



Australian Government

Department of Health

Submission

Australian Law Reform Commission

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Elder Abuse Issues Paper (47)

August 2016

INTRODUCTION

The Australian Law Reform Commission (ALRC) has invited submissions in response to its Issues Paper, *Elder Abuse – Protecting the Rights of Older Australians from Abuse*, released in June 2016.

The Issues Paper is informed by two key principles:

- the principle that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse; and
- the principle that laws and legal frameworks should provide appropriate protections and safeguards for older Australians, while minimising interference with the rights and preferences of the person.

The Department of Health (the Department) welcomes the opportunity to provide information in response to the Issues Paper. The Department's response is focussed on current arrangements in Aged Care and/or under the *Aged Care Act 1997* (the Act) and associated principles.

The Department's response makes reference to both home care and residential care packages. Home care packages provide assistance for people who need help to stay healthy and safe at home, including personal care and general support. Residential care packages include accommodation services, personal care assistance and may also provide complex care and services according to a person's care needs.

DEPARTMENT OF HEALTH

The Department is the lead government agency providing national leadership in shaping Australia's health and aged care systems, and sporting outcomes through evidence based policy, well targeted programs, and best practice regulation.

The Department ensures access to quality and affordable aged care and carer support services for older people through the provision of aged care services in a range of settings, including in residential aged care and within the home. Depending on the care provided, aged care is governed by the Act and associated principles, or through contractual arrangements.

The Department recognises the importance of protecting the rights of older Australians from abuse, whether it is physical, emotional or financial. The Department's primary responsibility in relation to elder abuse is ensuring that older people receiving Australian Government funded services receive their rightful protections provided under the Act.

The Act does not define elder abuse, however, there are provisions under the Act for compulsory reporting of allegations or suspicions of reportable assaults.

The Department has provided information regarding elder abuse on its My Aged Care website, including the World Health Organisation definition of elder abuse: "*a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person*".

RESPONSE TO SPECIFIC PROPOSALS AND QUESTIONS

Question 11 What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

To help protect residents, the *Aged Care Act 1997* (the Act) has compulsory reporting provisions. Residential aged care services must report suspicions or allegations of assaults to local police and the Department.

The Department publishes data in relation to reportable assaults in the Report on the Operation of the *Aged Care Act 1997* (ROACA). This data reflects the number of reports made by providers of residential aged care and does not reflect the number of substantiated allegations. Investigation of alleged or suspected assaults does not fall under the remit of the Department. The police are the most appropriate service to respond to reports of assault and are responsible for investigating and substantiating any allegations.

The definition of a reportable assault is set out in the aged care legislation and the Department has provided the following clarification to providers of residential aged care. A reportable assault is:

- Unreasonable use of force on a resident: Unreasonable use of force as defined in the Act is intended to capture assaults ranging from deliberate and violent physical attacks on residents to the use of unwarranted physical force on a resident. This may include hitting, punching or kicking a resident regardless of whether this causes visible harm, such as bruising.
- Unlawful sexual contact on a resident: The term ‘unlawful sexual contact’ is intended to capture any sexual contact, without consent, that is unlawful under any Commonwealth, State or Territory law. If the contact involves residents with an assessed cognitive or mental impairment, the resident may not have the ability to provide informed consent.

The ROACA is available at <https://agedcare.health.gov.au/publications-and-articles/reports/report-on-the-operation-of-the-aged-care-act-1997>.

Question 12 What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?

Several of the Department’s programs currently play a role in identifying and responding to people at risk of elder abuse. For example, My Aged Care introduced accredited training programs for the Contact Centre, Aged Care Assessment Teams and Regional Assessment Service. These courses provide information on forms of elder abuse and advise staff to follow appropriate pathways, as outlined below for each workforce, should concerns of elder abuse be detected. Please note Western Australia does not have a Commonwealth Regional Assessment Service as their Home and Community Care program has not transitioned to the national Commonwealth Home Support Programme.

