

Aged Care Complaints Investigation Scheme Review

Advocacy Tasmania Inc.

Submission

August 2009

Introduction

Advocacy Tasmania Incorporated (ATI) has prepared this paper in response to the Department of Health and Ageing Consultation Paper's invitation to interested organisations and individuals to provide input into the Review of the Complaints Investigation Scheme (CIS).

The opinions and recommendations articulated are those of the advocates of Advocacy Tasmania Inc. as at August 2009 and stem from their professional experiences of working with clients to progress complaints through the CIS, and are also drawn from an analysis of comments made by clients to advocates about the CIS process.

Overview of ATI

Advocacy Tasmania Inc. is a state-wide, free and confidential service that provides advocacy services to older people and people with a disability. The organisation has 19 years experience and currently has 6 state-wide advocacy programs:

- Aged Care
- Home and Community Care (HACC)
- Dementia Advocacy Service
- Disability
- Mental Health
- Mental Health Tribunal Representation Scheme

The organisation is overseen by an elected Board of Management consisting of people with disabilities, family members and carers. All Board members are well-known within the Tasmanian community and have noteworthy links with peak and local consumer groups.

ATI works to promote and protect the rights and interests of its clients to -

- fundamental health & well being – including receiving good quality care and services
- be safe from harm and protected from abuse and neglect
- shelter – somewhere to live
- freedom and personal liberty.

The Review Process

ATI has a number of concerns regarding the process established for the review.

- While the review is claimed to be independent, the secretariat and contact points reside with the Department; responses are submitted to the Department; and the review paper is only accessible through the Departmental website. These factors give the impression that the review is controlled by the Department, an indicator of a process that could be conflicted and biased.
- Our organisation has an expectation that the reviewers will engage with aged care consumers. ATI is unaware of such a process. It is necessary to review the CIS process by eliciting input from complainants. It is also necessary to develop an understanding of the perceptions of potential complainants who choose not to make a complaint, why, and what needs to happen to better ensure that vulnerable people can exercise their choice to complain.
- The timeframe for submissions is unreasonably short and limits the detail of the responses that can be provided by organisations already working to capacity. The timeframe is impossibly short for even a rudimentary standard of consumer engagement to occur.

It is our recommendation that -

- **it is made demonstrable that the review is an independent and unbiased process**
- **the timeline for the review is extended**
- **the review is promoted widely to aged care consumers**
 - **consumers are engaged through a supportive and safe process**
 - **a variety of avenues for comment are open to respondents.**

Independence

One of the positive differences between the Complaint Investigation Scheme and the previous Complaints Resolution Scheme is the change of focus from the R in resolution to the I in investigation. When it works, it works well however the present scheme does have fundamental flaws which should not be ignored.

There is a general perception amongst aged care facility residents that the CIS is biased. As members of the Australian public, they are acutely aware of the present shortage of aged care beds and packages of care, and that the existing, limited resources will need to dramatically increase as the baby boomers age. They know that while it may not be in the service provider's financial interests to have their facility closed by government intervention such as in the Riverside case, it is equally

not in the public interest to lose aged care places at such a time. It is also not uncommon for staff in some facilities so say to residents that “if you complain the government might close this home and you will have nowhere to live”. Understandably this makes many residents reluctant to complain.

At the same time many residents and their family members have read the aged care horror stories in the newspapers and watched the television exposés and have formed the view that the Aged Care Commissioner has no real power and that the only appeal from a CIS decision is through a complex process that, for most, is simply too difficult. For this reason, it is important that the review deviates beyond the experiences of actual and anonymous complainants and explores the experiences of those consumers unwilling to make a complaint.

Therefore, the CIS is at times perceived by our clients to be conflicted in its interests; not independent; not impartial, and limited in its practices..

It is our recommendation that -

- **the CIS is made an independent statutory body situated in the Office of the Aged Care Commissioner, reporting to the Commissioner**
- **the Commissioner has oversight, and powers relating to all breaches of the Act, not the Department.**
- **Appeal from a decision of the Aged Care Commissioner is to the Commonwealth Ombudsman.**

Outreach

In the past, senior CIS personnel met with Advocacy Tasmania staff quarterly. This process was useful in establishing networks, developing professional relationships and exchanging information, and was considered a core part of business between the two agencies. As a consequence, complainants, advocates and investigators shared a common understanding of current policies, procedures and personnel; trends; and system problems which ensured a more efficient and effective approach to the investigation of complaints. These meetings no longer take place in Tasmania. We are unsure as to the practices in other states.

It is our recommendation that the quarterly meetings between CIS and ATI are reinitiated.

Referral

The right to an advocate is fundamental for aged people and their carers, and vital if they are entering a potentially complicated, lengthy statutory process at a time when they are feeling aggrieved, fearful of retribution, and are in a physically, psychologically and/or emotionally weakened state due to the perceived wrong experienced by themselves or their loved one. In such circumstances we would have expected more frequent referrals to advocacy from complainants who had been advised to contact us by the CIS. While CIS locally have indicated that they do provide information to complainants about their right to an advocate more active encouragement of the use of advocates by complainants by CIS officers is probably needed. Our experience is we receive referrals from complainants currently

involved with the CIS at the appeal stage. This is a difficult point for an advocate to become involved.

