

Submission

No 10

## INQUIRY INTO THE OPERATION OF THE HEALTH CARE COMPLAINTS ACT 1993

**Organisation:** Office of the Aged Care Commissioner  
**Name:** Ms Rhonda Parker  
**Position:** Aged Care Commissioner  
**Telephone:** 1800 500 294  
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## Australian Government

### Office of the Aged Care Commissioner

Level 4, 12-20 Flinders Lane, MELBOURNE VIC 3000  
Locked Bag 3, Collins Street East VIC 8003  
Tel: 1800 500 294, (03) 9665 8078, Fax: (03) 9663 7369  
ABN: 83 605 426 759

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

ATTENTION: The Hon Helen Westwood AM MLC (Chair)

Dear Ms Westwood

#### **Submission to the Inquiry into the Operation of the *Health Care Complaints Act 1993* (NSW)**

1. Thank you for inviting the Aged Care Commissioner to make a submission to the above inquiry. This submission is provided to assist the Committee in understanding the role of the Aged Care Commissioner in relation to complaints. I hope this information will be of assistance to the Committee in its examination of the health care complaints system in New South Wales.

#### **Who is the Aged Care Commissioner?**

2. The office of the Aged Care Commissioner (**the Commissioner**) is established by s 95A-1 of the *Aged Care Act 1997* (**the Act**). The Commissioner is appointed by the Minister for Health and Ageing: s 95A-2 of the Act. The Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by the Act that are determined by the Minister. Unlike the *Health Care Complaints Act 1993* (NSW), neither the Act nor the *Aged Care Principles* (**the Principles**) provide for ministerial control or direction. The Commissioner is independent from the Department of Health and Ageing and the Aged Care Standards and Accreditation Agency.

#### **What are the Aged Care Commissioner's functions?**

3. The Commissioner's functions are prescribed by s 95A-1(2) of the Act and include:
  - examining certain decisions made by the Complaints Investigation Scheme (**the Scheme**);
  - examining complaints made about the Scheme's processes;
  - examining complaints made about the conduct of the Aged Care Standards and Accreditation Agency (**the Agency**)
  - examining complaints made about the conduct of persons carrying out audits or making support contacts under the *Accreditation Grant Principles 1999*;
  - Conducting own motion investigations; that is, conducting investigations even when a complaint has not been received; and

— Advising the Minister, at the Minister's request, about matters relating to the Commissioner's functions.

4. The Commissioner does not have power to examine or review decisions of the Agency. Such decisions are reviewable by the Administrative Appeals Tribunal.
5. Unlike its predecessor, the Commissioner of Complaints, the Commissioner does not have responsibility for overseeing of the Commonwealth's complaint handling system.

#### **Examining certain decisions of the Scheme**

6. The Scheme investigates complaints about Commonwealth Government subsidised aged care residential services, flexible services and community aged care packages (known under the Act as 'approved providers') and, in particular, information that an approved provider may be in breach of their responsibilities under the Act or the Principles.
7. After investigating the information, the Scheme may determine whether the approved provider has or has not breached its responsibilities under the Act or the Principles. The Scheme may end an investigation without making such a determination. The Scheme also has power to give an approved provider a notice of required action, which specifies the action that the approved provider must take to comply with its responsibilities under the Act or Principles. The Secretary may also take compliance action under Part 4.4 of the Act instead of issuing a notice of required action.
8. Care recipients, their representatives and approved providers may apply to the Commissioner for examination of a decision by the Scheme. Such an application must be made within 14 days after being told by the Scheme of its decision. The Commissioner does not have power to extend the time for applying for examination of a decision by the Scheme.
9. Within 60 days of receiving an application, the Commissioner must give to the Secretary of the Department of Health and Ageing a recommendation about the examinable decision or a report about a decision to refuse to examine the decision.
10. The recommendations made by the Commissioner include recommendations to confirm the examinable decisions; recommendations to vary the examinable decision; and recommendations to set aside the examinable decision and substitute a new decision. The Commissioner will recommend the original decision be confirmed if that decision is supported by substantial evidence; that is, evidence that a reasonable person might accept as adequate to support the conclusion, given the legislation. The Commissioner will recommend the original decision be varied where some aspect of the decision cannot be supported or where additional breaches are found. A recommendation to set aside a decision is made where the Commissioner is convinced that a fair minded person, with the same facts before them, could not have reached the same conclusions as those arrived at originally.
11. There are also occasions when, during the examination of a decision by the Scheme, issues related to the matter under review arise where comment is warranted and needs to be brought to the attention of the Scheme. These issues may relate to administrative procedures or the investigation itself. These matters are reported in the final report to the Department under a section titled 'Related Issues'. The recommendations made in the related issues report are intended to inform management, improve processes and assist learning.

