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Dear Ms Walton

### **Review of the Aged Care Complaints Investigation Scheme**

Royal College of Nursing, Australia (RCNA) welcomes the opportunity to provide a submission to the review of the Aged Care Complaints Investigation Scheme (CIS).

RCNA is the peak national professional organisation for Australian nurses. RCNA represents nursing across all areas of practice throughout Australia. A not-for-profit organisation, RCNA provides a voice for nursing by speaking out on health issues that affect nurses and the community. With representation on government committees and health advisory bodies, RCNA is recognised as a key centre of influence in the health policy arena in Australia. When health policy decisions are made, RCNA presents a professional nursing perspective, independent of political allegiance.

Attached is RCNA's submission for your consideration. Please do not hesitate to contact me for further information or clarification.

Sincerely

Debra Y Cerasa FRCNA  
Chief Executive Officer

*Australia's peak professional nursing organisation*





## **RCNA submission to the review of the Aged Care Complaints Investigation Scheme (CIS)**

### **1. Introduction**

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An underlying principle of the CIS should be to avoid the unnecessary escalation of a complaints investigation and to, where possible, seek local level resolution through enhanced communication efforts between CIS investigators and involved parties. The impact of CIS investigation procedures can be costly in terms of the financial, administrative and emotional burden placed on aged care providers and staff. RCNA is advised that there are many circumstances where improved communication could result in fewer and less intensive investigation procedures being undertaken, and this could have broader implications for the sector particularly for fostering positive work environments focused on continuous improvement and for nursing staff retention rates. Creating environments for complaints investigations with less punitive approaches and more focus on open dialogue, could reduce the need for such extensive use of full investigation procedures. This could be positive for all parties involved in addressing complaints in the aged care sector.

The establishment and maintenance of administrative systems that enable those directly affected by a service to be able to provide feedback on the appropriateness and efficacy of a service and to lodge a complaint with the goal of resolving issues of concern is fully endorsed. Such systems must be established and operationalised in ways that provide procedural fairness to all parties and result in reasonable outcomes around the resolution of legitimate complaints. By encouraging feedback and offering opportunities to receive and resolve complaints from aggrieved parties, organisations can discover opportunities to improve the quality of their services and to refine what they are able to offer to clients. It is important that within the aged care context, administrative systems, which currently are linked with regulatory compliance and compliance inspections, satisfy the same principles of natural justice as apply in any other context.

In responding to the review, RCNA provides brief responses to the questions raised in the Consultation Paper and in addition, some broader detailed comments and recommendations relating to aspects of the CIS. These responses have been informed by members with extensive aged care systems knowledge as well as specialised nursing expertise. RCNA is of the firm view that aged care consumers, their families, carers and advocates must have access to a fair and robust complaints mechanism to protect their rights within the complex aged care system. The views expressed in this submission represent the perspective of registered nurses (RNs) working within this system with the aim of identifying gaps and problems experienced by RNs and to provide recommendations for systems improvement from a provider and/or nursing staff standpoint.

### **2. Recommendations**

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RCNA, as informed by key members, provides the following set of recommendations:

1. A new complaints handling system is needed that will enable feedback and complaints to be responded to in a grievance conciliation process at the organisational level in the first instance and facilitate referral access to a grievance resolution system if the matter is not able to be resolved at the organisational level.

The role of the organisation manager and key personnel in resolving aged care issues needs to be acknowledged as a legitimate part of the grievance conciliation and resolution process. Any new system needs to be set up to support managers in this role through providing information on procedural fairness and monitoring complaints handling strategies at the local level.

2. Procedural fairness needs to be entrenched as a basis for any new or revised system and apply to all stages of complaint handling:
  - Checking the credibility, appropriateness and relevance of the grievance
  - Informing those involved of the allegations or grounds for negative comments against them
  - If full disclosure of complaint information is deemed inappropriate (eg. serious risk to safety or public funding) expert advice and full documentation is required so that all information is available should the decision be appealed
  - Providing a reasonable opportunity to respond to allegations in writing or at a hearing or other appropriate means of oral representations
  - Impartial hearing of both sides of the grievance; acceptance of new information at any stage of the investigation; consider only relevant factors
  - Disclose the decision prior to it being sent to the final decision-maker so that the credibility of the investigation can be tested before a decision is taken
  - Complete the process without undue delay
  - Maintain a full record of all aspects of the investigation and decision and ensure confidentiality and privacy of the parties involved
  - Decision-makers should allow a fair hearing to occur at any stage of the process
  - Decision-makers need to be unbiased and uninfluenced by personal agendas.
  - Provide the parties with any summaries of arguments for and against the decision even after the hearing has ended.
3. Communication between CIS investigators and involved parties could be improved with more efficient systems of information management to ensure sensitive information is handled appropriately and confidentially by investigating officers. Policies are needed within CIS or any new system that replaces it, to allow for some discretion in balancing the interests of the parties. Where a negative outcome for either party exists there is a need for procedural and evidentiary rules that explain how rights, duties, powers and liabilities are administered. This would allow for parties to be fully informed of the processes and factors influencing an investigation or hearing.