It is our recommendation that CIS officers

- **Receive a briefing from the local aged care advocacy service as part of their induction**
- **receive regular training in how to work with advocates**
- **are required to provide complainants, at initial contact, with information about their right to an advocate**
- **are required to give the complainant an Advocacy Tasmania Inc. brochure and actively encourage them to use an advocate**

Language

It is our experience that the communication used by the CIS is weighted in legalistic jargon. This is particularly evident in written communication. While we accept that the complaint investigation itself might be the first evidentiary step in a future negligence claim by the complainant, it is also important for the CIS to accept that the recipients of the Scheme's communiqués are often vulnerable, distraught, fearful residents or family members who are only seeking to have what they perceive to be a wrong done to them acknowledged; an apology given; and gain the knowledge that it won't happen to someone else.

How the message is conveyed to a person who is feeling wronged is particularly important when the investigator finds that no breach of the Act occurred.

It is our recommendation that CIS staff –

- **better balance their legal responsibilities with their obligation to deliver information to complainants empathetically**
- **in a manner and form which they understand.**

Follow Up

While CIS officers agree to follow up with the advocate when a decision is reached, this does not always occur. Some complainants have received a letter informing them that there was no breach of the Act, and that the case is therefore closed. At the same time the advocate was not informed of the decision. The complainant however can be left without understanding as to why and how the decision was reached. Communication with the CIS officer can help the advocate achieve a better understanding, and possible acceptance, for their aggrieved client.

It is our recommendation that CIS officers provide advocates with an opportunity to follow up once they have reached their decision.

Interpersonal Skills

The good outcome of communication between an investigator and a complainant is achieved when the complainant feels that throughout the process they were listened to, and that what they had to say was important, and respected. There are some CIS

officers with excellent interpersonal skills who achieve these good outcomes. However there are others who appear to lack empathy, sensitivity, and who generally have poor communication skills.

It is our recommendation that;

- **more emphasis is placed on applicants demonstrating good interpersonal skills in the recruitment process of CIS officers**
- **CIS officers regularly attending communication training**

Community Care Complaints

It is our experience that some CIS officers do not fully understand their role in the investigation of complaints when the complainant has a package of care and is living in the community. This lack of understanding may be expressed through their initial unwillingness to accept the complaint; their lack of confidence around the process that should be followed; and/or an inability to separate the differences in probable outcomes for complainants. Residential complainants are likely to continue their relationship with their provider while community clients commonly change the provider that has given them cause to complain about. There are differences in the options available to the complainants.

It is our recommendation that investigators receive better training regarding the investigation of complaints made by community care complainants.

Treatment of Anonymous Complaints

The taking of anonymous complaints by the CIS was a positive development. It provides an opportunity for complainants too fearful to formally complain to direct the CIS to allegations of breaches of the Act which it might otherwise not be made aware.

ATI is unaware of the outcomes achieved through anonymous complaints as there is no requirement on the Scheme to follow up even when the complaint was directed through an advocate. Previously, this type of informal follow up occurred in the quarterly meetings between CIS and ATI.

It is our recommendation that

- **anonymous complaints are mapped, issues identified, and trends are made generally available to interested parties**
- **in those anonymous complaints which have been made through an advocate, the processes followed and the outcomes achieved should be made known to advocates in a generalised way during the regular meetings between the CIS and ATI**

Rules of Natural Justice

A fundamental element of procedural fairness is for decision-makers to act on the basis of logically probative evidence. The civil standard of balance of probabilities applies generally in fact finding whereas the investigator decides that a particular fact was more likely than not to be true.

Example: A complaint is made to the CIS by a relative who states that their mother complained to them of being hungry and that she hadn't been fed for two days. By the time the investigator investigates, the mother has a vague recollection of not being fed but the medical notes state that on those days, the lady had refused to eat her meals.

The complainant was complaining that their mother was not fed for two days. The investigator is investigating a possible breach of the Act. The onus falls on the complainant to prove a breach of the Act. Considering that the mother is aged with only a vague memory, the relative was not there, and the medical notes state clearly that the lady refused to eat, the investigator determines that no breach occurred.

If the investigator looked at the staff roster for the two days and saw that two of the four staff members were off sick; found that the facility has a policy that residents who were susceptible to choking were fed first; interviewed residents who when asked, one or more remembered the specific occasion being complained about, or other times where staff shortages in the facility had resulted on adverse dietary consequences for residents; or identified a similar complaint having been made previously even though on that occasion, a breach was not found to have occurred, then on the balance of probabilities, it is more likely than not, that the wrong complained of happened.

It is recommended that the practices and decision making of CIS investigators follow the principle of natural justice –

- **shifting the focus from CIS of proving there was a breach of the Act to deciding whether on the balance of probabilities, a complained of act or omission occurred;**
- **removing the present onus of proof from the complainant**

Conclusion

Advocacy Tasmania Inc. is grateful for the opportunity to provide its comments to the review, and we anticipate the positive changes that will be made to the philosophy and operation of the Complaints Investigation Scheme in the future.

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