

National Aged Care Alliance

Resolving aged care complaints

A continuous improvement orientation for the aged care complaints mechanisms

June 2009

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About the Alliance

The National Aged Care Alliance (the Alliance) is a representative body of peak national organisations in aged care including consumer groups, providers, unions, and health professionals, working together to achieve a more positive future for the aged care sector in Australia.

The Alliance was formed in April 2000, and has developed a united policy agenda to achieve better outcomes for the care of older people in Australia.

The Alliance members are concerned about the future sustainability and funding of aged care services, and are seeking the establishment of industry wide benchmarks of care.

The following organisations are members of the Alliance:

Aged and Community Services Australia, Aged Care Association Australia, Alzheimer's Australia, Anglicare Australia, Australian Association of Gerontology, Australian General Practice Network, Australian Healthcare and Hospitals Association, Australian Nursing Federation, Australian Pensioners' and Superannuants' Federation, Australian Physiotherapy Association, Australian and New Zealand Society for Geriatric Medicine, Baptist Care Australia, Carers' Australia, Catholic Health Australia, COTA Over 50's (Councils on the Ageing), Diversional Therapy Association of Australia, Geriaction, Health Services Union, Legacy Co-ordinating Council Incorporated, LHMU, Lutheran Aged Care Australia, OT Australia, Palliative Care Australia, Pharmacy Guild of Australia, Royal Australian College of General Practitioners, Royal College of Nursing *Australia* and UnitingCare Australia.

More information about the Alliance is available at www.naca.asn.au.

Executive summary

Aged care complaints resolution: key issues

The National Aged Care Alliance (the Alliance) is an alliance representing peak national organisations in aged care including consumer groups, providers, unions and health professionals working together to determine a more positive future for the residential aged care sector.

This paper is an outcome of Alliance discussions about the complaints system and is based on information publicly accessible.

There have been some recent significant changes to how aged care complaints are addressed in Australia. The Office of Aged Care Quality and Compliance (OACQC) was established in May 2007 and the Complaints Resolution Scheme (CRS) was essentially replaced by the Complaints Investigation Scheme (CIS). At the same time the Commissioner for Complaints was replaced by the Aged Care Commissioner.

In addition to these new complaints agencies the Aged Care Standards Agency (ACSA) and the Department of Health and Ageing (DoHA) are also very much involved in the resolution of residential care client complaints, ACSA through the ongoing standards monitoring process and DoHA when it's deemed necessary.

The purpose of the paper is to explore the key issues of the existing complaints mechanism for aged care facilities and identify the future principles required to address the key issues.

Research has shown that in 1997 'Benchmarks for Industry-Based Customer Dispute Resolution Schemes' were documented by the then Minister for Customs and Consumer Affairs, the Hon. Chris Ellison. These benchmarks are well recognised and established on the six principles (see appendix one) of accessibility, independence, fairness, accountability, efficiency and effectiveness. (Minister for Customs and Consumer Affairs 1997)

In comparing the benchmarks with the current Aged Care CIS there are many areas of non-conformance and the Alliance calls on the government to:

- support and resource the development of robust independent complaints mechanism/system that has fair and transparent processes including an oversighting agency comprised of consumers providers and other key agencies;
- publish and make publicly available standard format annual reports including all meaningful data of the CIS the ACSA and the aged care Commissioner;
- establish conformance to and on-going performance evaluation against, the Benchmarks/Principles for Industry-Based Customer Dispute Resolution Scheme; and
- provide clear consumer information, translated to meet the cultural and linguistic diversity of older Australians, on an integrated approach to quality care services, which includes complaints and standards mechanisms.

Any complaints process should provide an independent, unbiased, free and accessible complaints mechanism in which the paramount consideration is, where feasible, to resolve the complaint for the complainant. This means that the blame and punitive ethos on which the current system appears to be based must be removed and total emphasis placed on complaint resolution for the complainant.

As an integral part of quality aged care service provision, credible and effective mechanisms are necessary to enable people to seek to have problems and issues addressed and rectified and thus help to ensure the provision of high quality aged care facilities in which consumers and the public can be confident.

Existing mechanism for resolving complaints

The Aged Care Complaints Investigation Scheme (CIS) is operated by the Commonwealth Department of Health and Aging (DoHA) to resolve complaints about Commonwealth funded aged care services (nursing home or hostel and community aged care packages). Information pertaining to the Aged Care CIS is available on the Departmental website.

The current Scheme was introduced from 1 May 2007 in an attempt (Santo Santoro: October 2006) to revamp and strengthen the complaints process aimed at further safeguarding older people in residential aged care homes. The reforms included the creation of a new Aged Care Commissioner to replace the Commissioner for complaints and a rigorous new aged care complaints investigation procedure which included the Office for Quality and Compliance and essentially replacing the complaints resolution scheme (CRS) with the CIS. Unfortunately the independence of the process expressed in the Ministers press releases leading up to the reforms never eventuated with the CIS becoming part of DoHA.

Departmental literature states that CIS is wider than CRS as it covers a broader range of complaints. For example from 1 July 2007 to 31 December 2007 CIS handled 3947 complaints compared to 1260 complaints handled by the CRS in 2005/06.

It is understood that the following documents are provided on the DoHA website to assist and inform all people who are involved in some way with the aged care complaints process:

- Aged Care CIS guidelines for approved providers;
- Aged Care CIS operational guidelines;
- Role of the Aged Care Commissioner; and
- Aged Care CIS six monthly report.

It is clear from the contents of these papers there has been no attempt to benchmark the process or to implement a model which meets something like the six principles mentioned in the executive summary of accessibility, independence, fairness, accountability, efficiency and effectiveness for clients family, staff, providers and the Department. In fact the mechanism has regressed and become even less independent, more regulatory and bureaucratic and the role of the Aged Care Commissioner is primarily limited to process rather than outcome.