- The My Aged Care Contact Centre has operating procedures in place if evidence of elder abuse is detected by staff during the registration and assessment screening process.
- Aged Care Assessment Teams (ACATs) follow their own state guidelines for home care abuse. Predominately they will refer the older person to a social worker and also recommend calling the elder abuse hotline. A fundamental requirement of an ACAT assessment is to ensure that it is comprehensive. Several components of a person's circumstances are considered during the assessment, including social factors.
- The Regional Assessment Service (RAS) facilitates access to the appropriate State and Territory contacts. As set out in their agreements with the Department, the RAS are required to develop their own standard operating procedures for identifying and escalating concerns of elder abuse.
- Since July 2015, the RAS has been using My Aged Care to conduct home support assessments face-to-face using the National Screening and Assessment Form (NSAF). The NSAF is a form designed to support the collection of information to support the screening and assessment processes. The NSAF is based on existing best practice assessment processes from around Australia and includes a number of questions that relate to the client's personal safety.

Laws and legal frameworks

Question 13 What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient?

Question 21 What changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?

Elder abuse is an issue which is not specific to Commonwealth-funded aged care services, and many aspects of elder abuse fall within the jurisdiction of State and Territory criminal laws.

The *Aged Care Act 1997* (the Act) and funding arrangements provide a framework to protect the health and wellbeing of people receiving Commonwealth-subsidised aged care and to promote high quality aged care (details of these arrangements are provided in the response to question 15). State and territory laws, including criminal laws and laws relating to guardianship, administration and powers of attorney are the way in which abuse arising from decisions made on behalf of care recipients can be addressed.

Aged care providers must identify and comply with all relevant legislation and regulations within their jurisdiction.

Question 14 What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?

The aged care consumer directed care model aims to provide the consumer with more control over the services provided to them. The Department is aware that consumers may still be vulnerable in negotiations with providers competing to supply aged care services.

In relation to safeguards, Commonwealth arrangements within aged care target information to consumers to ensure a level playing field. The *Home Care Today* website assists consumers with actively accessing information relating to resources and support services to inform their care choices. Approved providers must offer Resident Agreements which provide details on services, fees, rights and responsibilities. Additionally, the Australian Competition and Consumer Commission and State and Territory Offices of Fair Trading also provide protection against misleading and deceptive conduct, false representations and unconscionable conduct more broadly.

To further assist consumers, the Government funds aged care advocacy services through two separate programs. The National Aged Care Advocacy Program (NACAP) for consumers of Australian Government subsidised residential aged care and home care services, and the Commonwealth Home Support Programme (CHSP) for entry level support to remain living independently at home.

Through the provision of free, independent and individually focussed advocacy services the NACAP aims to support aged care consumers and empower them to apply informed decision making; have their aged care rights better understood; have their care needs optimally met and the opportunity to resolve problems and complaints.

The client advocacy services currently funded under the CHSP also aim to support consumers in accessing the care they need and in promoting the rights and interests of CHSP clients.

The total funding allocation for advocacy services across both programs is around \$7 million annually.

Quality of care and reporting

Question 15 What changes to the requirements concerning quality of care in aged care should be made to improve safeguards against elder abuse?

Question 17 What changes to the requirements for reporting assaults in aged care settings should be made to improve responses to elder abuse?

The *Aged Care Act 1997* (the Act) and funding arrangements provide a framework to protect the health and wellbeing of people receiving Commonwealth-subsidised aged care and to promote high quality aged care. The arrangements include:

- The Commonwealth determining the suitability of aged care providers prior to market entry. This includes key personnel requirements, such as disqualification of people from executive decision making positions within residential, home care and flexible care services who have been convicted of an indictable offence (including serious assault), who are insolvent, and who are of unsound mind.
- On a provider's entry to the aged care market, they must comply with the relevant quality standards that aim to protect the safety, health and wellbeing of consumers. These include having policies and procedures in place for documenting, reporting and responding to alleged or suspected reportable assaults and ensuring staff training programs and appropriate recruitment practices are in place, along with relevant police checks for all staff and volunteers.
- Except in very specific circumstances (i.e. where the incident has already been reported by other staff members or the perpetrator has a previously diagnosed cognitive or mental impairment, with a documented clinical assessment, and strategies to manage the behaviour are in place within 24 hours), all providers must report allegations or suspicions of reportable assaults (as defined in the Act) to the Police (for investigation and substantiation) and the Department. The Department may take regulatory action if an approved provider does not meet its reporting requirements or have strategies in place to reduce the risk of the situation from occurring again.
- Providers must keep consolidated records of all incidents involving allegations or suspicions of reportable assaults which can be, upon request, reviewed by the Department and the Australian Aged Care Quality Agency.
- Providers must take reasonable measures to protect the identity of any staff member who reports a reportable assault and protect them from victimisation. Residents of aged care homes, their families and advocates, visiting medical practitioners, other allied health professionals, volunteers and visitors are not afforded the same statutory protection under the aged care legislation.

