Submission to The Australian Law Reform Commission on the Reference On Elder Abuse

A proposal for an arbitration option to empower aged care residents and recipients to achieve a binding decision to resolve conflict situations

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# Aged Care Complaints

The Aged Care Complaints Commissioner is now charged with managing what was formerly known as the Aged Care Complaints Scheme[[1]](#footnote-1). The new arrangements seek to separate the complaints handling process from the Department of Health which also administers the *Aged Care Act* and licences the Providers.

The former Scheme was replaced partly because the Department was not seen [by some complainants] to be completely independent from the process of complaints.

The complaints system established under the aged care legislation in 1997 was always designed to be a place to take all complaints arising from the delivery of aged care services to residents. In recent times the system has been adapted to the changes in the delivery of services through the recent introduction of home care funding and the focus on consumer directed care.

# Features of the present system

Recent improvements nevertheless have not seen much change in the way in which the system works. Features of the system include:

1. An environment surrounding complaints in which the formal complaints system is foremost in the published material produced and promoted by the department;
2. Providers are willing and able to provide support in their own published material urging the use of the complaints system to intending and emplaced residents;
3. The *Aged Care Act* requires the Provider to include in the residential care contract the complaints resolution mechanism that the approved provider will use to address complaints made by or on behalf of the care recipient[[2]](#footnote-2)

# Relevant legislation: the scheme is compulsory for providers

Because much of this submission relates to how the residential care contract may be used to improve the present relative position of legal inferiority for residents, the relevant section of the *Aged Care Act* 1997 is set out in full:

**AGED CARE ACT 1997 - SECT 56.4**[[3]](#footnote-3)

**Complaints resolution mechanisms**

(1)  The approved provider must:

(a)  establish a complaints resolution mechanism for the \* aged care service; and

(b) use the complaints resolution mechanism to address any complaints made by or on behalf of a person to whom care is provided through the service; and

(c)  advise the person of any other mechanisms that are available to address complaints, and provide such assistance as the person requires to use those mechanisms; and

(d)  allow \* authorised complaints officers to have such access to the service as is specified in the User Rights Principles, for the purpose of those officers investigating and assisting in the resolution of complaints; and

(e)  comply with any requirement made of the approved provider under the Complaints Principles.

(2)  If the \* aged care service is a residential care service, the complaints resolution mechanism must be the complaints resolution mechanism provided for in the \* resident agreements entered into between the care recipients provided with care through the service and the approved provider (see paragraph 59-1(1)(g)).

(3) If the \* aged care service is a home care service, the complaints resolution mechanism must be the complaints resolution mechanism provided for in the \* home care agreements entered into between the care recipients provided with care through the service and the approved provider (see paragraph 61-1(1)(f)).

This section is often honoured by the drafters of residential care agreements prepared for providers, by incorporating references to the Complaints mechanisms established under the *Aged Care Act* 1997 in compliance with s 56.4 [2] above. The executors of those mechanisms are the Secretary of the Department of Social Security and the Aged Care Complaints Commissioner.

# Sanctions and lesser penalties: a short summary

The Residential Care Manual 2014 (replaced with the Guide to Aged Care Law[[4]](#footnote-4)) published by the Department of Social Services describes in some detail the process for imposing sanctions and generally imposing conditions upon Providers when non-compliance with the *Aged Care Act* and Principles is discovered. What follows is an edited summary[[5]](#footnote-5):

Sanctions can be imposed on an approved provider if:

* the approved provider is not complying with …its responsibilities in relation to quality of care, prudential requirements, user rights and/or accountability
* the Secretary is satisfied that it is appropriate to impose sanctions. See s 65-2, Aged Care Act 1997.

Sanctions can be imposed- either;

1. immediately, if [the Secretary believes] there is an immediate and severe risk to the safety, health or well-being of residents, or
2. if there is no immediate risk, then a series of notices is issued, starting with a notice of non-compliance, before imposing sanctions.

The notice may contain:

* action the Secretary requires the approved provider to take to remedy the non-compliance
* the timeframe for making a written submission to DSS
* what sanctions can be imposed.

Next, assuming that the approved provider has not established that the non-compliance did not occur, the Secretary can decide to:

* issue a notice of intention to impose sanctions
* issue a notice to remedy the non-compliance; or
* issue a notice which combines them[[6]](#footnote-6).

If the Secretary is satisfied with the response a notice will issue to remedy the non-compliance and require an undertaking from the Provider to remedy the non-compliance.

If however the Provider fails to take the necessary steps to remedy the non-compliance, in due course a notice of intention to impose sanctions will be issued by the secretary, followed, if there is still no compliance, by a notice of decision to impose sanctions.

As can be readily seen, the Act is extremely fair towards the Provider in its process to impose restrictions or sanctions.

When sanctions are imposed, they may result in the suspension or revocation of approved Provider status, a fatal blow to the Provider’s business operations.