The Commonwealth Ombudsman's Report entitled 'Report of an Own Motion Investigation into the Department of Health and Aged Care's Complaints Resolution Scheme (July 2000), identified a number of areas where improvement was needed within the CRS (some of these are covered later in this paper under principles) which do not appear to have been adequately addressed if addressed at all.

To further add to the complaints confusion the Commonwealth's residential aged care accreditation standards which are monitored by the ACSA include an outcome standard on 'Comments and Complaints' as part of Standard 1: Management Systems, Staffing and Organisational Development.

The documented expected outcome and criteria for each residential aged care facility pertaining to the outcome Standard 1.4 'Comments and Complaints' are:

Expected outcome

'Each resident (or his or her representative) and other interested parties have access to internal and external complaints mechanisms.'

Criteria

- "that the organisation's management actively seeks feedback from each resident (or his or her representative) and staff on all aspects of the services provided by the service;
- that issues raised by a resident (or his or her representative) relating to the services provided by the service are dealt with fairly, promptly, confidentially and without retribution;
- that a simple and easy-to-use comments and complaints resolution mechanism is in place;
- that all comments and complaints are recorded, monitored and acted upon in order to achieve a satisfactory resolution;
- that information relating to internal and external complaints mechanisms is available to each resident (or his or her representative); and
- for the referral of complaints that are unable to be resolved internally, to the appropriate external agencies for resolution." (Commonwealth Department of Health and Aged Care 1998)

Once again the ACSA does not disclose benchmarks or principles against which this standard 1.4 is assessed not to mention the confusion caused by yet another participant in the process.

A conclusion from this summary of 'Existing Mechanisms for Resolving Complaints' is there are no effective standards/principles/guidelines with which to judge the outcomes of the aged care complaints process.

The Alliance therefore recommends to the Government that the following key principles included in the following discussion be introduced as a mechanism for ensuring the Quality of Aged care Complaint outcomes.

Identification of key issues and future principles

The information presented here represents a comparison of the known existing mechanism for resolving aged care complaints against the well recognised and accepted Benchmarks (see appendix one) for Industry-Based Customer Dispute Resolution Schemes (Minister for Customs and Consumer Affairs 1997). The benchmarks are based on the six principles:

- 1 Accessibility;
- 2 Independence;
- 3 Fairness;
- 4 Accountability;
- 5 Efficiency; and
- 6 Effectiveness.

The information also draws on reports from a number of government sources as well as sector knowledge and experience.

The critical gaps rose from the identification of key issues and future principles form the basis of the recommendations of the Alliance.

1

Accessibility

Key issues

A key issue identified by the Ombudsman's report on the Department of Health and Aged Care's Complaints Resolution Scheme was that "residents, their families and advocates were uncertain about how they should make complaints and their rights to assistance and review" (Commonwealth Ombudsman 2000). This key issue remains unresolved today.

There is currently a lack of clarity and understanding of the complaints mechanism process across and between areas, such as the CIS, the Office of Quality and Compliance, the Aged Care Commissioner and the Aged Care Standards Agency.

This ultimately creates barriers to an accessible, easy to use and transparent complaints mechanism for consumers and providers.

The Alliance has noted that the CIS information published on the Department's website was well publicised but difficult in itself to access, particularly for consumers. The scheme's information on the website is not regularly updated.

The Ombudsman has also noted "that the Scheme's literature and pamphlets should be amended to include reference to the role of the Ombudsman and the complainants' rights to external review."

The current complaints resolution scheme does not promote access for consumers from culturally and linguistically diverse backgrounds via the dissemination of translated information. The number of older Australians aged 65 years and over from culturally and linguistically diverse backgrounds will have increased by 66% between 1996 to 2001, compared to only a 23% increase of the Australian born population. (Australian Institute of Health and Welfare 2000)

Future principles

New information about the Scheme should make it clear that potential complainants may include all aged care service users – older people, their families and carers and any staff person, including visiting staff working with aged care service users.

An effective complaints mechanism is critically dependent on accessibility to consumers through the promotion of information and an easy to use system.

Clarification of roles of the CIS, the Office of Quality and Compliance the Aged Care Commissioner and the Aged Care Standards Agency is required to provide certainty and to promote consumer, sector and public understanding.

Consumer information must include resident rights and responsibilities, how the complaints process works and the review process. All information should be available in translated form to promote equity of access for people from culturally and linguistically diverse backgrounds. Information should also be provided on rights to assistance for consumers with special needs e.g. residents with dementia.

Complaints Investigation Scheme information available on the Department's website must be easily accessible to promote utilisation.

2 Independence

Key issues

A key issue for the aged care sector is that the current complaints mechanisms are not independent; rather they are a function of the Department of Health and Ageing.

Consumer, provider and other stakeholder interests are absent from any structures that could provide oversight to the independence of the operation of a complaints mechanism and have been further eroded by the May 2007 changes. Ministerial media releases leading up to the May 2007 reforms advocated greater independence for the new complaints process but unfortunately when implemented any semblance of independence had gone.

A key issue identified by the Ombudsman's report was that "Department management was not closely involved in overseeing and using the system better to deliver outcomes for residents of aged care".

Future principles

The complaints mechanism must be administered by an independent agency with the establishment of an oversight entity (comprising consumer, provider and other key stakeholder interests), to ensure the ongoing independence of the complaint's mechanism's operation. The responsibilities for the overseeing entity are outlined in the Benchmarks for Industry-Based Customer Dispute Resolution Schemes (Benchmark Two - Independence, paragraph 2.6)

Aged Care consumer, provider and other stakeholder organisations should be involved in consultation processes whenever changes are proposed to the roles and responsibilities of any of the complaints bodies.

