

Submission

No 35

INQUIRY INTO THE OPERATION OF THE HEALTH CARE COMPLAINTS ACT 1993

Organisation: Aged Care Commissioner
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Date Received: 23/10/2009



Australian Government

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23 October 2009

The Committee Manager
Committee on the Health Care Complaints Commission
Parliament House of New South Wales
Macquarie Street
SYDNEY NSW 2000

By email: chccc@parliament.nsw.gov.au

ATTENTION: The Hon. Helen Westwood AM MLC (Chair)

Dear Ms Westwood

Written response to the Inquiry into the operation of the *Health Care Complaints Act 1993 (NSW)* - Discussion Paper

1. Thank you for inviting me to make a written response to the above discussion paper. This response is provided to assist the Committee in understanding the role and experiences of the Aged Care Commissioner in relation to complaints. I trust this information will be of assistance to the Committee in its examination of the health care complaints system in New South Wales.

Submission of 28 November 2008

2. I provided a submission to the Committee's inquiry into the operation of the *Health Care Complaints Act 1993 (NSW)* on 28 November 2008. In that submission, I explained the role and functions of the Aged Care Commissioner (**Commissioner**) under the *Aged Care Act 1997 (Cth)* (**the Act**) and the *Investigation Principles 2007 (Cth)* (**the Principles**).
3. Since I provided the submission, the Principles have been amended with effect from 1 January 2009. I wish to draw the Committee's attention to the following amendments, which affected the functions and powers of the Commissioner.

Verbal complaints

4. Prior to 1 January 2009, complaints and applications for examination of decisions by the Complaints Investigation Scheme (**the Scheme**) made to the Commissioner were required to be in writing.
5. Since 1 January 2009, applications for examination of decisions by the Scheme made to the Commissioner may be in writing or oral. Complaints made to the Commissioner must still be in writing.

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6. The amendment was made to increase the accessibility of the examination process. The amendment recognises that there may be circumstances where a care recipient is unable, or would be deterred by the requirement, to apply for examination in writing. Language barriers, written communication skills and disability are all factors which may affect a care recipient's ability or willingness to make a written application for examination.
7. The Office of the Aged Care Commissioner (**the Office**) has developed and implemented procedures to receive oral applications for examination. Oral applications are entered into the Office's Case Management System. The issues are noted and read back to the applicant to ensure that they have been correctly recorded. Depending on the complexity of the issues and the information provided orally, the Office may confirm the application issues in writing. In some cases, the applicant will confirm the application issues in writing on their own initiative.
8. Since 1 January 2009, the Office has received 40 oral applications for examination. This represents 32 per cent of all applications made in this period. All oral applications were made by care recipients. Approved providers did not make any oral applications.
9. There has been no observable increase in the time taken to investigate applications since provision was made for oral applications. The average time taken to resolve an application has remained largely unchanged. Any changes in the average time taken to resolve an application are attributable to the increasing complexity of issues raised by applications and resource constraints. The number of applications lodged out of time has remained consistent, with approximately 10% of applications being refused on the basis that they were lodged outside the prescribed period of 14 days.
10. The Commissioner may require an applicant to confirm their application in writing. If the Commissioner requires the applicant to record the application in writing, the Commissioner may decline to examine the decision until the applicant does so. This provision is based on a similar provision in the *Ombudsman Act 1973* (Cth). Since 1 January 2009, this power has been exercised on one occasion.

Advising the relevant organisation of the complaint

11. Prior to 1 January 2009, a person making a complaint to the Commissioner was required to bring the matter to the attention of the relevant organisation. This requirement was removed with effect from 1 January 2009.
12. The Commissioner is still required to tell the person or body against whom the complaint is made about the complaint. Since 1 January 2009, the Commissioner has been required to tell the person or body against whom the complaint is made about the nature and substance of the complaint. This advice must be provided in writing.

13. Since 1 January 2009, the Commissioner has received 18 complaints. The Commissioner has complied with the requirement to tell the person or body against whom the complaint is made about the nature and substance of complaint for each received. The Commissioner also complied with this requirement in relation to a complaint received in December 2008.
14. The requirement to advise of the nature and substance of a complaint can delay the investigation of complaints. Opinions regarding the level of detail required to satisfy the requirement to advise of the nature and substance can, and do, differ. This can result in prolonged exchanges of correspondence between the Office and the subject of the complaint regarding whether the requirement has been satisfied. In some complaints, this process has delayed the Office's interview with the person or body against whom the complaint is made. This delay may have affected the interviewee's ability to recall the events which are the subject of the complaint.

