ACSA
Aged & Community Services Australia

AUSTRALIAN LAW REFORM COMMISSION

# ELDER ABUSE – DISCUSSION PAPER

**Submission**

1 March 2017

# ABOUT ACSA

Aged & Community Services Australia (ACSA) is the leading aged care peak body supporting over 700 church, charitable and community-based, not-for-profit organisations. Not-for-profit organisations provide care and accommodation services to about one million older Australians.[1]

ACSA represents, leads and supports its members to achieve excellence in providing quality affordable housing and community and residential care services for older Australians.

Aged care providers make a significant $17.1 billion contribution to the economy by producing outputs, employing labour, paying wages and through buying goods and services.[2] This is akin to the contribution made by the residential housing, beef and dairy industries. In many regional and rural areas aged care is the largest employer, which is where the majority, if not all, providers are not-for-profit.

ACSA members are important to the community and the people they serve, and are passionate about the quality and value of the services they provide, irrespective of their size, service mix or location.

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[1] Australian Government, Department of Health, Report on the Operation of the *Aged Care Act 1997*, December 2016.
[2] Deloitte Access Economics, Australia's aged care sector: economic contribution and future directions, Aged Care Guild, June 2016.

# AUSTRALIAN LAW REFORM COMMISSION: ELDER ABUSE – DISCUSSION PAPER 83

## INTRODUCTION

Aged & Community Services Australia (ACSA) refers to its submission dated 18 August 2016 to the Issues Paper[3] and its November 2016 Elder Abuse position paper[4].

ACSA believes that elder abuse is a significant public policy issue that has devastating consequences for older people. At the very core of elder abuse is the loss of dignity and basic human rights. ACSA believes combating ageism across our society is an integral component in the prevention and recognition of elder abuse.

ACSA believes any response to elder abuse must start from a position of recognising the inherent dignity and worth of all older people, irrespective of disability or any other characteristic. Combating ageist stereotypes of older people will go a long way to setting a scene where older people are treated with the respect they deserve.

ACSA believes that Commonwealth (and State and Territory) laws should be based on the position that abuse of anyone including older people is not to be tolerated. ACSA also believes there should be a single national framework supporting these laws.

Accordingly ACSA considers Commonwealth (and State and Territory) laws should be put in place with the aim of both preventing abuse and dealing with abuse when it occurs, regardless of the age of the person being abused and the setting in which that abuse is occurring. People of all ages should have the same rights in the way these matters are handled. Having a set of clear and simple laws supported by a single national framework with consistent definitions will be easier to administer and to understand for the wide range of affected people including the person at risk of abuse or being abused, advocates, police, lawyers, staff in aged care and other facilities, educators etc. If needed, specific laws and frameworks could then be put in place based on the age of people as a subset of the general laws and framework.

ACSA is concerned that some of the proposals in the discussion paper for additional reporting, monitoring and regulation in aged care will be expensive to implement taking away much needed funding for the care of older Australians and with no certainty that abuse against older Australians will be reduced as a result. ACSA suggests that the intent behind these particular proposals would be more effectively addressed through the Government's existing quality and accreditation framework and the process currently being undertaken by the Department of Health to develop a single quality framework.

It is also important that proposals are proportionate to the risks involved noting that research shows the majority of elder abuse take place in the person's own home, with family members the most likely abusers and financial abuse being a particular issue.

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[3] http://www.acsa.asn.au/getattachment/Publications-Submissions/Submissions/0816-Submission-to-ALRC-Inquiry-into-elder-abuse.pdf.aspx?lang=en-AU

[4] http://www.acsa.asn.au/getattachment/Publications-Submissions/Position-Statements/ACSA-Elder-Abuse-Position-Statement-Nov-2016.pdf.aspx?lang=en-AU

In this submission, ACSA provides comments against section 2 – National Plan; section 3 – Powers of Investigation; section 5 – Enduring Powers of Attorney and Enduring Guardianship; section 6 – Guardianship and Financial Administration Orders; and section 11 – Aged Care.