Confidence would be increased in the Aged Care Standards Agency by ensuring its independence from perceived government interference.

3

Fairness

Key issues

A key issue identified by the Ombudsman's report was that "there was insufficient guidance given to Nursing Home Proprietors about the way in which they were required to respond to complaints" (Commonwealth Ombudsman 2000). Undoubtedly this affects procedural fairness for providers resulting in an unnecessarily adversarial or punitive approach. This has been further exacerbated by the May 2007 changes.

Materiality of a complaint is also a major issue. Every effort is required to eliminate frivolous and vexatious complaints before they get into the system. These are often staff on staff complaints which could be referred to providers for initial review.

Sector feedback suggests that both parties are not always given sufficient information to understand the issues of the other party, which again lacks procedural fairness.

The complaints process should be designed to provide a positive opportunity to investigate problems and to reconsider and improve the delivery of aged care services.

Future principles

For the public to have confidence in a complaints handling system, it must be impartial and treat the complainant in an unprejudiced fashion. The Ombudsman recommends the publication *A Good Practice Guide for Effective Complaint Handling* (1997) as a useful source of advice on establishing a complaints service that is client focused.

The main focus of the complaints and accreditation process should be improvement oriented. The complainant should be encouraged to state the desired outcome of the complaint.

The complaints process should promote and respect the rights of the complainant as well as any person with an interest in the complaint and any need for privacy or confidentiality. The blame and punitive ethos which currently exists within the system must be eliminated with greater emphasis being placed on complaint resolution for the complainant.

If the complaint is confidential, sufficient information and argument must be provided to the other party (whilst protecting identity) to ensure an opportunity to rebut the information or argument in order to protect procedural fairness.

If the complaint is anonymous, the complainant should be informed that individual resolution is unlikely as the process is restricted. Only a preliminary systemic assessment can be undertaken if the complaint is anonymous.

4

Accountability

Key issues

There is no publicly available comprehensive annual report for the Aged Care CIS and reports from the Aged Care Commissioner are of little benefit to the sector.

There is no public accountability for its operations through the publishing of information highlighting any systemic sector problems. This adversely affects sector and public confidence in the scheme and does not allow assessment and improvement of performance.

The Aged Care Standards Agency does not appear to have benchmarks on which to assess or measure the success or otherwise of Accreditation Standard 1.4. It therefore becomes a very subjective outcome.

Future principles

While there is a report provided on the website of the Office of Quality, it does not address the following issues in a single document and some not at all:

- how the scheme works;
- the number and type of complaints and their outcomes;
- time taken to resolve complaints;
- systemic problems detected;
- case examples (altered to protect privacy where appropriate);
- information on how the scheme ensures equitable access;
- information on new developments or key areas in which policy or education initiatives are required; and
- the type of complaints made about the CIS and the Aged Care Standards Agency.

Standard public annual reporting of the Complaints Investigation Scheme, the Aged Care Standards Agency and the Commissioner for Complaints, would provide benefit from learning from aged care consumers. Even facilities with very few complaints would still benefit from this valuable insight.

Complaints mechanisms themselves must be part of the aged care sector's continuous improvement orientation. Therefore, complaints about these mechanisms should be seen as an opportunity to improve through assessment and improvement of performance. It is vital that information on the effectiveness of complaint handling processes is readily available in order for the aged care sector and the Australian public to maintain confidence in the model.

5 Efficiency

Key issues

Key issues of efficiency identified by the Ombudsman's Report include:

- "The role of the Aged Care Standards and Accreditation Agency in resolving complaints and its relationship with other parties was not clearly understood by all stakeholders.
- Complaints Officers of the Department were not always clear about when their role was a resolver or referrer of a complaint." (Commonwealth Ombudsman 2000).

Efficiency of the current complaints mechanisms is suboptimal due also to:

- a lack of co-ordinated access to historical complaint data to ensure that systemic issues are identified early;
- fragmentation of feedback; complaints are considered in isolation to other important consumer feedback;
- a lack of procedural guidance on where it is appropriate for complaints to be referred to other agencies;
- a lack of procedural guidance on where it is appropriate for complaints to be excluded, e.g. vexatious and frivolous complaints.

Future principles

Complaints should not be considered in isolation to other forms of consumer feedback, including comments and compliments. Consumer opinion and consumer relationships are critical to the setting and maintenance of high service levels and standards.

Vexatious and frivolous complaints must be quickly excluded. The Complaints Investigation Scheme needs to have in place guidelines on when the Scheme may decide not to deal with complaints. These include, but are by no means limited to vexatious, frivolous and trivial complaints and complaints not made in good faith. An example of guidelines is those used by the NSW Health Care Complaints Commission:

"The Office for Quality and Compliance may decide not to deal with a complaint for a range of reasons including:

- it is trivial, frivolous, vexatious or not made in good faith. Perhaps complaints made by staff on staff could be discussed with providers before proceeding. This has the potential to save an enormous amount of CIS, ACSA, DoHA and providers time.
- it may be resolved in another way: for example, the Commission may decide that the complainant should discuss the complaint directly with the respondent;
- it is already being investigated, or has been investigated, by another person or organisation;
- it has been or is currently the subject of legal proceedings;

- it needs to be investigated by another person or organisation: for example, if a complaint about a public hospital does not involve significant issues of public health and safety, it may be referred to an Area Health Service;
- it is more than five years old and there is no sufficient reason for the delay in lodging it;
- the person making the complaint has not provided additional information requested by the Office of Quality and Compliance within the specific time;
- it should be handled by the Commonwealth for example, complaints concerning Medicare are the responsibility of the Health Insurance Commission; or
- it concerns fees, the available resources in the health system or compensation.”

