**Submission to:**

**The Australian Law Reform Commission**

**In response to:**

**Issues Paper 47 (IP 47)**

**Elder Abuse**

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Introduction:

1. As the Aged Care Complaints Commissioner (the Complaints Commissioner) I am making this submission to the Australian Law Reform Commission (ALRC) in response to Issues Paper 47 (issues paper) on elder abuse. I thank the ALRC for this opportunity.

1. Elder abuse is a serious issue. As the ALRC will know, it can involve the physical, emotional, sexual or financial abuse or neglect of an older person by another person in a position of trust. It can occur in any situation or location such as in the family home or in residential aged care services. Responsibility for elder abuse complaints currently sits with a range of Commonwealth, State and Territory organisations. As the national aged care complaints body we see complaints that raise issues of abuse in aged care. This includes residential care and care and services delivered in peoples own homes.
2. In this submission I have provided an overview of the complaints mechanisms available to the public in relation to Australian Government funded aged care. I have also provided comments in response to questions 11, 14 and 18 of the issues paper.

Complaints mechanisms:

1. On 1 January 2016, responsibility for the former Aged Care Complaints Scheme transferred from the Australian Department of Health (the Department) to me as the Complaints Commissioner. I am appointed by the Minister of Health and Ageing. I am independent from the Department and the Australian Aged Care Quality Agency (Quality Agency). However together we are responsible for protecting the safety and wellbeing of people receiving Australian Government funded aged care services. We have referral and information sharing powers and memorandums of understanding to facilitate this.
2. My functions as set out in the *Aged Care Act 1997* (the Act) are to:
* resolve complaints about aged care services,
* educate people and aged care service providers about the best ways to handle complaints and the issues they raise, and
* provide information to the Minister in relation to any of our functions, if requested.

The Department is responsible for managing national programs in relation to regulation of approved providers and grant management for service providers, including compliance and the administration of sanctions. The Quality Agency is the independent regulator of the quality of Australian Government funded aged care services and is responsible for accrediting aged care services.

1. The Act establishes my jurisdiction as Complaints Commissioner. Specifically my team and I have the power to resolve complaints about aged care services funded by the Australian Government, such as:
* residential or respite care,
* Home Care Packages,
* Commonwealth Home Support Programme services (in all states and territories except Western Australia) and
* flexible care services including transition care, innovative care or multi-purpose services and the National Aboriginal and Torres Strait Islander Flexible Aged Care Programme.

I also have the power to commence own-initiative investigations when I receive information that I feel warrants further scrutiny.

1. Elder abuse occurs in a range of environments and is not limited to elderly people who are receiving Australian Government funded aged care services. For this reason many complaints of elder abuse fall outside of my jurisdiction and my team and I do not have any power to resolve those matters. I can only deal with issues of abuse when they involve an Australian Government funded aged care service and someone receiving care.
2. If there is an allegation of physical or sexual abuse in a residential aged care setting, the service is required under the Act to report the matter to the Department and the Police within a specified timeframe. The Department maintains a record of all mandatory reports made and is able to refer matters relating to the actions of individual aged care staff, to the state and territory health complaint entities or the Australian Health Practitioner Regulation Agency (AHPRA). If the Department is concerned about the aged care service’s management of the person receiving care or the alleged offender (if they are another person receiving care) or management of the incident, they can refer this information to me for consideration of an own-initiative investigation. Similarly, anyone who is concerned about the service’s management of an incident or of the residents involved can complain to me.
3. It should be noted that the mandatory reporting requirements under the Act only apply to residential aged care. Aged care services in the home or community or delivering flexible aged care are not required to report allegations of abuse under these arrangements.
4. When we are contacted about allegations of elder abuse and the alleged victim is receiving aged care services, we work with the aged care service and the complainant to have these concerns addressed. As noted earlier, the complaints we manage must relate to an aged care service’s responsibilities under the Act or their Agreement. Examples of complaints relating to elder abuse that we can consider include:
* Inappropriate chemical or physical restraint,
* Inappropriate use of force,
* Seclusion or not involving the person receiving care in social and other activities of the service,
* Neglect and other gaps or omissions in care, or
* Not allowing a person receiving care to make their own decisions.
1. We aim to achieve the right outcome for the person receiving care and ensure that the aged care service has appropriate systems in place to minimise the risk of repeat incidents. If it is alleged that a family member or friend is abusing a person receiving care, we cannot deal with the actions of the family member or friend but it is common for us to provide complainants and aged care services with information about state based protection services such as public guardians or financial trustees, advocacy services or the police. Similarly, if it is alleged that a staff member is abusing a person receiving care, we expect the aged care service to take immediate action to protect the victim. We will consider referring the information to the AHPRA or state based health complaints entities and the police.
2. Examples of complaints we cannot consider include complaints about who is appointed as a person’s guardian or financial decision maker or complaints about privately funded carers. In these situations it can be unclear who is responsible for assisting individuals to manage and resolve their concerns. If someone contacts us to raise a concern about an elderly person being abused whether it be financially, emotionally or otherwise, we try to help them to determine the most appropriate organisation to refer to. We may provide them with information about state or territory based public guardians or financial trustees, aged care advocacy services or the police.

