

25 March 2011

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Re: Aged Care Complaints Scheme: Proposed Complaints Management Framework

This is a submission in response to the invitation contained in the Discussion Paper – “*Aged Care Complaints Scheme: Proposed Complaints Management Framework*”.

My comments fall into the general issues raised by:

- **Discussion Point one: overview of the framework.**

I am concerning myself mostly with complaints of a serious kind which have had significant impact in terms of injury or damage. It is those complaints where I have seen for myself that the frail aged, or any aged person for that matter, and their relatives and friends have found themselves powerless in the face of the system as it presently exists.

I am talking about falls leading to fracture, medication error leading to severe consequences for health and wellbeing, neglect leading to short/ long term damage to health such as hydration and nutrition shortcomings, decubitus ulcers ...and so on. It is often simply not good enough to say ‘sorry’ in such cases.

In such cases all we have at the moment is a CIS (**C**omplaints **I**nvestigation **S**cheme) which is incapable of assisting the individual who has suffered serious injury or damage from neglect by the Provider and its employees.

There are at least three prime reasons for this -

1. The CIS deals with systemic issues – the common complaint about CIS visits is that the representatives do not bother to see the complainant! They apparently content themselves with reviewing the paperwork;
2. It has a mandate for breaches of the *Aged Care Act* only – they have no training or mandate (and unless there is a specific referral of powers from the States and Territories for this purpose of regulating disputes in nursing homes – they never will);
3. It cannot legally deal with issues which are the province of State and Territory law (such as falls with permanent consequences, medication error and negligence issues generally, and very importantly, unlawful restraint – and also contract breaches).

I cannot pretend that the common law can provide any answers except those to which you and I are entitled to – that is, going to law. But people in nursing homes are at a special disadvantage, easily recognisable by all. Yet everyone will agree – residents of aged care homes SHOULD NOT LOSE THEIR LEGAL RIGHTS – including those with dementia.

The overall management plan includes conciliation and the intervention of mediators – but that does not go far enough for the serious cases which I am thinking about. We need to take the further step to ARBITRATION – where arbitrators may even visit the aged care home at the invitation of both the resident with a grievance or claim and the Provider.

It is entirely possible to imagine the training up lawyers and others who would have the skills to arbitrate serious disputes and award damages – with a pre-agreed cap – inserted in the residential care agreement at the time of entry into the nursing home. The legal profession is the most widely distributed around the country with the basic skills to manage small scale arbitrations.

Given that the CIS has constitutional and legal constraints in dealing with these matters, it is misleading to encourage people to put their confidence in the present CIS system, when it is patently obvious to anyone who thinks about it that there is no resolution to be had for the hard cases. Yet the industry and the DOHA persist in encouraging the view that there is a clear pathway to follow in all cases in the aged care system. Patently there must be a final pathway to resolution when all else fails, including conciliation and mediation. That pathway is arbitration.

First option – mandatory DOHA sponsored arbitration & ‘one stop shop’

The proposal for mandatory arbitration in serious cases requires a comprehensive re-think of what the Commonwealth is prepared to do in this area of serious consumer complaints.

There are models to follow or at least to draw from – such as the Retirement Village laws – which in most States allow appeal to a Tribunal used to dealing with consumer claims.

In this case of aged care the power to award some damages (perhaps capped) and without awarding costs against residents/ consumer in bona fide cases which fail, is essential because of the severe disadvantage from which residents bring their claim, having regard to their social dependence, financial position (for most) and the respect due to them from their community.

Unless an intermediate proposal for mandatory arbitration is developed (see below), aged care residents will have nowhere else to turn in their campaign for justice, to more extensive and publicly expensive mechanisms such as –

- a. Creation of a Tribunal to which claims may be brought which cannot be resolved by the CIS, with the power to award compensation and damages; and / or
- b. Ensure that the CIS addresses all complaints from residents including claims for negligence, medication error, restraint, assault and all other complaint issues arising from the operation of the aged care home and where necessary, referring to State / Territory authorities persons who may be subject to disciplinary proceedings by their professional organisations. In other words assuming responsibility as the ‘one stop shop’ for complaints in aged care, subject always to preserving common law rights.

Second option - The private arbitration proposal

The *Aged Care Act* already requires a number of provisions to be inserted into the residential aged care agreement (see the User Rights Principles).

This proposal for private arbitration requires a mandatory clause to be inserted which requires the Provider to submit to arbitration on terms set out in the agreement, in the event conciliation and/ or mediation do not produce agreement.

Some of the essential features of the requirement would be –

- (i) That the Provider is obliged , in cases where the resident has not already done so, to enter into a residential care agreement at any time during the stay of the resident – this would overcome the common difficulty as to enforcement of contract rights, that residents, although offered an agreement upon entry, often decline;
- (ii) The parties would have been obliged to attend mediation before the arbitration provisions were applied;
- (iii) An agreed limit to the arbitrator's authority to award compensation and damages would be stated in the agreement but should be no less than the limit on monetary awards which a Local Court in the area in which the Aged care home is situated could make.

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