Specialist aged care knowledge and experience of complaints resolution staff should lead to efficient and consistent complaint investigation.

The complaints process roles of the Aged Care Standards Agency, the CIS and the Office of Quality and Compliance Section must be clarified with efficiencies promoted.

Transparent efficient procedures should be developed for referring complaints to other bodies, with the referral process understood by the sector.

6 Effectiveness

Key issues

A key effectiveness issue identified by the Ombudsman's Report was that "the CRS was unclear about its role and powers of determination." (Commonwealth Ombudsman 2000).

This is also the case with the current system. With the multitude of agencies which become involved in a complaint and the apparent lack of coordination it can only be assumed they cover the same ground over and over.

Effectiveness of the current complaints mechanisms is limited due to:

- a lack of mechanisms and procedures for referring systemic problems arising from complaints to the sector;
- a lack of feedback, review and evaluation from the sector on the performance of the complaints mechanism; and
- an aged care facility can still achieve accreditation despite an unsatisfactory or critical rating for the comments and complaints outcome standard.

Future principles

The roles and responsibilities of all involved in the aged care complaints mechanism must be clear.

The aged care sector recognises and values an efficient and effective complaints resolution mechanism that enables the sector to ascertain the systemic problems faced by consumers and take actions to rectify them across the sector.

Any external complaints mechanism should be integrated with the internal complaints mechanism operating in each facility. Therefore, aged care providers require clear information and resources to achieve expected internal complaints outcomes. With these resources, the Comments and Complaints Outcome Standard could become a mandatory outcome to achieve three year accreditation status. Making a complaint locally at the facility is the optimal and preferable method to achieve effective resolution.

The performance of the aged care complaints mechanisms should include feedback, review and evaluation from the sector as part of the process.

An independent review should be conducted regularly after first being undertaken three years after the establishment of any complaints mechanism. The review must be conducted in consultation with the aged care sector with results publicly available.

Recommendations

The Alliance calls on Government to examine the following recommendations in order to promote public confidence, accountability and a continuous improvement orientation for the aged care complaints mechanisms.

1. The aged care complaints mechanisms should conform at a minimum to the established 'Benchmarks for Industry – Based Customer Dispute Resolution Schemes' (1997). The Benchmarks and their underlying principles are:
 - 1 Accessibility;
 - 2 Independence;
 - 3 Fairness;
 - 4 Accountability;
 - 5 Efficiency; and
 - 6 Effectiveness.
2. Urgently publish and publicly release annual reports (and thereafter aggregated quarterly progress and annual reports) for the CIS and the Aged Care Standards Agency. The reports should have as a minimum requirement the reporting requirements set out in the 'Benchmarks for Industry-Based Customer Dispute Resolution Schemes' (1997).
3. The blame and punitive ethos of the current system must be removed with greater emphasis being placed on the actual complaint resolution for the complainant. This may only become achievable if the complaints mechanism becomes totally independent of DoHA with oversight by an independent community structure.
4. Staff on staff complaints should initially be discussed with the provider which should result in the elimination of many frivolous and vexatious complaints and save an enormous amount of time.
5. Commission an independent review of the operation of the complaints mechanisms against the standards set out in the Benchmarks for Industry- Based Customer Dispute Resolution Schemes (1997). This review should be undertaken within three years from the establishment of a scheme and regularly thereafter in consultation with the aged care sector.
6. Provide older people and their families with clear, culturally appropriate information about the complaints pathway, (including health complaints), their rights and responsibilities and actively encourage families to be involved in the communication feedback loop within facilities. The complaints pathway involves determining and advising the complainant whether the complaint is to be handled as such or should be referred to the compliance section of DoHA, or to another authority, or back to the facility.
7. Produce plain language information in a range of languages, that provides an integrated outline of all aspects of quality care in residential services, including:

- resident rights and responsibilities;
- accreditation standards and user rights principles as per the Aged Care Act; and
- the complaint investigation process, including rights of review.

The publication should be distributed by the Aged Care Assessment Team to residents, potential residents and their families at the time of assessment, as well as being available in every residential care facility.

8. Responsibilities and processes of the following in relation to aged care complaints are communicated, transparent, fair and prevents overlap:
 - the Department of Health and Aged Care Office of Quality and Compliance;
 - the Aged Care Standards Agency;
 - the Complaints Investigation scheme; and
 - the Aged Care Commissioner.

Provide Department of Health and Aged Care information, resources and training programs for the development of robust internal complaints systems that have transparent and fair processes.

The aged care industry should be resourced to develop best practice initiatives in relation to the management of consumer feedback, including complaints and other forms of consumer feedback such as customer satisfaction surveys, in collaboration with the Department of Health and aged care, the Aged Care Standards and Accreditation Agency, the Aged care Commissioner and the Continually develop Complaints Investigations Committee panellists through training programs and state and national level meetings with the Commissioner for performance, feedback and review of difficult cases.

9. Adequately resource consumer bodies and advocacy services to promote community education about individual rights to complain and the different avenues for complaint.
10. That the role of the Aged Care Commissioner be made more accountable by reporting directly to the Parliament.

Appendix

Benchmarks for Industry-Based Customer Dispute Resolution Schemes

Released by the Hon Chris Ellison, Minister for Customs and Consumer Affairs, August 2007.

Minister for Customs and Consumer Affairs

I am pleased to release the Benchmarks for Industry-Based Customer Dispute Resolution Schemes.

One of the issues which I consider a priority as Minister with responsibility for consumer affairs is that of alternative dispute resolution.

It makes good business sense to have a system for dealing with customer complaints. A dissatisfied customer is not a good advertisement for any business. While a company should try to resolve complaints with its customers, there are some situations where this is not possible. Subscribing to a dispute scheme, which can deal with unresolved complaints, is an equally important part of dealing with customer concerns.

