**SUBMISSION TO THE**

**AUSTRALIAN LAW REFORM COMMISSION**

**Response to the Elder Abuse Discussion Paper 83**

**February 2017**

MECWACARE appreciates the opportunity to provide feedback on the *Elder Abuse Discussion Paper* prepared by the Australian Law Reform Commission (ALRC).

mecwacare is a leading not-for-profit organisation with a reputation for excellence. We have provided care to the Victorian community for over 58 years, offering residential aged care, home care packages, respite care, in-home support, community housing, community programs, disability and nursing services. We provide optimal choice for people of all ages, irrespective of financial, religious, cultural or lifestyle background.

mecwacare cares for more than 12,000 people each week across greater Melbourne and regional Victoria through a highly-integrated service network operated by more than 1,600 employees and 350 volunteers. Our staff are culturally and linguistically diverse, representing 86 nationalities and speaking 98 languages.

Our organisation believes in responding to the changing needs of the community and actively encourages and supports continuous improvement, innovation and safe service delivery.

**DISCUSSION**

***Definition of elder abuse***

mecwacare supports the view that definitions of elder abuse should be focussed upon the victim and identify that the absence of a precise and agreed definition of elder abuse is problematic. Specifically, the lack of definition prohibits the accurate measurement and monitoring of abuse and reduced detection due to lack of clarity as to what constitutes abuse [[1]](#footnote-1).

A definition of elder abuse must underpin the National Plan to enable effective implementation. mecwacare believe that this definition should be based on the widely-accepted World Health Organisation definition, taking into account different forms of abuse, including emotional, financial, medication, physical, sexual, domestic abuse and neglect[[2]](#footnote-2).

It is noted that the Discussion Paper’s observation that “unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as ‘elder abuse’”, and the subsequent comment that:

*1.77 Responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of government, and various justice system frameworks within the private sector and across non-government organisations[[3]](#footnote-3)*.

mecwacare believes that consistency must be applied across all legal frameworks to reduce confusion, and misinterpretation and enhance protection for all elderly people’s across all jurisdictions. The national Plan should provide for this consistency.

***Powers of Investigation***

mecwacare seeks clarification on the anticipated thresholds for investigation before supporting the proposal to increase powers for the Public Guardian in undertaking investigations.

We caution that changes to investigation processes should not result in duplication of strategies already facilitated through other provisions, such as the Aged Care Act 1997.

Further guidance in relation to powers of investigation and how it can be navigated is required.

Regarding other investigation mechanisms – we note that Elder Abuse helplines may have limited efficacy in the provision of support by referral to other agencies/ services with nil investigative powers and limited capacity to determine or investigate the actuality of abuse.

In the context of investigation, we believe that service providers’ legal obligations related to compulsory reporting and responsibilities concerning privacy and confidentiality of client information must be considered as part of the options for investigation.

***Aged Care Proposals***

*Proposal 11–1 Aged care legislation should establish a reportable incidents scheme. The scheme should require approved providers to notify reportable incidents to the Aged Care Complaints Commissioner, who will oversee the approved provider’s investigation of and response to those incidents.*

mecwacare strongly rejects the proposal for additional reporting. Approved providers have a duty of care enforceable through the Aged Care Act and other regulations and in the first instance should be managed through the criminal justice system and Police as care recipients have the same rights as all citizens.

This proposal to require the matter be reported to the Aged Care Complaints Commissioner appears to fundamentally change the role of the Commissioner from a complaints resolution body to that of a standards investigator. Traditionally, this compliance monitoring function has been performed Department of Health and Quality Agency and the proposal has the potential to blur the roles of these roles adding a layer of confusion.

*Proposal 11–2 The term ‘reportable assault’ in the Aged Care Act 1997 (Cth) should be replaced with ‘reportable incident’. With respect to residential care, ‘reportable incident’ should mean:(a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient; (b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or (c) an incident resulting in an unexplained serious injury to a care recipient.*

Within home care or flexible care, ‘reportable incident’ should mean a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient.

In regard to the proposed definition for part (b), mecwacare forwards that violence or exploitation ‘that is part of a pattern of abuse when committed by a care recipient toward another care recipient’ should focus on the perpetrator’s pattern of behaviour, whether or not the abuse is directed against the same co-resident each time. We support the inclusion of staff-to-resident incidents occurring in home-care settings under this mandatory reporting scheme.

Requiring providers to report resident-resident assaults, even where the perpetrator has a cognitive impairment has the potentially to significantly increase the number of reports which are made without due respect to the significance / seriousness of the injury. While the ALRC proposal only requires more serious assaults to be provided, aged care providers may report all incidents to reduce the risk of missing any that may meet the definition.