12. The Commissioner's power to refuse to examine a decision is discussed below.

### **Examining certain complaints**

13. The Commissioner may examine complaints about the Scheme's processes for handling complaints under the *Investigation Principles 2007*; the conduct of the Agency relating to its responsibilities under the *Accreditation Grant Principles 1999*; or about the conduct of persons carrying out audits or making support contacts under those Principles.

14. 'Conduct' is not defined by the Act or Principles. The absence of a definition has generated considerable discussion and consideration as to whether a complaint relates to the 'conduct' of the Agency or persons carrying out audits or making support contacts and is therefore examinable by the Commissioner.

15. Any person who is dissatisfied can complain. People are able to contact the Office of the Aged Care Commissioner to discuss their concerns and the Commissioner's complaint handling processes.

16. The legislation currently states that the Commissioner must refuse to examine a complaint if the Commissioner is satisfied that the complaint:

- does not relate to function of the Commissioner; or
- the complainant has not first brought the matter to the attention of the Agency or the Scheme (whichever is the body about whom the complaint relates); or
- the complainant has not made a complaint about the matter to the Agency or the Scheme (whichever is the body about whom the complaint relates).

17. As soon as possible after the Commissioner decides to examine a complaint, she must tell the person or body, against whom the complaint is made, about the complaint.

18. Unlike applications for examinable decisions, there is no prescribed period in which a decision on a complaint must be made.

### **General comments**

19. The Scheme is able to investigate information regarding Australian Government subsidised aged care services and can determine whether the approved provider has met its responsibilities under the Act/Principles. If the Scheme determines there is a breach in those responsibilities it may issue the provider with a Notice of Required Actions.

20. Complaints and applications for examination of decisions by the Scheme made to the Commissioner must be in writing. Views have been expressed that the requirement to make a complaint or application in writing constitutes an unreasonable imposition on persons who are most likely to use the Commissioner's services—as does the requirement that a complainant must first bring the matter to the attention of the relevant organisation. At the time of this submission, consideration is being given to amending the *Investigation Principles 2007*. These amendments may affect the requirements for valid applications or complaints to the Commissioner. We note that complaints to the Scheme may be oral or written.

21. It is the Commissioner's practice to interview complainants and applicants to ensure that the nature and scope of the application/complaint are understood.

22. The Commissioner has a discretion to refuse to examine a decision or complaint if the Commissioner is satisfied that the complaint/application for examination:

- is frivolous or vexatious; or
- was not made in good faith; or
- relates to a matter that is, or has been, the subject of a legal proceeding; or
- (in relation to complaints only) having regard to all the circumstances, examination of the complaint is not warranted.

23. The manner of investigation is not prescribed by the Act or Principles but is within the discretion of the Commissioner. With the exception of s 16A.28 of the *Investigation Principles 2007*, which requires the Commissioner to give a person about whom a complaint is made notice of that complaint, neither the Act nor the Principles expressly provide that the rules of natural justice apply to the Commissioner's investigations, examinations or recommendations. The Commissioner is of the view that the common law rules of natural justice apply to her investigations, examinations and recommendations. The Commissioner accords natural justice to parties whose interests may be affected by her recommendations and decisions by providing a draft statement of reasons to relevant parties.

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

24. There is potential for overlap between the functions of the Commissioner and the functions of the Health Care Complaints Commission (**HCCC**). An application/complaint made to the Commissioner may involve matters which are relevant to a complaint made to the Health Care Complaints Commission and *vice versa*. For example, in examining a decision of the Scheme and, in particular, considering whether an approved provider has breached its obligations under the Act or Principles, the Commissioner may identify information which is relevant to the professional conduct of a health practitioner. Although the *Health Care Complaints Act 1993* (NSW) does not provide for the Commissioner to make or refer a complaint to the HCCC, the Commissioner can make complainants and applicants aware of the role of the HCCC.

#### **Further information**

25. 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>.

I trust this information is of assistance in your deliberations.

Yours sincerely



**RHONDA PARKER**  
Aged Care Commissioner