Dispute schemes also serve as an alternative to the court system. The Government and the courts have recognised that costs and delays have reduced access to the court system by the average consumer. Where possible the courts are using alternative dispute resolution within the court system itself. There is also a place for alternative dispute resolution outside the court system.

Dispute schemes have therefore fulfilled a need for cost-free, accessible and effective resolution of disputes.

We have been fortunate in Australia that many industries have taken the initiative to develop dispute schemes. There are a variety of schemes which have allowed us to form views as to the advantages of different scheme structures.

The Benchmarks have been developed with the assistance of dispute schemes, consumer groups, government and regulatory authorities. Public consultation has been extensive, with the final Benchmarks reflecting a balance of views from all parties. I would like to thank those people who contributed to these consultations.

The Benchmarks are not mandatory and have drawn on existing dispute schemes to highlight the desirable elements of a good scheme.

Although the Benchmarks are not mandatory, I encourage industries with schemes to play close attention to them and to assess whether their existing or proposed scheme meets each benchmark.

I also encourage those industries which are considering introducing dispute schemes to use the benchmarks to guide the creation of a good scheme.

There is scope for present schemes to continue to evolve and to work more closely with each other in meeting customer needs. I am confident the Benchmarks will play their part in informing further discussion and work in these areas.

I wish to express my appreciation for the contribution of the members of the Working Group in preparing the benchmarks. I look forward to the continued development of effective avenues of dispute resolution for consumers.

*Chris Ellison
Senator for Western Australia
August 1997*

Since 1990 various dispute resolution schemes have been set up by industry seeking to provide a cost-free, effective and relatively quick means of resolving complaints about the products or services provided by an industry. Customer dispute schemes of this type play a vital role as an alternative to expensive legal action for both consumers and industry.

The emergence of customer dispute schemes is also due in part to the increasing recognition of the value of effective industry self-regulation. Such schemes enable industry to ascertain the problems faced by their customers and take steps to rectify them, negating the need for government intervention.

Good business practice

Customer dispute schemes also make good business sense. They result in improved business practices and the creation of better quality goods and services for customers.

In order to encourage and support the development of customer dispute schemes the government has facilitated the development of a set of benchmarks to guide industry in developing and improving such schemes.

The benchmarks have been developed to apply primarily to nationally-based customer dispute schemes set up under the auspices of an industry. Such schemes currently exist in relation to banking, telecommunications and insurance. However, many of the principles that they represent may be capable of applying to state or territory based industry schemes or non-industry schemes.

Flexibility

The benchmarks are constituted by key practices which it is hoped many schemes will adopt. However, it is recognised that some key practices in the benchmarks may not be applicable to the smaller sectors of industry or those sectors where there are few complaints. Every key practice does not have to be adopted by each industry sector. Industries should consider the applicability of each of the key practices to their sector taking into account the industry's size, resources and complaint history. However, where possible, the use of these benchmarks by all customer dispute schemes is encouraged.

Some existing schemes hear complaints involving individual consumers while others allow small business to access their scheme. The benchmarks have been drafted primarily with a focus on individual consumers as users of the schemes. However, where the terms of reference of a scheme allow access to it by other entities, the benchmarks are still capable of applying to such schemes.

Most of the customer dispute resolution schemes to date have been set up in the financial services sector or the telecommunications sector. There are some sectors, such as the legal profession, which do not traditionally recognise themselves as an industry and which may have customer dispute resolution schemes set up independently of statute. The benchmarks are capable of applying to dispute resolution schemes in these professions as well.

The benchmarks have a three-fold purpose. They are meant to act as a guide to good practice for those industry sectors which intend setting up a scheme to resolve disputes between their industry members and individual consumers of their goods or services. For existing schemes they will provide objective guidance on the practices to aim for in the operation of such schemes. They will also serve as a guide for consumers in giving them some idea of what they should expect from such schemes.

Voluntary guidelines

The benchmarks do not have the force of law and are intended to be a guide to stakeholders - but adherence to them by the schemes will be a clear demonstration of their commitment to good practice.

The benchmarks have been drafted by a working group chaired by the Federal Bureau of Consumer Affairs and including representatives of the current major schemes – the Life Insurance Complaints Service, the Australian Banking Industry Ombudsman, the Telecommunications Industry Ombudsman and the General Insurance Enquiries and Complaints Scheme, as well as representatives of the Consumers' Federation of Australia, the Australian Competition and Consumer Commission, the Business Council of Australia and the Australian Chamber of Commerce and Industry. In drafting the benchmarks, the working group undertook extensive consultation with existing schemes and business and consumer groups.

Emphasis on alternative dispute resolution

The schemes set up under these benchmarks will reflect an informal and inquisitorial style of dispute resolution rather than a formal and adversarial style. Thus overly prescriptive practices have been avoided and early resolution of disputes by consensus has been emphasised.

It is expected that in implementing and interpreting these benchmarks, both industry and consumers will not take an overly legalistic approach to them. The benchmarks should be approached in a spirit of seeking resolution by consensus as far as possible at an early stage to reduce costs, increase productivity and build better relationships between the parties. This is the essence of alternative dispute resolution.

Emphasis on early resolution at the company level

Customer dispute schemes do not obviate the need for each business to have its own mechanisms for dealing with complaints made by its customers. It is desirable to have a complaint resolved as early as possible after it has been made. It is only when resolution is not possible at the company level that the scheme should be utilised.

The Benchmarks and their underlying principles

1 Accessibility

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

2 Independence

The decision-making process and administration of the scheme are independent from scheme members.

3 Fairness

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

4 Accountability

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

5 Efficiency

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

6 Effectiveness

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

1

Benchmark - Accessibility

Principle

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

Purpose

To promote customer access to the scheme on an equitable basis.