*Proposal 11–3 The exemption to reporting provided by s 53 of the Accountability Principles 2014 (Cth), regarding alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, should be removed.*

mecwacare disagrees with this proposal and requests that this proposal be reviewed with consideration of the clinical and cognitive condition of a care recipients in the discretionary reporting of incidents.

Where a resident does not have the capacity to determine intent, then no specific action will be managed against that person. As such, internal management strategies would be expected to identify the causative actions, behavioural triggers, and to action effective preventative and management strategies.

We support the need to ensure effective processes around the compulsory reporting of abuse and complaints handling. We forward, however, that such strategies should complement existing complaint mechanisms and work to strengthen the broader complaints architecture that underpins the aged care system.

*Proposal 11–4 There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of: (a) a person’s national criminal history;(b) relevant reportable incidents under the proposed reportable incidents scheme; and (c) relevant disciplinary proceedings or complaints.*

mecwacare accepts this proposal with extension to ensure any reportable incidents from the person’s prior employment in children’s and disability services are captured with potential for increased safeguarding of vulnerable care recipients and cost savings[[4]](#footnote-4).

*Proposal 11–5 A national database should be established to record the outcome and status of employment clearances.*

mecwacare supports this proposal, however the management of this system and inherent issues related to privacy of employee information needs to be considered and managed.

*Question 11–1 Where a person is the subject of an adverse finding in respect of a reportable incident, what sort of incident should automatically exclude the person from working in aged care?*

mecwacare contends that any adverse finding(s) in relation to allegations of physical assault, sexual misconduct or assault, theft and financial abuse and/or fraud, and neglect should automatically exclude the person from working in aged care. This needs to be extended to any regulatory body review and adverse finding with consideration of periods of exclusion.

*Question 11–2 How long should an employment clearance remain valid?*

mecwacare would support the clearance remaining current for a period of three to five-years.

The management of this system needs consideration related to notification and removal of employee clearance issues.

*Question 11–3 Are there further offences which should preclude a person from employment in aged care?*

Currently the Aged Care Act 1997 (Cth) precludes non-executive staff from employment in aged care if they have been convicted of murder, sexual assault or other assault where the sentence included a term of imprisonment. mecwacare proposes that any convictions for physical assault / crime against person and fraud should also prevent a person from working in the sector.

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.

mecwacare supports this proposal.

Proposal 11–7 The Aged Care Act 1997 (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:(a) when necessary to prevent physical harm; (b) to the extent necessary to prevent the harm; (c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and (d) as prescribed in a person’s behaviour management plan.

mecwacare does not support the referral to a senior external clinician with statutory authority to make restraint decisions. Aged care provider must have suitably skilled and qualified staff on site as part of compliance with the Aged care act 1988 accreditation principles. As such the home is required to have staff with sufficient skills and capacity to manage care recipient clinical needs and preferences. The definition of a prescriptive legislative requirement to regulate restrictive practices will not provide the immediate onsite advice and support for staff in the delivery of safe and competent care. Recently released NDIS Quality and Safeguarding Framework contains the new role of Senior Practitioner.[[5]](#footnote-5) It would make sense for the ALRC to consider whether this role should be extended to cover the aged-care sector for the provision of support and advice only.

Proposals 11.10 and 11.11 –

mecwacare rejects these proposals as this would add significant administrative and cost burden to the industry with duplication of processes with the Australian Aged Care Quality Agency and cost of audit. In regard to Disability Services in Victoria, Community Visitors report to the Office of Public Advocate who fund and administer the program.

**Conclusion**

mecwacare is committed to ensuring the wellbeing of all our care recipients and the broader community regarding elder abuse.

We thank the ALRC for the opportunity to review the proposals and initiatives top address elder abuse contained within the Discussion Paper.

1. ALRC. 2016. *Elder Abuse: Discussion Paper.* Page 32. [↑](#footnote-ref-1)
2. World Health Organisation. 2002. *The Toronto Declaration on the Global Prevention of Elder Abuse.* Available at: http://www.who.int/ageing/projects/elder\_abuse/alc\_toronto\_declaration\_en.pdf?ua=1 [↑](#footnote-ref-2)
3. ALRC. 2016. *Elder Abuse: Discussion Paper.* [↑](#footnote-ref-3)
4. ALRC, 2016, p. 233 [↑](#footnote-ref-4)
5. Australian Government Department of Social Services, December 2016, *NDIS Quality and Safeguarding Framework*, p. 71 [↑](#footnote-ref-5)