How do I determine a care recipient’s wishes when they are named in a complaint?

Introduction
When a complaint relates to a specific care recipient, and the care recipient (or their nominated representative) is not the complainant, you should:

- make a reasonable effort to ascertain whether or not the care recipient wants the Aged Care Quality and Safety Commission (the Commission) to progress the complaint
- contact the nominated representative to ascertain the care recipient’s wishes if the care recipient is unable to make their wishes known, and
- take these views into account when assessing whether or not to progress the complaint, how to progress the complaint and what feedback is provided.

This information needs to be considered alongside other relevant information such as the risk assessment and resolution plan (RARP), the complainant’s requests for confidentiality and the Australian Privacy Principles (APPs).

Does the care recipient know a complaint is being made?
Where the complaint relates to a specific care recipient, you should ask the complainant if the care recipient or their nominated representative knows the complainant is making a complaint and if they wish us to progress the complaint.

If yes, you should advise the complainant that a complaints officer will contact the care recipient or their nominated representative to discuss the complaint and obtain their consent for the collection of personal information.

In order to communicate effectively, you should:

- ascertain if the care recipient has a cognitive, mental or physical impairment that hinders or prevents effective communication
- ask the complainant how best to communicate with the care recipient and whether they have any special communication needs
- ascertain if the complainant is the care recipient’s nominated representative or holds some formal decision making powers for the care recipient, such as guardianship, and
- collect contact details for the care recipient.

If no, you should advise the complainant that one of the factors we take into consideration in determining how to manage a complaint is to ascertain the care

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recipient’s wishes. Under the APPs, to resolve the complaint, we will need to talk to the care recipient or their nominated representative to issue a notice of collection or to obtain consent for the collection of their information, if required.

If the complainant objects to us speaking with the care recipient about the complaint you should seek to understand the complainant’s objections and discuss options for addressing these. For instance, if the complainant does not want to tell the care recipient that they have lodged a complaint because the care recipient may be too embarrassed by the complaint issues, reassure and advise the complainant of the privacy classifications that are available (open, confidential, anonymous).

How to confirm the care recipient’s nominated representative
If the care recipient has a cognitive impairment or has appointed a nominated representative, you will need to identify and contact the care recipient’s nominated representative to discuss whether they are supportive of us progressing the complaint. You can do this by contacting the provider and requesting the nominated representative’s details. You should also seek any documentation confirming this arrangement, such as a guardianship order or Power of Attorney instrument, at this time.

Refer to: Factsheet 7 - How do I know what a legally appointed representative is?

Contacting the care recipient or nominated representative
If there is no reason to not contact the care recipient or their nominated representative, you should:

- contact the care recipient or their nominated representative to discuss the complaint and any concerns that they may have in relation to us progressing that complaint. This form of initial contact will depend on the care recipient and their individual needs and abilities
- ascertain the extent to which the care recipient or their nominated representative wants to be involved in the resolution process, including participation in conciliation meetings, receiving feedback and so on, and
- ascertain whether the care recipient or their nominated representative has any concerns about us sharing information collected during the complaints resolution process about them with the complainant or provider.

What should I do when a care recipient does not wish to progress a complaint?
If a care recipient does not wish for a complaint to proceed, the delegate may decide to take no further action. Proceeding against the wishes of the care recipient should not be done without careful consideration.

Under the APPs if a care recipient does not consent to the collection, use or disclosure of their personal information for the purposes of handling their complaint, our ability to continue with a complaint may be limited. However, the APPs allow for personal information to be collected, used or disclosed without a care recipient’s consent in certain circumstances. This includes situations where we reasonably believe the particular collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual. In such circumstances the confidentiality of the care recipient should be respected and care should be taken to minimise any distress our actions may cause the care recipient.

Our reasons for continuing the complaint should be explained to the care recipient or their nominated representative with reassurance that we will take into account wherever possible the concerns raised.

What if the nominated representative or legally appointed representative does not want the complaint to continue?

If a nominated or legally appointed representative does not wish for a complaint to continue there are a number of things you must consider before deciding to take no further action for one of the reasons in section 14 or end a resolution process under section 17 of the Aged Care Quality and Safety Commission Rules 2018 (the Rules).

You should:

- obtain a copy of the relevant instrument
- be certain that the individual listed on the instrument has the necessary power to make that specific decision. For example, a financial EPOA might not have the power to make decisions about medical treatments for the care recipient, and
- be certain that the issues raised in the complaint pose no threat to the life, health or safety of any care recipient (noting that the provider still has responsibilities under the Aged Care Act 1997).

In these situations, the correct grounds for taking no further action or finalising the case is either paragraph 14(h) of the Rules – ‘an aged care consumer identified in the complaint does not wish the issue to be considered by the Commissioner’ or if a resolution process has commenced, 17(h)(vii) – ‘an aged care consumer identified in the complaint, or in the provider responsibility information, does not wish the issue to be considered by the Commissioner’.

Note: If the complainant is the nominated representative or legally appointed representative and decides to withdraw from the complaint (and we are not
proceeding with the issues in early resolution), the case should be finalised under 14(f) – 'the complaint has been withdrawn under section 12'.

**Key questions**

Questions you should consider when deciding whether or not to proceed with a complaint against a care recipient's wishes include:

- Is there any indication that the care recipient's decision has been influenced by concerns about how staff or management might react if the complaint proceeds?
- Has the care recipient demonstrated an understanding of the level of care and services that they are entitled to receive?
- Has the care recipient provided any information that suggests there may be concerns about the care and services provided?
- Could the complaint cause embarrassment to the care recipient?
- Could the complaint, if not resolved, result in a serious threat to the life, health or safety of any individual?

If a care recipient or their nominated representative expresses their wish that the complaint not proceed, a delegate may decide to take no further action. In most cases a delegate should respect the wishes of a care recipient and end the process on this basis, unless there are ongoing concerns for the safety, health or wellbeing of any care recipient within the service.

**Making a decision to take no further action**

When a delegate decides to take no further action, a care recipient or their nominated representative should be informed of this decision.

**How to correctly finalise the case**

- During the intake or the detailed assessment phase:
  - No further action under paragraph 13(1)(a) on the grounds of paragraph 14(h) of the Rules.
  - Send template 3d to the complainant and provide the care recipient or their nominated representative with feedback.

**Note:** There are some circumstances where it might be appropriate to finalise the case under 13(1)(b) instead of 14(h). However, to finalise the case under 13(1)(b) the complainant must express to us that they are satisfied and understand that they have no review rights.

For example, if the care recipient asks us not proceed as they are happy with the care they are receiving, already discussing the issues with the service, or does not want our assistance (etc.) we need to feed this back to the complainant. If the
complainant states that they are satisfied with what we have done, that the matter is being looked at, happy that the care recipient is aware and dealing with the concern/s, then we can end the complaint under 13(1)(b) and a RARP would not be required.

- **During the resolution phase:**
  - Finalise the case under section 17 on the grounds of paragraph 17(1)(h)(vii) of the Rules.
  - Send template 10b to the complainant and provide the care recipient or nominated representative with feedback.

**How to proceed with a complaint during each phase of the complaints process**

- **During the intake or detailed assessment phase:**
  - Progress the complaint to resolution under paragraph 13(1)(c) of the Rules.
  - Advise the complainant, care recipient or their nominated representative of our decision to continue with the complaint.

- **During the resolution phase:**
  - Continue resolving the complaint and advise the complainant, care recipient or their nominated representative of our decision to continue with the complaint.