Key practices

Awareness/promotion

- 1.1 The scheme¹ seeks to ensure that all customers of the relevant industry are aware of its existence.
- 1.2 The scheme promotes its existence in the media or by other means.
- 1.3 The scheme produces readily available material in simple terms explaining:
 - how to access the scheme;
 - how the scheme works;
 - the major areas with which the scheme deals; and
 - any restrictions on the scheme's powers.
- 1.4 The scheme requires scheme members² to inform their customers³ about the scheme⁴.
- 1.5 The scheme ensures that information about its existence, procedures and scope is available to customers through scheme members:
 - a. when a scheme member responds to a customer's complaint; and
 - b. when customers are not satisfied in whole or in part with the outcome of the internal complaints mechanism of a scheme member, when the scheme member refuses to deal with a complaint, or when the time period within which the internal complaints mechanism⁵ is expected to produce an outcome has expired, whichever first occurs.
- 1.6 The scheme promotes its existence in such a way as to be sensitive to disadvantaged customers or customers with special needs.

Access

- 1.7 The scheme seeks to ensure nation-wide access to it by customers.⁶
- 1.8 The scheme provides appropriate facilities and assistance for disadvantaged complainants or those with special needs.
- 1.9 Complainants can make initial contact with the scheme orally or in writing but the complaint must ultimately be reduced to writing.⁷

1.10 The terms of reference of the scheme are expressed clearly.

Cost

1.11 Customers do not pay any application or other fee or charge before a complaint is dealt with by the scheme, or at any stage in the process.

Staff assistance

1.12 The scheme's staff have the ability to handle customer complaints and are provided with adequate training in complaints handling.

1.13 The scheme's staff explain to complainants in simple terms:

- a. how the scheme works;
- b. the major areas it deals with;
- c. any restrictions on its powers; and
- d. the timelines applicable to each of the processes in the scheme.

1.14 The scheme's staff assist complainants to subsequently reduce a complaint to writing, where complainants need assistance to do so.

Use

1.15 The scheme's processes are simple for complainants to understand and easy to use.

1.16 The scheme provides for a complainant's case to be presented orally or in writing at the determination stage, at the discretion of the decision maker.

1.17 The scheme provides for complainants to be supported by another person at any stage in the scheme's processes.

Non-adversarial approach

1.18 The scheme uses appropriate techniques including conciliation, mediation and negotiation in attempting to settle complaints.⁸

1.19 The scheme provides for informal proceedings which discourage a legalistic, adversarial approach at all stages in the scheme's processes.

Legal representation

1.20 The scheme discourages the use of legal representatives before the decision-maker⁹ except in special circumstances.

1.21 The scheme provides the opportunity for both parties to be legally represented where one party is so allowed.

1.22 The scheme provides for the scheme member to pay the legal costs of complainants where the scheme member is the first party to request to be legally represented and the decision-maker agrees to that request.

2 Benchmark - Independence

Principle

The decision-making process and administration of the scheme are independent from scheme members.

Purpose

To ensure that the processes and decisions of the scheme are objective and unbiased and are seen to be objective and unbiased.

Key practices

The decision-maker

- 2.1 The scheme has a decision-maker who is responsible for the determination of complaints.
- 2.2 The decision-maker is appointed to the scheme for a fixed term.
- 2.3 The decision-maker is not selected directly by scheme members and is not answerable to scheme members for determinations.¹⁰
- 2.4 The decision-maker has no relationship with the scheme members that fund or administer the scheme which would give rise to a perceived or actual conflict of interest.

Staff

- 2.5 The scheme's staff are not selected directly by scheme members and are not answerable to scheme members for the operation of the scheme.

Overseeing entity

- 2.6 There is a separate entity set up formally to oversee the independence of the scheme's operation.¹¹ The entity has a balance of consumer, industry and, where relevant, other key stakeholder interests.
- 2.7 Representatives of consumer interests on the overseeing entity¹² are:
 - a. capable of reflecting the viewpoints and concerns of consumers; and
 - b. persons in whom consumers and consumer organisations have confidence.
- 2.8 As a minimum the functions of the overseeing entity comprise:
 - a. appointing or dismissing the decision-maker;
 - b. recommending or approving the scheme's budget;
 - c. receiving complaints about the operation of the scheme;¹³
 - d. recommending and being consulted about any changes to the scheme's terms of reference;

- e. receiving regular reports about the operation of the scheme; and
- f. Receiving information about and taking appropriate action in relation to, systemic industry problems referred to it by the scheme.

Funding

- 2.9 The scheme has sufficient funding to enable its caseload and other relevant functions necessary to fulfil its terms of reference to be handled in accordance with these benchmarks.

Terms of reference

- 2.10 Changes to the terms of reference are made in consultation with relevant stakeholders, including scheme members, industry and consumer organisations and government.

3 Benchmark - Fairness

Principle

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

Purpose

To ensure that the decisions of the scheme are fair and are seen to be fair.

Key practices

Determinations

- 3.1 The decision-maker bases determinations¹⁴ on what is fair and reasonable, having regard to good industry practice, relevant industry codes of practice and the law.

Procedural fairness

- 3.2 The scheme's staff advise complainants of their right to access the legal system or other redress mechanisms at any stage if they are dissatisfied with any of the scheme's decisions or with the decision-maker's determination.
- 3.3 Both parties can put their case to the decision-maker.
- 3.4 Both parties are told the arguments and sufficient information to know the case of the other party.
- 3.5 Both parties have the opportunity to rebut the arguments of and information provided by the other party.
- 3.6 Both parties are told of the reasons for any determination.
- 3.7 Complainants are advised of the reasons why a complaint is outside jurisdiction or is otherwise excluded.

