



ADR in the Regulation of Aged Care

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This paper was settled jointly by the members of ADRAC.

Introduction

The role of ADR in the aged care sector has a chequered history with regulatory bodies and dispute resolution processes frequently changing in response to public concerns and budgetary considerations. The rate of change in this sector is rapid. In the last ten years there have been three different schemes aimed at resolving complaints and three different manifestations of a Commissioner. The industry's reliance on ADR processes, such as mediation, has varied significantly with each change.

Background

The introduction of the *Aged Care Act 1997* (Cth) brought together the two separate services of hostels (concerned with accommodation) and nursing homes (concerned with healthcare) into a new institutional space.¹ The reforms also moved the aged care sector towards more of a market based system where users were perceived as 'consumers'.²

The reform was introduced in the Aged Care Complaints Resolution Scheme (CRS) as an ADR service run by the Department of Health. The CRS engaged external mediators to conduct mediations between parties if an initial negotiation conducted by the CRS failed to reach an outcome.

A 2000 Commonwealth Ombudsman's report found significant issues with the CRS's complaints resolutions process.³ On the use of mediation, the Ombudsman found a 'lack of specific guidance on mediation' and a 'lack of training for staff of Scheme'.⁴

Amendments to the Act in 2000 saw the appointment of an independent Commissioner for Complaints to oversee the complaints process.

In 2007, following a series of highly publicised controversies, the Howard Government introduced a series of reforms including the creation of the Aged Care Complaints Investigation Scheme (CIS) replacing the CRS.⁵ The new scheme provided departmental officers with greater powers to investigate service provider's compliance with their obligations. The changes were in response to criticism levelled at CRS for its ineffectiveness at resolving disputes including too much reliance on mediation.⁶ In a press release, the Minister said the following on the changes:

The government has moved to significantly strengthen the complaints handling powers available under the Aged Care Act 1997 by introducing the capacity to investigate complaints, as opposed to the former conflict resolution role that relied on mediation. Some complaints are just unamenable to mediation.

The changes also created the Aged Care Commissioner, an office which replaced the Commissioner for Complaints.

The next overhaul of the complaints resolution system occurred in 2009 following the review of the Aged Care Complaints Investigation Scheme conducted by Prof. Merylyn Walton (the Walton Report). The Aged Care Complaints Scheme was introduced to replace the CIS. The new scheme was designed to focus on the resolution of complaints rather than the investigation of providers' compliance with regulations.⁷

Then, in 2016, the Commonwealth established the Aged Care Complaints Commissioner. This new body removed the complaints resolution process from the Aged Care Complaints Resolution Scheme. In explaining the reforms, the Minister said that the change was to facilitate the recommendations of the Walton Report.⁸ It was considered that the Commissioner, being an independent office-holder from the Department, would be better placed to resolve disputes between complainants, Aged Care providers, and the Department.⁹

ADR and the Aged Care Complaints Commissioner

The Commissioner has four options of dispute resolution available. These are conciliation, provider resolution, mediation and investigation. Conciliation and mediation are examined here.

Conciliation

The Commissioner's policy document describes conciliation as involving:

...complaints officers assisting the parties to work together to discuss the issues and reach agreement. This could be achieved by phone discussion or through meetings between the parties.¹⁰

The document states that issues are suitable for conciliation if (i) the participants are "willing and able" to participate, (ii) the participants agree to the Commissioner's assistance in the process, and (iii) an outcome is likely to achieve a timely and positive outcome. The policy stresses that the process is not legal and it is not appropriate for parties to have legal representatives attend the conciliation.

Mediation

If the Commissioner believes that mediation is appropriate in the circumstances a recommendation may be made that the parties engage an

independent mediator at their own expense. On agreement of the parties to engage a mediator, the Commissioner will end involvement in the dispute. However, involvement of the Commissioner may be reengaged if the mediation fails to resolve the dispute. As the mediation engages a third party provider, the Commissioner's policy has limited detail surrounding the process.

Recent developments

In April 2018, the Minister for Aged Care announced that a new independent Commission would be established to regulate and police the aged care industry.¹¹ The new Aged Care Quality and Safety Commission, to be established from 1 January 2019, is anticipated to bring together the functions of the Australian Aged Care Quality Agency and the Aged Care Complaints Commissioner. Eventually, it is also expected to absorb the aged care regulatory functions of the Department of Health. Any effect of this change on the use of ADR in the aged care sector remains to be seen.

On 16 September 2018 the Prime Minister Scott Morrison announced the Government's intention to establish a Royal Commission into the residential aged care sector. No terms of reference have yet been published. An ABC report on the announcement can be viewed [here](#).

Conclusion

The use of ADR in resolving disputes within the Aged Care Sector has changed significantly with the various legislative schemes. It appears that dispute resolution in this space has been a politically sensitive area with different approaches and attitudes towards ADR with each reform. With dispute resolution now located within an independent body, ADRAC will be interested to follow the extent of the use of ADR in the aged care sector over the coming years.

The topic of DR, older people and Elder Mediation is dealt with here.

1. J Angus and R Nay, 'The Paradox of the Aged Care Act 1997: The Marginalisation of Nursing Discourse' (2003) 10.2 *Nursing Inquiry*130.
2. Ibid, 131.
3. Commonwealth Ombudsman, *Report of an Own Motion Investigation into the Department of Health and Aged Care's Complaints Resolution Scheme*, July 2000 http://www.ombudsman.gov.au/_data/assets/pdf_file/0014/26321/investigation_2000_01.pdf.
4. Ibid, 12.
5. Peter Condliffe, 'Resolving Aged Care Disputes' (2007) *Law Institute of Victoria*, 3. <http://petercondliffe.com/wp-content/uploads/2013/01/Resolving-Aged-Care-Disputes.pdf>.
6. National Seniors Australia – Submission to *Complaints Investigation Scheme Review*, August 2009. <http://nationalseniors.com.au/sites/default/files/090801-NationalSeniors-Aged-Care-Complaints-Investigation-Submission.pdf>.
7. The Auditor-General, *Managing Aged Care Complaints*, Audit Report No.10 2012–13, <http://www.anao.gov.au/~media/Files/Audit%20Reports/2012%202013/Audit%20Report%2010/Report%20No10.pdf>.
8. Minister for Health, 'New Aged Care Complaints Commissioner Gets to Work' (Press Release, 3 January 2016). <https://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2016-ley03012016.htm>.
9. Ibid.
10. Aged Care Complaints Commissioner, 'Guidelines for the Aged Care Complaints Commissioner' (Commonwealth of Australia, 2016) <https://www.agedcarecomplaints.gov.au/wp-content/uploads/2015/09/Interim-Guidelines-for-the-Aged-Care-Commissioer-PDF-Version-2.pdf>.
11. See the Department of Health, 'Better Quality of Care – establishing an Aged Care Quality and Safety Commission' (Commonwealth of Australia, 2018), <http://www.health.gov.au/internet/budget/publishing.nsf/Content/budget2018-factsheet81.htm>.