The Australian Aged Care Quality Agency (Quality Agency) monitor and assess providers performance. The Quality Agency informs the Department when expected outcomes are not met. If serious risk to care recipients is identified by the Quality Agency, the service provider and Department are notified immediately.

The Department receives information about concerns in aged care services from a range of sources including the Quality Agency, the Aged Care Complaints Commissioner, and external parties. If non-compliance exists, the Department may take appropriate and proportionate regulatory action aimed at protecting care recipients and returning the provider to compliance.

Where consumers of aged care services suspect or discover instances of elder abuse, including reportable assaults, they can seek support through:

- the aged care provider, which is required to have an effective complaints mechanism in place at its services and comply with the relevant Charters of care recipients' rights and responsibilities. It is the responsibility of providers to ensure that care recipients involved in a reportable assault receive appropriate follow-up care.
- the Aged Care Complaints Commissioner, which provides a free service for people to raise concerns about the quality of care or services delivered to people who receive Commonwealth funded residential or home care services.
- the Department, which may contact the police if it develops serious concerns about the safety of care recipients, or if it receives evidence of possible criminal activity.
- the National Aged Care Advocacy Program (NACAP), which provides free, confidential advocacy support and information to consumers of Commonwealth-subsidised Home Care Packages and residential aged care services.

The Department's website publishes guidance material about compulsory reporting responsibilities. Information about elder abuse is available on the Department's My Aged Care website.

In addition to the above arrangements, providers may also choose to participate in the voluntary National Aged Care Quality Indicator Program (QI Program). The QI Program allows residential aged care facilities to collect and report on three quality indicators, including use of physical restraint, which help to measure the quality of care and services given by a provider. A national QI Program for home care is currently planned for 2017.

The Department is working with the aged care sector to develop a single quality framework across aged care that focuses on consumer engagement and better targeting regulatory activities to manage consumer risks.

In the case of the Commonwealth Home Support Programme (CHSP), all grant recipients are required to operate in line with the Home Care Standards (the Standards). The Standards sit under the Quality of Care Principles 2014 and relate to quality of care and quality of life for the provision of aged care in the community.

The Standards require CHSP service providers to demonstrate effective management processes based on a continuous improvement approach to service management, planning and delivery. This includes policies for managing staff and volunteers, regulatory compliance with funded program guidelines, relevant legislation including work health and safety legislation and professional standards and having complaint mechanisms in place. Some of the Standards relate to service access and assessment and referral practices.

The CHSP Grant Agreement currently requires reporting of serious incidents which have an adverse impact on the health and safety or wellbeing of a client or seriously affecting public confidence in CHSP. This may include incidences of elder abuse.

Question 16 In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

The Department has produced a toolkit to assist residential aged care providers to minimise the use of restraints in managing severe behaviours which may be associated with dementia.

A number of projects have also been funded to develop resources for clinicians to improve the quality use of antipsychotic medications. An example is NPS MedicineWise, which is funded to support clinicians in the quality use of medicines and has a range of resources specifically for aged care facilities.

The decision to use seclusion, physical, mechanical or chemical restraint in an aged care home or in community care is a clinical decision and must be made for each care recipient in consultation with the care recipient and/or their representative, staff and their medical practitioner.

Under the quality standards for residential aged care providers, management is required to be actively working to provide a safe and comfortable environment consistent with residents' care needs. This includes putting in place environmental strategies for avoiding the restraint of residents and ensuring residents with challenging behaviours (such as wandering) are safe.

As noted above, the Department has produced tool kits to assist staff and management working in both residential and community aged care settings to make informed decisions in relation to the use of restraints. Where restraints are justifiable, staff must comply with all other legal requirements, professional regulations and guidelines, and must operate at all times within their scope of practice.