Provision of information to the decision-maker

- 3.8 The decision-maker encourages but cannot compel complainants to provide information relevant to a complaint.
- 3.9 The decision-maker can demand that scheme members provide all information which, in the decision-maker's view, is relevant to a complaint, unless that information identifies a third party to whom a duty of confidentiality or privacy is owed¹⁵, or unless it contains information which the scheme member is prohibited by law from disclosing.

Confidentiality

- 3.10 Where a scheme member provides information which identifies a third party, the information may be provided to the other party with deletions, where appropriate, at the discretion of the decision-maker.
- 3.11 The scheme ensures that information provided to it for the purposes of resolving complaints is kept confidential, unless disclosure is required by law or for any other purpose specified in these benchmarks.
- 3.12 Parties to a complaint agree not to disclose information gained during the course of any mediation, conciliation or negotiation to any third party, unless required by law to disclose such information.

4

Benchmark - Accountability

Principle

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.¹⁶

Purpose

To ensure public confidence in the scheme and allow assessment and improvement of its performance and that of scheme members.

Key practices

Determinations

- 4.1 The scheme regularly provides written reports of determinations¹⁷ to scheme members and any interested bodies for the purposes of:
 - a. educating scheme members and consumers; and
 - b. demonstrating consistency and fairness in decision-making.
- 4.2 Written reports of determinations do not name the parties involved.

Reporting

- 4.3 The scheme publishes a detailed and informative annual report containing specific statistical and other data about the performance of the scheme, including:
 - a. information about how the scheme works;
 - b. the number and types of complaints it receives and their outcome;
 - c. the time taken to resolve complaints;
 - d. any systemic problems arising from complaints;
 - e. examples of representative case studies;
 - f. information about how the scheme ensures equitable access;
 - g. a list of scheme members supporting the scheme, together with any changes to the list during the year;
 - h. where the scheme's terms of reference permit, the names of those scheme members which do not meet their obligations as members of the scheme¹⁸; and
 - i. information about new developments or key areas in which policy or education initiatives are required.
- 4.4 The annual report is distributed to relevant stakeholders and otherwise made available upon request.

5 Benchmark - Efficiency

Principle

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

Purpose

To give customers and scheme member's confidence in the scheme and to ensure the scheme provides value for its funding.

Key practices

Appropriate process or forum

- 5.1 The scheme deals only with complaints which are within its terms of reference and have not been dealt with, or are not being dealt with, by another dispute resolution forum¹⁹ and:
 - a. which have been considered and not resolved to the customer's satisfaction by a scheme member's internal complaints resolution mechanism; or
 - b. where a scheme member has refused, or failed within a reasonable time, to deal with a complaint under its internal complaints resolution mechanism.
- 5.2 The scheme has mechanisms and procedures for referring relevant complaints to other more appropriate fora.
- 5.3 The scheme has mechanisms and procedures for referring systemic industry problems that become apparent from complaints to relevant scheme members.
- 5.4 The scheme excludes vexatious and frivolous complaints at the discretion of the decision-maker.

Tracking of complaints

- 5.5 The scheme has reasonable time limits set for each of its processes which facilitate speedy resolution without compromising quality decision-making.
- 5.6 The scheme has mechanisms to ensure that the time limits are complied with as far as possible.
- 5.7 The scheme has a system for tracking the progress of complaints.
- 5.8 The scheme's staff keep the parties informed about the progress of their complaint.

Monitoring

- 5.9 The scheme sets objective targets against which it can assess its performance.

- 5.10 The scheme keeps systematic records of all complaints and enquiries, their progress and their outcome.
- 5.11 The scheme conducts regular reviews of its performance.
- 5.12 The scheme's staff seek periodic feedback from the parties about the parties' perceptions of the performance of the scheme.
- 5.13 The scheme reports regularly to the overseeing entity on the results of its monitoring and review.

6 Benchmark - Effectiveness

Principle

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Purpose

To promote customer confidence in the scheme and ensure that the scheme fulfils its role.

Key practices

Coverage

- 6.1 The scope of the scheme and the powers of the decision-maker are clear.
- 6.2 The scope of the scheme (including the decision-maker's powers) is sufficient to deal with:
 - a. the vast majority of customer complaints in the relevant industry and the whole of each such complaint; and
 - b. customer complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of customer transactions in the relevant industry.²⁰
- 6.3 The decision-maker has the power to make monetary awards of sufficient size and other awards (but not punitive damages) as appropriate.

Systemic problems

- 6.4 The scheme has mechanisms for referring systemic industry problems to the overseeing entity (where referral to the scheme member or members under key practice 5.3 does not result in the systemic problem being adequately addressed) for appropriate action.

Scheme performance

- 6.5 The scheme has procedures in place for:
 - a. receiving complaints about the scheme; and
 - b. referring complaints about the scheme to the overseeing entity for appropriate action.
- 6.6 The scheme responds to any recommendations of the overseeing entity in a timely and appropriate manner.

Internal complaints mechanisms

- 6.7 The scheme requires scheme members to set up internal complaints mechanisms.²¹

- 6.8 The scheme has the capacity to advise scheme members about their internal complaints mechanisms.

Compliance

- 6.9 The scheme has mechanisms to encourage scheme members to abide by the rules of the scheme.²²
- 6.10 The determinations of the decision-maker are binding on the scheme member if complainants accept the determination.

Independent review

- 6.11 The operation of the scheme is reviewed within three years of its establishment and regularly thereafter, by an independent party commissioned by the overseeing entity.
- 6.12 The review, undertaken in consultation with relevant stakeholders, includes:
- a. the scheme's progress towards meeting these benchmarks;
 - b. whether the scope of the scheme is appropriate;
 - c. scheme member and complainant satisfaction with the scheme;
 - d. assessing whether the dispute resolution processes used by the scheme are just and reasonable;
 - e. the degree of equitable access to the scheme; and
 - f. the effectiveness of the terms of reference.
- 6.13 The results of the review are made available to relevant stakeholders.