In the alternative the secretary may agree to other restrictions such as:

* restricting approval to existing services or places
* restricting funding to existing residents
* revoking or suspending the existing allocation of places
* varying the conditions of approval for allocated places
* prohibiting the further allocation of places
* revoking or suspending extra service status
* prohibiting granting of approval for extra service status
* revoking or suspending certification
* prohibiting the charging of accommodation charges or accommodation bonds
* requiring repayment of grants
* other sanctions as specified in the Sanctions Principles[[7]](#footnote-7).

Other options to which the Provider may agree, if offered by the Secretary include:

* provide, at its expense, training for officers, employees and agents
* provide security for a debt owed to the Commonwealth
* appoint an adviser or an administrator, approved by the Commonwealth
* and/or transfer some or all of its allocated places to another approved provider. [[8]](#footnote-8)

# The need for focus on redress for individuals

An analysis of the way the complaints system works will show that it is designed to address systemic failure rather than individual complaints. That becomes apparent when one looks at the applications of sanctions, appointment of advisers and administrators, which are the main tools by which change and remedy are sought un der the system.

Recently a client sent to me with a statement of her despair, which illustrates the frustration and sense of unfairness and powerlessness of family members caught up in serious incidents in aged care homes, involving their loved ones.

*My mum died in a nursing home 5 days after her third fall from bed within a 6 week period. The aged care facility put no procedures in place to protect her if/when she fell again even after I begged them to. I believe I could still have her with me today if they had done their job. The aged care commission have told me that the facility have NOW put procedures in place, but this does not bring back my mum.*

*I don't understand how facilities can get away with this without penalty!  Are these facilities a work-in-progress? Is my mum's death just to help this facility get it's policies and procedures fine-tuned ??*

*Is there anyone who can help me make this facility admit that they have FAILED in their duty of care?  Or do they just get a slap on the wrist?*

That statement which is a typical cry for help in this writer’s experience, shows how difficult it is for someone under our present aged care system to follow up a serious lapse of care quality especially one leading to injury and trauma, to find a way to demonstrate:

* What went wrong?
* Who failed the resident?
* Was this an isolated incident or part of a pattern of failure of care quality?
* Can lessons be learnt and enforceable undertakings as to avoidance be sought?

There are several well-known ways in which the delivery of quality care can fall seriously short.

Those include:

* Medication error;
* Failure to provide adequate pain relief;
* Prevention of falls;
* Failure to provide adequate hydration and nutrition;
* Infection control [for example, pressure sores];
* Unlawful restraint [that is, without consent] ;
* Toileting
* Showering;
* Transfers [for example, lifting]
* Failure to recognise injury, pain and illness in a timely way;
* Treatment without lawful consent [for example, without consent of person responsible or guardian];
* Refusal of access by family members;

# Do aged care residents have any rights?

The User Rights Principles contain in the schedules to that instrument a set of Rights and Responsibilities to which it is assumed, all residents and recipients have access. They are generous rights designed no doubt to provide some comfort to residents and their families and friends. However, the notion that these Rights are somehow enforceable, which is an understandable impression for those for whom they are designed, is false.

Likewise the standards of care and quality assurances to be found in the Quality Assurance Principles are unenforceable.

The reasons for these essential rights and services are not enforceable upon the claim of the resident is found firstly in s 59-1 of the Aged Care Act1997. That section provides:

**AGED CARE ACT 1997 - SECT 53.2**

**Failure to meet responsibilities does not have consequences apart from under this Act**

(1) If:

(a)  an approved provider fails to meet a responsibility under this Chapter; and

(b)  the failure does not give rise to an offence;

the failure has no consequences under any law other than this Act.

(2) However, if the act or omission that constitutes that failure also constitutes a breach of an obligation under another law, this section does not affect the operation of any law in relation to that breach of obligation.

The second ‘bar’ which applies to claims for breach of care quality standards is to be found in the judgment of Justice Young in a case decided in 1995 in the Supreme Court of New South Wales[[9]](#footnote-9).

So, absent a clause in the residential care contract itself, there appears to be no legal means a resident or recipient can enforce their [so – called] rights or the very quality standards upon which their health and their lives depend.[[10]](#footnote-10)

# A requirement for arbitration in aged care contracts

There are limited pathways for redress in circumstances of injury stress and trauma. They include:

**Claims or other remedies at law**

* Claims for negligence;
* Claims under the residential care contract;
* Claims for trespass to the person [in the case of treatment or restraint without consent];
* Claims under the Australian Consumer Law [implied service guarantees]
* Coronial Inquest

**Arbitration**

At the time of writing, the legal claims described above are almost unheard of in the community. If there have been such claims brought to the courts, there have been no reported judgments of which this writer is aware. As for arbitration, there is no provision for arbitration in any residential care contract of which this writer is aware. Certainly there is no general consensus among lawyers that these contracts should or could contain such a clause as requires the parties to submit to arbitration.