Because of the implications of a negative outcome for either party to a grievance, CIS should ensure that interpreter services are made available throughout the process of investigation and hearing and during a review of any decision. This responsibility extends to an interpretation of any written reports associated with the investigation.

4. It is necessary to define what is meant by anonymous complaints and whether anonymous telephone contacts with CIS are in fact complaints. Past enquiries to CIS have reportedly been inaccurately logged as complaints and then reported to the media as an increase in complaints about the aged care industry.

A process for validating or at least undertaking a factual check of a complaint and the true identity of the complainant by CIS is necessary whenever a complaint is received. If the person asks for the matter to be treated confidentially they still need to give proof of their identity to CIS before the issue can proceed. Significant reasons are required before denying any provider access to the identity of the complainant, but even so, the complainant's details need to be recorded by CIS even if they are not shared with the provider. If it is found that the accusation is false or mischievous, all information about the identity of the person making the false accusation should be available to the provider to enable them to pursue compensation in the civil courts. This may lead to the reduction of vexatious and unjust complaints made against aged care providers and nurses working in aged care.

5. Expectations of procedural justice and a fair hearing are core community values regardless of any statutory protections established to protect administrative biases. By

adopting a culture and process based on procedural fairness, CIS could move toward meeting the expectations of all stakeholders. While every provider of care and their staff are presumed to be guilty in any complaint situation, no party benefits. The potential damage to reputations, careers and businesses of poorly managed complaints investigations and poorly informed judgements on issues without reference to the context of aged care, is substantial.

6. It is recommended that the nature of the relationship between the CIS and the Aged Care Commissioner and the role and authority of the Commissioner be reviewed.

### **3. Specific responses to questions**

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#### ***Q.1 How can the communication between the CIS investigators and involved parties (including: family members, residents and advocacy groups who lodge complaints, aged care service providers and their staff) be improved?***

RCNA has been informed that, in order to improve communication between CIS investigators and involved parties, consideration must be given to the nature of the relationship between the CIS and the Aged Care Commissioner. Expert members argued that there is a need to enhance the authority of the Aged Care Commissioner in this relationship. It is understood that due to a lack of authority the Commissioner does not have power to action its decisions, and this has become problematic in situations where the Commissioner's decisions contradict the findings of the Department of Health and Ageing (DOHA).

Also of importance to improving communication between parties involved in the aged care complaints mechanisms is the relationship between the CIS and the Aged Care Accreditation Agency. Aspects of this relationship appear to be ineffective particularly with respect to data exchange which may be an important component in a complaints investigation.

In identifying options for improving communication, there is a need to examine communication inconsistencies within the complaints investigation processes. It is understood that at times, there can be great variation between the information requested concerning the systems linked to the topic of investigation and information provided relating to the complaint. This communication gap can result in an imbalance in the data considered in an investigation.

RCNA has been advised that CIS procedures should seek to address complaints, where possible, through improved communication between investigators and involved parties at the local level to reduce the need for unnecessary investigation particularly, when a complaint is being investigated for a second time. The commencement of a second formal complaints investigation can occur in situations where there are well-known challenging relationships with families, and the CIS procedure does not tend to seek to clarify or resolve relationships and situational issues with providers before accepting a new complaint and undertaking a second full investigation.

It is proposed that the CIS should do this enquiry work as the first point of contact and should refer to its own records of the previous complaint prior to commencing to collect the same information again. As outlined in the Consultation Paper, under the *Investigation Principles 2007* the CIS may choose not to investigate a matter if 'the matter relates to an issue that has been dealt with already by the CIS or the previous complaints handling arrangements (the CRS)'. Complaints investigation processes can apply unnecessary burden on providers and staff.

#### ***Q.2 Is the current CIS treatment of anonymous complaints appropriate? Where are the opportunities for improvement?***

RCNA is strongly advised that the acceptance of anonymous complaints requires review as there is evidence that shows the acceptance of these can create an unnecessary drain on resources and may be used by disgruntled people in a vexatious manner.