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

1. As noted earlier, our window on this issue is limited to what we see through complaints about Australian Government funded aged care.
2. In our first six months (between 1 January and 30 June 2016) we received 2,153 complaints raising 5,239 issues. While there are limitations on the availability of data within our National Complaints and Compliance Information Management System (NCCIMS), within this period we recorded 113 complaint issues under the keyword ‘abuse’. This represents two per cent of all the complaint issues raised with us during this time. Of the 113 issues, 103 related to residential aged care and 10 issues related to people receiving aged care services in the community.(I note that up to a million people may be receiving Australian Government funded aged care in homes or in the community each year.)
3. These numbers do not represent all allegations of elder abuse that we receive. It must be acknowledged that defining an action as abuse is somewhat subjective. What some complainants see as abuse others may see as poor care and vice versa. Complaint issues may be recorded by us under a keyword other than ‘abuse’ depending on the circumstances and how the complainant raises their concern.
4. Further it is important to acknowledge that not all complaints of abuse may be substantiated. In the first instance they are concerns and allegations. Of the 113 issues raised with us, 44 issues were resolved to the satisfaction of the complainant. After careful assessment, we took no further action on 45 of the issues. This decision was made for various reasons, such as the issue was better dealt with by another organisation or the complainant or person receiving care did not wish for the matter to proceed. Eighteen issues proceeded to our resolution process with more than half of these being investigated. Of these issues, it was ultimately decided that a continuation of a resolution process was not warranted for eight issues, four issues were resolved to my satisfaction, three issues were resolved with the agreement of the complainant, two were withdrawn and one issue was referred to the Department and the Quality Agency. Further explanation is provided later in this submission regarding our resolution based approach and processes.
5. As residential aged care services are required to report suspicions and allegations of sexual and physical abuse to the Department, it holds the data for this rather than us. As noted earlier, where we receive associated complaints or information referrals our focus is on ensuring service providers have acted appropriately to: ensure any affected residents are safe; find out what happened; ensure it doesn’t happen again; and the right people are told.

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?

1. There are a number of safeguards currently in place such as police checks for staff, which others are better placed than me to comment on.
2. The two main concerns people raise with us, in this consumer focused environment, relate to fees and communication. It is not uncommon for people to have concerns about:
* elements of their home care package,
* their budget/monthly statements,
* the fees they are required to pay,
* their rights as a recipient of a home care package,
* how to raise a concern, and/or
* how to access advocates.
1. Information is made available to individuals through websites, meetings and information bundles when people commence services. However an individual’s first interaction with an aged care service may occur at times of stress and/or in an emergency situation. For this reason individuals may feel pressured to accept services or information verbatim and may not have time to access assistance to understand information they are provided.
2. The provision of good information at times and in a form that takes account of the individual’s needs and circumstances is another important safeguard for consumers as they exercise greater choice and control of their aged care and the associated funding. Good information, including how to raise concerns, is vital and helps to correct the power imbalance for the consumer. The provision of information must be done well, and in accordance with the requirements of informed consent in the health sector.
3. It should not only include how to raise a concern. Safe and accessible processes must be in place to facilitate this.