The reason is likely to be that the aged care complaints system, as it is described in the *Aged Care Act* 1997 and has been since commencement of the Act, has revolved around the need for an alternate dispute resolution system which is utterly devoid of remedies available to the resident or their family or delegate.

The past and present iterations of the aged care complaints system encompass mediation and conciliation, but have never accommodated arbitration. Yet arbitration is a well-known feature of alternate resolution procedures, where the objective is to enable the parties to by-pass the formal legal courts system. Clearly aged care providers have sought to avoid formal legal claims being brought against them, as it is in their interests to do so. Thus, most if not all aged care homes refer, in their literature for intending residents, to the aged care complaints system, and [again in the writer’s experience] there is never a mention of legal intervention. Neither is that to be found in any of the literature [website or otherwise] which this writer has seen since 1997 from the Department responsible for administering the *Aged Care Act*.

It is submitted that arbitration may be a partial answer to those who call for some way to bring their complaints directly to the aged care provider and to empower the resident or their delegate to call for documents and to seek some appropriate remedy.

If both parties were to submit to arbitration, all or any of the above claims may be brought. This proposal is made on the basis that the Provider would be obliged under the residential care contract, but not the resident, to seek compulsory arbitration upon disputes and conflicts which may arise and which are susceptible to a legal remedy.

This is not a suggestion that should lead to the system of litigation which exists in some states of the United States. There it is possible in some cases to seek punitive damages for egregious error and neglect. However, this submission seeks remedies which are appropriate to the situation of the individual aged care resident. That probably does not mean an award of substantial damages. What it may mean however, if the arbitration provision in the residential care contract allows, are much more innovative ways in which to restore the resident to health and to make more comfortable their daily lives and assist them in recovery from injury or trauma, rehabilitation and recreation.

**Suggested pathway to introduce arbitration into the aged care system**

This submission seeks to demonstrate that there is a pathway which is possible to follow and simple to implement for the Commonwealth Government and Minister responsible. The proposal is described as follows:

1. The User Rights Principles should be amended to require that the alternative dispute resolution procedures which an aged care provider includes and refers to in the residential care contract shall have an option for the resident to require the Provider to submit to arbitration.
2. The powers of the arbitrator to award damages will be limited to the amount permitted as the limit of civil jurisdiction in the Local or Magistrates Court in the region in which the resident is situated;
3. Providers may be required to waive their rights to the threshold for pain and suffering in the various Civil Liability laws of the States and Territories limiting clams and to the Australian Consumer Law and its similar threshold requirements.
4. If the arbitrator thinks fit and if there is a finding in favour of the resident, awards may include or they may be limited to restoration and rehabilitation measures [such as various remedial therapies, medical procedures and support and social support, including additional nursing and community care] designed to improve the resident’s enjoyment of life. These measures should not necessarily be limited by the award for money damages referred to in [2].
5. Costs of the arbitration to be borne by the provider if there is an adverse award but if no award is made in favour of the resident, no order for costs will be the rule, unless there are exceptional circumstances, the claim was not frivolous or vexatious or with no proper basis in law and there is an ability to pay.

The advantages of arbitration include:

* The Legal profession is widely distributed around the country and are available in most rural areas and country and regional towns removing the need to resort to the Capital cities for those in rural and regional areas;
* Legal practitioners are able to be trained as arbitrators and also to address the legal problems involved in such cases as may be litigated under the aged care arbitration system.
* The proceedings are less formal than court proceedings.
* The process can be completed in a timely manner.

1. See Complaints Principles 2015 made under the Aged Care Act 1997 [↑](#footnote-ref-1)
2. Aged Care Act 1997, s 59-1[g] [↑](#footnote-ref-2)
3. Courtesy of austlii.edu.au: the use of \* in the text refers to defined terms in the Act [↑](#footnote-ref-3)
4. Guide to Aged Care Law: <http://guides.dss.gov.au/guide-aged-care-law> [↑](#footnote-ref-4)
5. See Sanctions Principles 2014 accessed at www.legislation.gov.au/Details/F2014L00803 [↑](#footnote-ref-5)
6. section 67-2(2)(e), Aged Care Act 1997 [↑](#footnote-ref-6)
7. s 66-1, Aged Care Act 1997 [↑](#footnote-ref-7)
8. See : <http://www.resicaremanual.health.gov.au/wp-content/uploads/Residential-Care-Manual-PDF.pdf> accessed 11.08.2016 at p253 -264. [↑](#footnote-ref-8)
9. Rosenthal v Sir Moses Montefiore Jewish Home [no 2], unreported, BC9505363 [↑](#footnote-ref-9)
10. See however the paper addressing remedies apparently available under the Australian Consumer Law by the same author. [↑](#footnote-ref-10)