Medical practitioners, registered and enrolled nurses and other health practitioners are bound by codes of ethics and professional conduct that they are required to comply with when providing care to older people and when responding to elder abuse. Registered health practitioners may also be required to make mandatory notifications to another health practitioner under the state/territory Health Practitioners Regulation National Law Acts. The Australian Health Practitioner Regulation Agency (AHPRA) regulates registered health practitioners in partnership with the National Boards.

Question 18 What changes to aged care complaints mechanisms should be made to improve responses to elder abuse?

Aged Care Complaints Commissioner

On 1 January 2016, the Aged Care Complaints Commissioner (Complaints Commissioner) became directly responsible for managing complaints about the care and services provided to people receiving Australian Government funded aged care in their homes and in residential aged care homes.

The Complaints Commissioner is a free national complaints resolution service and anyone can make a complaint including people receiving care, family members, friends, staff, volunteers, or professionals. The Complaints Commissioner can be contacted by phoning 1800 550 552 or by visiting the website at www.agedcarecomplaints.gov.au. Complaints may relate to any aspect of services including personal and clinical care, choice of activities, discrimination, catering, communication or the physical environment.

Question 19 What changes to the aged care sanctions regime should be made to improve responses to elder abuse?

The existing regulatory framework has a strong focus on the quality and accountability of aged care services. Under this framework, the *Aged Care Act 1997* (the Act) provides the Department with a range of powers when providers do not comply with their obligations.

Sanctions are put in place to address non-compliance with a provider's responsibilities under 4.1 (Quality of care), 4.2 (User rights) or 4.3 (Accountability) of the Act.

The current sanctions regime addresses a failure by a provider to comply with its responsibilities.

The Department can impose a range of sanctions depending on the nature of the non-compliance. The sanctions imposed will depend on the nature of the non-compliance and may include: only paying subsidy for existing care recipients (no new care recipients); requiring the appointment of an administrator and/or advisor; and the provision of training to the provider's employees.

Sanctions are imposed to protect care recipients and support approved providers to return to compliance as quickly as possible.

Question 20 What changes to the role of aged care advocacy services and the community visitors scheme should be made to improve the identification of and responses to elder abuse?

Aged care advocacy services

As part of their involvement in supporting and protecting the rights of aged care consumers, advocacy providers have established working relationships with the Aged Care Complaints Commissioner, as well as State and Territory authorities to ensure they are able to refer potential instances of elder abuse to the relevant authorities.

A number of existing advocacy providers, such as the National Elder Abuse Helplines, also have linkages to or receive funding through their relevant State and Territory body to deliver activities relating to elder abuse awareness and support.

A review of Commonwealth aged care advocacy services was undertaken in 2015. The review explored how consumers can best be supported by individual advocacy to effectively interact with the aged care system, exercise increased choice and have their rights protected. The outcomes of the review informed the redesign of the National Aged Care Advocacy Program (NACAP) to create a single, end to end aged care advocacy service accessible to all consumers of Commonwealth aged care services. The final report for the review is available from the Department's website at www.health.gov.au.

Community Visitors Scheme

The Community Visitors Scheme (CVS) provides support to older Australians by funding community-based organisations, known as 'auspices', to recruit volunteers to make regular one-on-one or group visits to consumers of Australian Government subsidised residential aged care services or one-on-one visits to Home Care Package consumers.

An aged care consumer who is socially isolated or at risk of social isolation, and whose quality of life could be improved by the companionship of a regular community visitor can be referred to the CVS.

CVS auspices are responsible for matching volunteers with consumers based on a range of consumer preferences, for example language or cultural preferences. The role of a CVS volunteer is to provide friendship and companionship to eligible aged care consumers. The role of the volunteer does not extend to monitoring, support or care services.

It is acknowledged that the relationship between a volunteer and consumer may inherently expose volunteers to issues of concern. The current Program Guidelines advise volunteers who may become aware of issues that are potentially unsafe or hazardous for the consumer to raise their concerns with the CVS auspice. The CVS auspice is then responsible for notifying the provider in the first instance.