RCNA is aware a perception exists that the CIS often informs the provider that the complaint is anonymous. It is argued a preferred approach would be to state that the complaint is confidential. In some situations, however, the complaint is so obscure that without some details and/or context it seems that all of the systems of the provider are assessed when these are already assessed by the accreditation agency processes. This can be interpreted as overzealous and can place unnecessary strain on resources and places great stress on aged care staff.

***Q.3 What can the CIS do to better meet the needs and expectations of residents, their families and aged care service providers?***

RCNA has been advised that, if a complaint under investigation is about a specific matter or incident, the CIS should investigate the matter of interest not all systems related to it. As these systems are already subject to audit regularly by the Accreditation Agency via announced and unannounced visits, this investigative habit has been identified as costly and often unnecessary.

RCNA expert member feedback was of the strong opinion that the CIS generates an enormously intrusive and resource intensive process which dominates and overpowers all other functions on the site they are investigating. This negatively affects health service delivery as it removes the focus of staff from residents to preparing to answer to the investigators, described as a "defence preparation". Views expressed stated that the nature of the investigation and the attitudes of the investigators commonly assume a shortcoming in the provider from the outset which results in the development of a defensive attitude on the part of provider and staff. More open and communicative and non-punitive methods of investigation would be a starting point for better meeting the needs and expectations of involved parties.

**4. Comprehensive comments on the current operation of the CIS**

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The following provides a range of comments relating to the CIS.

**4.1 Procedural fairness**

Procedural fairness based on the principles of natural justice that inform courts of law, provides a basis for fair and transparent procedures used in administrative decision-making to ensure that the rights of all involved are given equal protection. The rules that apply to procedural fairness include ensuring a lack of bias; evidence-based decisions; a fair hearing; and inquiry into disputed matters.

Applying procedural fairness to government policies and decisions can be difficult where the activities of the government are protected by statute. There is a widely held perception throughout the aged care industry and among professional groups that officials engaged in regulatory compliance monitoring presume an unjustified level of impunity from responsibility for the financial and other damaging consequences of biased and inadequately informed decision-making processes.

**4.2 A fair hearing**

Australian community values align closely with those underpinning procedural fairness and particularly the importance given to a fair hearing. The idea of a fair hearing does apply to the activities of governments and their agencies when there is the possibility of a decision that will negatively affect the interests or rights of the person or organisation being implicated. That both sides of a case will be heard fairly and without prejudice is a legitimate expectation of all Australian citizens. In a situation such as currently exists with the CIS, where anonymous accusations are encouraged against service providers and staff, where allegations are treated as facts and where evidence presented in defence to an allegation can be summarily dismissed by an unnamed official, the decision-making process cannot be said to be credible or fair.

If fairness were to be embraced by the CIS (and other government departments and agencies) then the person or organisation being investigated would have a right to:

- an opportunity to know what the complaint is about and some information about who has made the allegation and when. The identity of the complainant should be revealed unless it can be shown that they will suffer some direct or significant disadvantage as a result.
- have access to all relevant information before preparing a reply, within a reasonable timeframe, and to know the criteria for making a decision and the information that will be used for any possible decision. This includes the disclosure of any negative information that the agency or department has about the person or organisation.
- have an opportunity to reply to all allegations before any decision is taken.
- have a reasonable chance to consider their position before replying, for instance, time to seek legal representation or advice allowing time for differences in case complexity.
- their submissions being given due consideration by decision-makers who are aware of everything presented by the person or organisation under investigation. Where there is a lack of understanding, the decision-makers should seek clarification from the person before proceeding.
- receive a decision within a reasonable time-line that allows the person or organisation being investigated to appeal the decision if they feel it is necessary to do so.

The CIS as it currently operates fails to meet several of the above criteria for procedural fairness, particularly issues around timelines that undermine the ability of the person or organisation under investigation to understand the nature of the complaint, and reporting timelines from the CIS in sufficient time to allow for quality improvement to occur or further submissions to be made in reply.

#### **4.3 Attitudes and approaches of investigators**

There is a culture within the CIS that has generated a perception within the aged care industry that officials presume from the outset that the person or organisation under investigation is guilty of the offence even before any information is received in defence. This attitude may be apparent in the behaviour of officials demanding information and setting short timelines for it to be delivered and also in their assumption that complainants deserve greater protection than those who may be unfairly implicated.