**National Plan**

ACSA supports proposals 2-1 and 2-2.

See recommendations 1 and 7 from ACSA's November 2016 Elder Abuse position paper[5]:

> '**National Plan**
>
> 1. ACSA supports development of a National Plan to Protect the Rights of Older Australians and believes this must include:
>    - a comprehensive research program linked to policy and practice outcomes;
>    - confirmation of the role of Commonwealth-funded assessment services in assessing and case managing abuse of frail older people and people with dementia;
>    - working with Australian, State and Territory Governments to develop and implement a national elder abuse hotline, which covers all older people in community and residential care settings;
>    - reviewing existing training programs for frontline staff across key agencies involved in working with older people, such as health services, aged care services, financial services;
>    - developing appropriate new programs where needed and funding implementation of training programs to ensure comprehensive coverage; and
>    - developing and implementing a national awareness campaign to educate and to change attitudes and values.'
>
> **'Research and Data Collection**
>
> 7. A comprehensive program of research and data collection on abuse of older people should be developed. This should include consideration of funding a national prevalence survey, as well as including elder abuse items into regular reporting requirements for aged care services, accreditation and complaints bodies, law enforcement agencies and guardianship tribunals.'

**Powers of Investigation**

ACSA supports proposals 3-1 to 3-5 to give power to public advocates and public guardians to investigate elder abuse in certain circumstances.

**Enduring Powers of Attorney and Enduring Guardianship**

**Guardianship and Financial Administration Orders**

ACSA's position is set out in recommendation 2 from its November 2016 Elder Abuse position paper[6]:

[5] http://www.acsa.asn.au/getattachment/Publications-Submissions/Position-Statements/ACSA-Elder-Abuse-Position-Statement-Nov-2016.pdf.aspx?lang=en-AU

[6] http://www.acsa.asn.au/getattachment/Publications-Submissions/Position-Statements/ACSA-Elder-Abuse-Position-Statement-Nov-2016.pdf.aspx?lang=en-AU

'**Legal Framework**

2. Australian, State and Territory Governments should implement a national, consistent approach to powers of attorney and guardianship which provides for:
    - the inclusion of a copy of these documents in My Health Record (linked to My Aged Care);
    - interstate recognition;
    - a mechanism to monitor the use of private powers of attorney; and
    - education strategies to inform attorneys and the broader community about the role and functions of Power of Attorney and guardianship appointments.'

ACSA is concerned that adoption of proposals 5-1 to 5-4 in the discussion paper does not lead to an overly complicated and more expensive system that has the potential for Australians who need an enduring attorney or enduring guardian not putting one in place or not being able to find a person willing to take on the role for them with associated negative consequences. For example a national online register of enduring documents (proposal 5-1) will require the establishment and maintenance of the register and therefore both initial and ongoing costs for taxpayers, principals and enduring attorneys/guardians. Also obtaining two independent witnesses (proposal 5-4) is unlikely to be practical for many people. There are also existing mechanisms (for example My Aged Care) for recording such documents for some people. ACSA recommends that these concerns and existing mechanisms be taken into account by the Australian Law Reform Commission in preparing its final recommendations.

ACSA supports proposals 5-5 to 5-13 in the discussion paper in particular proposal 5-10 for nationally consistent laws. It will be important though that these laws are clear and simple so they are easily understood, implemented and administered. For example how will people who are ineligible to be an enduring attorney (proposal 5-7) know this and what are the implications for the principal and the independent witnesses if an ineligible person is proposed to be an enduring attorney? Implementation may involve an education and marketing process; for example My Aged Care could be a useful way to provide information.

ACSA supports the intent of proposals 6-1 and 6-2 in the discussion paper. However implementation must not be unnecessarily complicated or expensive otherwise the proposed new arrangements will not result in an improved system over existing arrangements. For example compulsory training (question 6-1) for newly-appointed non-professional guardians that is expensive and time-consuming is likely to deter people from agreeing to be a guardian.

