and reach a decision as to whether a proposed agreed outcome is above or below the minimum standard required by the Act. If the parties subsequently fail to reach agreement, or the agreement breaks down, the parties may perceive that the Scheme has already formed its opinion on this issue, and is therefore conflicted from being able to investigate the matter. Complainants may also raise the issue of apprehended bias if the same Scheme officer that conciliated the matter then determines that it should not be referred for investigation. Providers might make a similar claim if the same Scheme officer is involved in the investigation.
- Further, as noted earlier, information discussed with a conciliator at conciliation is normally considered confidential. While the discussion paper does not address how this information will be treated, complainants may raise concerns about the manner in which information they provide to the Scheme is used to determine either not to investigate an unresolved matter, or conduct an investigation if such a referral is made. Any amendments to the Principles will need to address how information disclosed for the purpose of conciliation will be used by Scheme officers and whether such information is confidential.
- Conciliation and mediation need to be confidential processes in order to have the best chance

of achieving resolution. There needs to be further discussion about the form and content of the information reported back to the Scheme regarding the outcome of these processes.

- That said, as noted earlier, confidential conciliation and mediation processes, will make it difficult for this Office to review subsequent decisions by the Scheme to take no further action when mediation or conciliation have failed to achieve resolution, and/or complaints about the handling of the complaint.
- It is not clear why investigation is still an option after conciliation but not after mediation. On the one hand this can be an incentive to providers to resolve the matter, but it can also set up the ADR processes to fail if complainants perceive that they have investigation to fall back on, as a follow up option.

### **Quality Improvement**

The focus of these reforms is rightly on resolving complaints at the most appropriate level while at the same time ensuring that the rights and safety of elderly Australians are protected and they get the best possible care.

However, should not a dual consideration be quality improvement? As we all know, international literature supports the view that people who complain about health and disability services generally want an apology, a good and open explanation, and to know that it won't happen to someone else. In many cases it is too late to undo what has occurred, but people can get considerable comfort, and it will assist in resolving a complaint, if they can be assured that their complaint has made a difference and improved the care for someone else. Focusing on this will assist with getting complainants to successfully engage with, and support, ADR processes.

It may be useful to include in the final documents some discussion of the positive value of complaints, as well as considering how the framework might be enhanced to include ways in which lessons from Aged Care complaints can be more widely used and shared.

Rae Lamb  
**Aged Care Commissioner**

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