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

1. The Act specifies that aged care services must have an internal complaints resolution mechanism to resolve concerns about the care or services they are providing. If an individual raises a suspicion of elder abuse with their aged care service, it is expected that the service will take any necessary action to protect the person receiving care (as well as reporting it). This may include referring the matter to the police, contacting advocacy services or initiating a review of guardianship arrangements.
2. The Charters of Care Recipients Rights and Responsibilities for both residential and home care, outline care recipients’ rights and responsibilities in relation to their aged care service. It is expected that aged care services ensure that each individual receives care that does not contradict these rights, including the right to live without exploitation, abuse or neglect.
3. Where people are unable to raise or resolve their complaints with a service, they come to us. We are an outcome focused complaints service. This means that in dealing with complaints that these rights have been breached, or that services have failed to meet other responsibilities, our focus is primarily on resolution rather than sanctions on individuals or aged care services. We aim to work with the complainant and the aged care service to improve services and make a difference for the individual receiving care. This is in line with international best practice complaints handling, similar to the approach of other complaints bodies and follows a number of reviews here in Australia.
4. We have a range of measures for dealing with complaints and aim to deal with them in a timely and proportionate way. We are able to visit the service in an announced or unannounced way, to investigate a complaint. If we become concerned that an aged care service is not meeting its responsibilities under the Act or the Agreement, I can direct them to do so and they must comply. If they fail to do so, and at any time, I can refer the matter to the Department who can consider if compliance action is necessary. This may result in the application of a sanction. The Department is the only agency with the power to impose sanctions under the Act. I can also refer matters to the Quality Agency for potential action by them as part of their accreditation, monitoring and review processes and signal when I think urgency is required.
5. There are couple of areas the ALRC may wish to consider in looking at improved responses to elder abuse. Firstly, it may be useful and timely to review the provisions in the Act relating to the disclosure of protected information to see if they need adjusting to make information sharing between government and non-government agencies and across the Commonwealth and States and Territories more fluid, and to see if more information can be provided to the public. Secondly, greater co-ordination and linkage between all the various agencies may help improve responses to complaints of elder abuse.

*Disclosure of information*

1. When my team and I receive information which we feel could be better dealt with by another organisation we will refer this information on; however with the exception of referrals to the Department and the Quality Agency, this is not a simple process. Most information my team and I receive is classed as ‘protected information’ under the Act and may also be covered under the *Privacy Act 1988* or the information that relates to “the affairs of” an Australian Government funded aged care service. There are limited circumstances where my team and I can release protected information outside of a complaint resolution process. Such examples are:
* to prevent or lessen a serious risk to the safety, health or wellbeing of a person receiving care,
* in situations where professional conduct is at question,
* in criminal matters, or
* to persons specified in the *Information Principles 2014* (the CEO of the Quality Agency, the Secretary of the Department or the Aged Care Pricing Commissioner).

Incorrect disclosure of protected information is a criminal offence and may attract a penalty of up to two years imprisonment. In a case of suspected elder abuse; the timely sharing of information between relevant agencies and other aged care services, may protect an individual or individuals. In some circumstances it may also be helpful to provide greater information to the public. Very little information is able to be provided publicly now. I acknowledge that the provisions for protected information exist for a reason but I also understand it is many years since they have been reviewed. It may be time to check to ensure they are still fit for purpose and reflect modern expectations of transparency of information in an increasingly consumer driven aged care environment.

1. I am not suggesting that information is not appropriately shared between Government agencies as necessary now. However I believe there may be merit in reviewing the provisions. They may be able to be revised to better facilitate the flow of information between different agencies, services and the public as well as reflecting contemporary expectations.

*A national approach*

1. Managing aged care complaints at a national level has its advantages. Specifically, we have access to national complaints data relating to Australian Government funded aged care services and we are in a position to identify trends about aged care (at a national or state and territory level) and share this information with the Department and the Quality Agency. From a consumer’s perspective our branding is present in all aged care services, so people know who can help them when they have a complaint about aged care and we are actively working to increase our visibility and profile.

1. However we have only a limited window on elder abuse and as the ALRC has noted, there are many different agencies that can be involved. In our experience people can be confused and unsure who to go to for assistance and my staff also struggle with this at times. When an individual contacts us to complain about a matter that is outside of our scope (for example a family member taking financial advantage of an elderly person), it is not always clear who can help. This is not helped by the myriad of different State and Territory laws particularly in relation to guardianship. Due to this lack of clarity people are often left feeling helpless or frustrated and give up trying to change the situation.
2. A national approach which links the relevant agencies and differing arrangements around the country may make it easier for individuals to seek help, and for agencies like us to effectively respond to issues of elder abuse. We would certainly welcome greater clarity around who else can assist particularly when issues of elder abuse arise that are outside my scope.
3. Thank you for providing me with the opportunity to comment on this serious issue. I would be happy to meet with you again to further discuss this issue and provide further information. If you would like to clarify any of the information contained within this submission or you have any further questions please don’t hesitate to contact Ms Rachel Mathison, Manager, Education and Engagement on (03) 9921 3917 or email Rachel.Mathison@agedcarecomplaints.gov.au.



Rae Lamb

Aged Care Complaints Commissioner

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