**Aged Care**

*Proposals 11-1 and 11-2 – reportable incidents*

ACSA does not support these proposals as there are adequate existing arrangements in place and the proposals would add an unnecessary additional reporting layer and new regulatory responsibility.

The Australian Government already has in place a quality and accreditation framework to provide assurance to care recipients of aged care services that aged care providers achieve a standard of quality and focus on quality improvement.

Additional reporting layers for aged care providers will lead to the need for more staff resulting in reduced care for older Australians and/or increased costs to taxpayers and older Australians.

ACSA is strongly of the view that aged care providers should only be required to notify reportable incidents once and to the relevant authority/regulator responsible for investigating and responding to the incident. ACSA does not believe the Aged Care Complaints Commissioner is the appropriate regulator for this function. For example serious assaults and fraud, whether by

staff members or care recipients, are treated as a criminal matter for all population cohorts and aged care recipients should be afforded the same rights and have the incident reported to and investigated by the police. Compulsory reporting must not take away care recipients' rights by treating them differently to other population cohorts.

ACSA also considers that it is not appropriate for aged care staff to delve into the financial situation of care recipients to look for financial abuse. Care recipients have the right to manage their own affairs without staff interference.

Aged care providers have a duty of care to staff and to care recipients and are required by relevant legislation to take all reasonable steps to operate their businesses in a way which prevents abuse and deals with abuse should it occur. Specifically for aged care is the *Aged Care Act 1997* and associated legislative instruments including the *Quality of Care Principles 2014*.

The *Quality of Care Principles 2014* specify a number of relevant principles and standards for example:

- In relation to management systems, staffing and organisational development for residential care providers, the expected outcome for item 1.2 (regulatory compliance) requires systems to be in place to identify and ensure compliance with all relevant legislation, regulatory requirements, professional standards and guidelines (*Quality of Care Principles 2014,* Schedule 2 – Accreditation Standards, Part 1 – Management systems, staffing and organisational development);
- In relation to health and personal care in residential care - the relevant principle requires care recipients' physical and mental health to be promoted and achieved at the optimum level in partnership between each care recipient and the health care team (*Quality of Care Principles 2014,* Schedule 2 – Accreditation Standards, Part 2 – Health and personal care);
- The expected outcome for Item 4.4 (living environment) requires management of a residential care service to actively work to provide a safe and comfortable environment consistent with care recipients' care needs (*Quality of Care Principles 2014,* Schedule 2 – Accreditation Standards, Part 4 – Physical environment and safe systems).

The home care common standards in the *Quality of Care Principles 2014* require under item 1.6 (risk management) that the service provider is actively working to identify and address potential risk, to ensure the safety of service users, staff and the organisation (*Quality of Care Principles 2014,* Schedule 4 – Home Care Common Standards, Part 1 – Effective management).

The Department of Health is currently consulting with the sector on the Government's announcement to develop a single quality framework. This process includes a review of the existing four sets of aged care standards with a view to creating a single set of standards; improving information about the performance of service providers; streamlining the assessment arrangements for residential care and home care; and reviewing consumer rights and responsibilities for residential care and home care.

Any deficiencies in the existing quality and accreditation framework for aged care should be addressed through this process and not by the addition of new reporting requirements and new regulatory responsibilities.

In addition, the Department of Health, the Australian Aged Care Quality Agency and/or the Aged Care Complaints Commissioner could assist aged care providers by providing them with feedback and guidance on best practice in preventing and responding to serious incidents. If providers are supported and encouraged to identify and manage risks, it is likely this will prevent potential adverse incidents from occurring and will educate providers on the best way to respond to incidents including by keeping victims informed of progress and outcomes.

*Compulsory reporting system for residential aged care*

ACSA also recommends that there be a review of the compulsory reporting system introduced into residential aged care in 2007.

See recommendation 9 from ACSA's November 2016 Elder Abuse position paper[7]:

> '**Residential Care**
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> 9. The Australian Government must review the compulsory reporting system introduced into residential aged care in 2007. ACSA supports residential care and community care staff being made aware of their legal obligations under State and Territory legislation to report crimes such as sexual assault and physical assault. However, there is little evidence that the reporting requirement to the Australian Department of Health has been effective.'