Issues identified in the Discussion Paper

15. The Discussion Paper raises issues and suggestions for reform. The Commissioner has had experience with some of suggested reforms and provides the following insights to inform the Committee's consideration of the issues.

Issue 5

16. The Commissioner is required to tell the person or body against whom the complaint is made about the nature and substance of the complaint. The consequences of this requirement have been addressed in paragraph 14 above. Additional information regarding the Commissioner's processes is available on the Commissioner's website.

Issue 11

17. One of the functions of the Commissioner is to conduct own motion investigations; that is, conducting investigations even where a complaint has not been received.
18. Since 1 May 2007, when the statutory office of the Commissioner was introduced, the power to conduct own motion investigations has not been exercised. This is largely attributable to the resource constraints on the Commissioner. The Commissioner has limited resources and priority is given to investigations arising from complaints or applications for examination.
19. It is important that complaints bodies have the power to conduct own motion investigations. However, such powers should be introduced on the understanding that additional resources are required to conduct own motion investigations.

Issue 13

20. The Commissioner may refuse to investigate an application for an examinable decision or a complaint if the Commissioner is satisfied that the application or complaint is frivolous or vexation; was not made in good faith; or relates to a matter that is, or has been, the subject of a legal proceeding. Furthermore, the Commissioner may refuse to investigate a complaint if, having regard to all the circumstances, the Commissioner is satisfied that investigation is not warranted. Since 1 May 2007, when the statutory office of the Commissioner was introduced, the Commissioner has not exercised her power to refuse to investigate a complaint or application on the basis that it is frivolous or vexatious.

21. The strength and viability of a complaints scheme requires the complaints body to have the discretion not to investigate frivolous and vexatious complaints.

Issue 18

22. The Act and Principles do not expressly require the Commissioner to give a written statement of reasons for post-investigation recommendations. The Commissioner is required to provide to the Scheme a report about a refusal to examine an examinable decision on the basis that the Commissioner is satisfied that the application is frivolous or vexatious; was not made in good faith; or relates to a matter that is, or has been, the subject of a legal proceeding.
23. As a matter of practice, the Commissioner provides a written statement of reasons for all recommendations. In the case of applications for examination, the written statement is provided to the applicant and the Scheme. In the case of complaints, the written statement is provided to the complainant and the person or body against whom the complaint is made.
24. The process of preparing a written statement of reasons improves the decision-making process by requiring the Commissioner and her delegates to analyse and explain their reasons for the decision. The process also ensures that the Office's processes are transparent and understood by complainants and applicants.

Review by the Council of Australian Governments

25. The Council of Australian Governments (**COAG**) is currently considering the implementation of a National Registration and Accreditation Scheme. The Discussion Paper notes that the Health Care Complaints Commission will be retained as part of the national scheme. The Committee is encouraged to ensure that any reforms arising out of its inquiry are consistent with, and do not duplicate, COAG's reforms.

The Aged Care Commissioner and the *Health Care Complaints Act 1993*

26. There is potential for overlap between the functions of the Commissioner and the functions of the Health Care Complaints Commission (**HCCC**). Complaints received by either body may raise issues that could be more appropriately investigated by the other body. For example, a complaint made to the HCCC may raise issues which suggest that an approved provider has breached its responsibilities under the Act. Vice versa, a complaint made to the Commissioner may raise issues which suggest that a registered medical practitioner has breached their professional responsibilities.
27. The Commissioner has entered into protocols with a number of government agencies to facilitate open, transparent and cooperative relationships with those agencies. The HCCC is invited to enter into discussions with the Office to develop a protocol between the HCCC and the Commissioner to facilitate the exchange of information and the referral of appropriate complaints.

Further information

28. Further information about the Commissioner and her roles and functions may be found in the Commissioner's Annual Report for 2007-2008, a copy of which is available at <http://www.agedcarecommissioner.net/au/pdf/07-08-annual-report.pdf>. Information is also available on the Commissioner's website <http://www.agedcarecommissioner.net.au>. The Commissioner's Annual Report for 2008-2009 will be available on the Commissioner's website from November 2009.

I trust this information is of assistance in your deliberations.

Yours sincerely,



RHONDA PARKER

Aged Care Commissioner