Failure to critically evaluate the source of complaints or to hold complainants accountable for false allegations is not always evident currently. The stress experienced by staff falsely implicated and the delays in CIS processes leading to resolution have on occasion resulted in key personnel resigning. In a sector facing significant workforce shortages, particularly senior managers and experienced registered nurses, the consequences of mishandled complaints and unfair processes by CIS can have a negative impact on workforce supply and development.

There is no clear evidence that procedural fairness guides CIS investigators in their dealings with aged care providers. If there were, then complaints received at CIS would be subjected to a process that would check the facts of what is being alleged, the major issues identified and assessed as to whether they fall within the scope of CIS or not, and a low-key inquiry made to the other party. It is not uncommon for CIS to investigate issues that are outside their scope or to refer matters to other agencies without first critically assessing the facts.

#### **4.4 Consequences of an unfair system**

Personal bias of investigators and decision-makers in the CIS may result in aged care providers and nurses believing they are compelled to adhere to unwise directives by CIS if they are to avoid a new risk of regulatory non-compliance.

CIS investigations into deaths in aged care have opened up the possibility of negating any advantage of being a resident in a home-like environment in which comfort and support is provided. Even if a resident has agreed they do not want resuscitation and are happy to end their days surrounded by family in their own rooms, and the general medical practitioner involved supports their decision, the CIS can question whether the resident has been denied medical interventions by the nurse or aged care provider. Consequently, families can no

longer decide on these matters and residents are reluctantly being sent to hospitals. The risk of not doing so, and opening oneself and the organisation to an investigation of the events around a death, can result in the loss of key staff due to stress; the referral of the death by CIS to other inspecting agencies who can then undertake a time-consuming and costly investigation of any aspect of the aged care organisation's activities; and the loss of reputation as a provider of sensitive and skilled care to older people because of government media releases prior to matters being fully resolved. To allow residents to die quietly as they and their families wish is presenting too great a compliance risk in the current CIS and accreditation environment.

#### **4.5 Misinformation and public expectations**

A sustained campaign of media announcements on the funding of aged care and any shortcomings providers have been found to have in relation to regulatory requirements, has generated a negative public perception of aged.

Aged care funding equates to around 20% of the funding of a chronic care bed in a public hospital. Despite this disparity in funding, the general public has been encouraged to expect aged care providers to deliver hospital-level treatment services and to provide staffing and resources equivalent to hospitals. The veracity of information given by hospital staff to families of people being transferred from hospital to aged care often creates expectations of treatment services that are not available in residential aged care. Aged care funding changes have focused the service on greater access for sicker people to be admitted to aged care but the level of funding is still less than 15% of funding for similarly sick people in hospital beds. Still, families now have an expectation that the same level of care and services that are available in hospital will be available in aged care, creating a fertile environment for the generation of complaints to CIS because such acute and even sub-acute care and treatment is not possible without access to hospital resources.

Some CIS investigators appear to have ill-informed expectations of what aged care can deliver. Investigators may not have had any experience in aged care environments or even understand the differences between aged care and hospital services. As a result, people working in the aged care industry have reduced confidence that CIS investigators and decision-makers can approach their tasks with fairness or evaluate the evidence with the necessary contextual acknowledgement such as people expecting to die in their own bed when they reach an advanced age.

#### **4.6 Timeliness and efficiency of CIS**

An aged care provider can receive a demand from the CIS for information that on average takes over 8 hours to compile, scan and deliver. Often the first submission of information is followed by further requests for facsimile copies of the same documents, often by different officials who are not aware that the information has been sent earlier to them. This raises concerns about the efficiency of the CIS in handling sensitive information and also whether confidentiality of information is being maintained.

Currently, it is taking up to three months for complaints to be closed out by the CIS during which time there is little or no feedback as to how the issue is progressing. As a result the person or organisation responding to the allegation is kept in a state of unnecessary stress and uncertainty which can cause staff to resign because they no longer feel trusted; hinder local efforts to set up strategies to prevent re-occurrence (because the details are not known); delay responsibilities for counselling or performance managing staff; prevent re-building relationships with the family or resident; and undermine efforts to maintain a positive approach to providing aged care services that are 'under a cloud'.

## **5. Conclusion**

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Overall the CIS as it is set up and managed does little to support quality improvement in the aged care industry and has increased the documentary and administrative burden associated with regulatory compliance. The processes used by CIS are perceived to be antagonistic to natural justice and procedural fairness and have contributed to a reduction in work satisfaction of registered nurses and others caring for older Australians in residential aged care.

### **Contact details**

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