The Aged Care Sector Committee's Red Tape Reduction Plan (2015) proposed to explore options to streamline reporting processes and minimise any red tape associated with the compulsory reporting requirements in relation to alleged reportable assaults (by Jan-June 2016). The Federal Government accepted the Red Tape Reduction Plan. ACSA believes it is imperative that the review of the compulsory reporting system is commissioned promptly. ACSA also believes it is very important that other actions in aged care are proportionate to the risks posed.

ACSA considers aged care providers should only be required to report incidents once and to the appropriate authority/regulator. There is little value in reporting when no action is taken by the agency you are reporting to. To illustrate ACSA's concerns, on 16 December 2016 in their Information for Aged Care Providers 2016/24, the Department of Health provided the following advice:

> **'Compulsory reporting of assaults and missing residents over the holiday period**
>
> The compulsory reporting phone line will not be staffed from 3 pm Friday 23 December 2016 to 8.30 am Tuesday 3 January 2017. Providers are still required to report within the legislative timeframe. Providers may leave a message but are encouraged to use the online reporting forms during this period.'

*Proposal 11-3 – Assaults by care recipients with a pre-diagnosed cognitive impairment*

While ACSA understands the rationale for proposal 11-3, ACSA is not convinced that removing the reporting exemption regarding an alleged or suspected assault committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient will lead to a reduction in elder abuse.

A change that makes mandatory the reporting of resident to resident abuse where cognitive impairment is involved will add a reporting burden (including a resource burden for police with little real benefit as experience has shown that the police are unlikely to prosecute as there is little likelihood of conviction in these circumstances) without any real likelihood that this would reduce episodes of resident to resident abuse.

While not required to be reported, it is required that the assault be recorded in the register and that within 24 hours after receipt of the allegation or the start of the suspicion, the approved provider puts in place arrangements for management of the care recipient's behaviour. The

[7] http://www.acsa.asn.au/getattachment/Publications-Submissions/Position-Statements/ACSA-Elder-Abuse-Position-Statement-Nov-2016.pdf.aspx?lang=en-AU

register and management strategies are routinely checked by the accreditation assessors at their visits to ensure compliance with these requirements.

When such an incident occurs measures are put in place to try and prevent another occurrence. For example staff will try and discover the reason for the attack and address the issue. Staff may also ensure that the care recipients involved are kept apart as much as possible eg separate dining tables, separate activities.

An ACSA member reviewed their past year Mandatory Reporting Register and noted that 26 out of 28 total reports in 2016 involved both offenders and victims to be care recipients with mental or cognitive impairment. Facility managers logged the incidents in the Mandatory Reporting Register, reviewed behavioural care plans, notified doctors and families involved in all these incidents. However, they exercised discretion not to report to the Department and the police. For some of these incidents, the Dementia Behaviour Management Advisory Service (DBMAS) was contacted and referral obtained to the Severe Behaviour Response Teams (SBRT) for timely assessment and intervention.

There is little value to report these incidents to anyone else when they cannot take any action in these situations. Instead the Government could consider additional support for aged care providers through education and consultancy programs to assist aged care providers in preventing and responding to incidents by people with a cognitive impairment.

*Proposals 11-4 to 11-5 – employment*

ACSA supports the establishment of a national employment screening process for the care of all vulnerable people. Such a process should not be limited to aged care and should not be limited to 'Australian Government funded aged care' as suggested in proposal 11-4.

See recommendation 6 from ACSA's November 2016 Elder Abuse position paper[8]:

> **'Workforce**
>
> 6. ACSA believes there is a range of options for staff screening that should be examined by an expert panel including representatives of law enforcement agencies, aged and community care employers and unions. These include improving the operation of mandatory criminal record checks, development of protection of vulnerable adult checks (as in place in the United Kingdom) and implementation of good practice in staff recruitment and supervision. The examination should look closely at the practicality, timeliness, costs and benefits of any new systems.'