References

Australian Standard AS4269-1995 Complaints Handling, Standards Australia.

Committee Amendment Principles 2000 (No. 1) Section 96.1 Aged Care Act 1997,
www.health.gov.au/acc/legislat/aca1997/acaindex.htm.

Commonwealth Ombudsman, Report of an Own Motion Investigation into the Department of Health and Aged Care's Complaint's Resolution Scheme, July 2000.

Minister for Customs and Consumer Affairs, Benchmarks for Industry-Based Customer Dispute Resolution Schemes, August 1997.

NSW Health Care Complaints Commission, The Complaints Process (brochure).

Commonwealth Department of Health and Aged Care, Standards and Guidelines for Residential Aged Care Services, 1998.

Endnotes

- ¹ The 'scheme' refers to a dispute resolution scheme run by an industry to resolve complaints by customers about businesses within that industry. The type of scheme which is set up will differ according to the size and nature of the relevant industry.
- ² 'Scheme members' refers to those businesses which participate in a customer dispute resolution scheme.
- ³ The term 'customer' is used to refer to consumers who purchase goods or services from scheme members.
- ⁴ This key practice relates to general promotion of the existence of the scheme by scheme members. The circumstances in which individual customers are required to be informed about the scheme are dealt with in key practice 1.5.
- ⁵ An 'internal complaints mechanism' refers to the system set up within a business to handle complaints by its customers.
- ⁶ Maximising access to the scheme could include measures such as providing toll free telephone access for consumers/complainants.
- ⁷ In most cases the staff of a scheme will help a complainant reduce a complaint to writing where the complainant requires assistance to do so.
- ⁸ While the focus of the scheme is mainly on alternative dispute resolution, it also has the function of arbitrating disputes which cannot be resolved by alternative means. The alternative dispute resolution techniques listed here are used before arbitration is considered. Initially, customers are encouraged to discuss their complaint with the scheme member and use any internal complaints mechanism that is available. Schemes are then encouraged to attempt to settle complaints before they get to the decision-maker.

The scheme does not have to use all of the listed alternative dispute resolution techniques nor in this particular order, but the ones cited in this key practice recognised techniques.
- ⁹ The 'decision-maker' refers to the individual, panel of individuals or other entity which is responsible for the final determination of complaints under a scheme.
- ¹⁰ Where the decision-maker consists, for example, of a panel of individuals, only the chair, or the individual who controls the decision-making process, is required to be independent of industry or consumer interests and be appointed by the entity which oversees the independence of a scheme's operation. Where the decision-maker consists of more than one individual, the chair ensures the independence of the decision-making. This allows for the relevant industry to be represented on the decision-making entity, as long as a balance between consumers and industry is maintained.
- ¹¹ An example of an entity which formally oversees the independence of a scheme could be a council or other body usually consisting of an independent chair, consumer member or members, industry member or members and, where relevant, other stakeholder members or members. Smaller industry sectors or those with few complaints may not have the ability or need to devote large resources to setting up such an entity. Other types of overseeing entities are not precluded as long as they allow for the relevant independence or a balance of competing interests.
- ¹² Suitable consumer representatives can be ascertained by a number of methods, including the relevant consumer organisation providing a nominee, advertising for representatives, or the relevant consumer affairs agency or Minister responsible for consumer affairs nominating a representative. Suitable industry and other stakeholder representatives can be sought from the relevant industry association or stakeholder respectively.
- ¹³ The receipt of complaints about the scheme's operation (by the entity which oversees the independence of a scheme's operation) does not extend to receiving appeals against the determinations of the decision-maker.
- ¹⁴ The term 'determinations' is used to refer to the final decision made by the decision maker when determining a complaint. The term 'decisions' is used to refer to the decisions made by the scheme's staff.

- ¹⁵ Where a duty of confidentiality or privacy is owed to a third party in relation to information sought by the decision-maker, the scheme members can seek the permission of the third party to release that information to the decision-maker in full or with deletions as appropriate.
- ¹⁶ Systematic industry problems can refer to issues or trends arising either out of many complaints about one scheme member or out of many complaints (which are essentially similar) about more than one scheme member.
- ¹⁷ Written reports of determinations can consist of a concise summary of a decision maker's determination and reasons for so determining. They do not necessarily need to include all the evidence, arguments and reasoning of each complaint. It is not envisaged that written reports would be provided of all determinations made by the decision maker.
- The determinations which are reported should be left to the decision-maker's discretion. It is not envisaged that written reports would necessarily be provided of other decisions (apart from determinations) made by the scheme.
- ¹⁸ The scheme should state in its terms of reference whether it will disclose the names of schemes members which do not meet their obligations under the scheme. Examples of where a scheme member does not meet its obligations under the scheme will include where it does not provide information as and when requested, or where it does not comply with a determination made under the scheme.
- ¹⁹ Complaints which have been made to one scheme but are found to be more appropriately dealt with by another scheme can be dealt with by the latter scheme. It is where a complaint has been substantially considered by one scheme that a complainant is discouraged from forum-shopping.
- ²⁰ Because the loss arising from the determination of a complaint may vary according to the industry concerned, the benchmarks do not specify a monetary limit above which complaints are excluded from the scheme.
- ²¹ The Standards Australia Standard on Complaints Handling AS 4269-1995 can assist scheme members to set up appropriate internal complaints mechanisms.
- ²² Mechanisms for encouraging scheme members to abide by the rules of the scheme could include contractual obligations which a scheme member enters into when joining the scheme or naming in annual reports or otherwise those scheme members which do not abide by the rules of the scheme.