However any national employment screening process needs to be proportionate to the risks being addressed and not include offences (for example minor drink driving) that are unlikely to impact on a person's ability to work with vulnerable people. The process will need to ensure people receive natural justice and have the opportunity to address any negative reports made about them.

The screening process needs to be efficient and timely so as to not delay recruitment processes. This is particularly important in aged care given current and expected future shortages of aged care workers.

[8] http://www.acsa.asn.au/getattachment/Publications-Submissions/Position-Statements/ACSA-Elder-Abuse-Position-Statement-Nov-2016.pdf.aspx?lang=en-AU

*Proposal 11-6 – Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.*

ACSA supports this proposal.

*Proposal 11-7 – restrictive practices*

ACSA supports proposal 11-7 and asks that any amended legislation identify regular reviews of restrictive practices as an additional requirement.

As noted in ACSA's submission dated 18 August 2016 to the Issues Paper[9], there are already substantial guidelines and checks and balances in place in relation to the management of chemical and physical restraints, including perimeter restraint which may be used in the management of people with dementia to ensure their safety.

The practices, if and when in place, require an assessment undertaken by a Registered Nurse and/or Doctor. For people with cognitive impairment their legal representative signs off on the practice and there is a review process for all parties in place. If the approval for restrictive practices is too onerous, people could be at risk; part of the management of the risk is about the safety of the care recipient, staff, other older people and family members.

Residential aged care facilities are only one influencer of whether a restrictive practice is used, with prescribing doctors and family members heavily involved.

*Proposal 11.8 – agreements between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters*

ACSA does not support this proposal as it is an unnecessary intervention by the Government.

ACSA supports an aged care system that is consumer driven, market based and less regulated as outlined in the Aged Care Sector Committee's Aged Care Roadmap released in 2016. This proposal is inconsistent with this approach as it seeks to override contractual arrangements between an aged care provider and a care recipient. If care recipients have concerns about the inclusion of such a clause in an agreement, they or their representative should discuss their concerns with the aged care provider.

*Proposal 11-9 – community visitors scheme*

ACSA supports this proposal provided the national guidelines: are clear and easy to understand; don't duplicate existing policies, procedures and training; and are developed in consultation with the industry.

*Proposals 11-10 and 11-11 – official visitors scheme for residential aged care*

ACSA does not support proposals 11-10 and 11-11 for the establishment of an official visitors scheme for residential aged care.

The Australian Government already has in place a quality and accreditation framework to provide assurance to care recipients of aged care services that aged care providers achieve a standard of quality and focus on quality improvement.

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[9] http://www.acsa.asn.au/getattachment/Publications-Submissions/Submissions/0816-Submission-to-ALRC-Inquiry-into-elder-abuse.pdf.aspx?lang=en-AU

ACSA's view is that as there is already a framework in place which is currently being reviewed, that any additional process as recommended in proposals 11-10 and 11-11 is unnecessary duplication, will lead to confusion and increased costs in the aged care system and potentially undermine the work of the Australian Aged Care Quality Agency (Quality Agency).

The Quality Agency is responsible for accrediting residential care services and assesses residential aged care homes against the accreditation standards. There are four principle standards and 44 expected outcomes which must be met. The Quality Agency undertakes reaccreditation audits, assessment contacts and review audits. Each home receives at least one unannounced assessment contact each year during which residents and their representatives are interviewed by the assessor. Review audits are onsite assessments of the quality of care and services provided to residents measured against the accreditation standards. These review audits may be announced or unannounced. During a review audit the Quality Agency interviews at least 10 per cent of residents or their representatives.

Concerns about the quality of aged care can also be raised with the Aged Care Complaints Commissioner.

As noted earlier, the Department of Health is currently consulting with the sector on the Government's announcement to develop a single quality framework. This process includes a review of the existing four sets of aged care standards with a view to creating a single set of standards; improving information about the performance of service providers; streamlining the assessment arrangements for residential care and home care; and reviewing consumer rights and responsibilities for residential care and home care.