



27 February 2017

Professor Rosalind Croucher AM  
Australian Law Reform Commission President  
Commissioner-in-charge  
Elder Abuse Inquiry

By online.

Dear Professor Rosalind Croucher AM,

### **Australian Law Reform Commission Elder Abuse Inquiry: response to Discussion Paper released December 2016**

Having made a submission to the first stage of consultation by the Australian Law Reform Commission (ALRC) for its Elder Abuse Inquiry, in August 2016, the Australian Nursing and Midwifery Federation (ANMF) has read with interest the ALRC *Elder Abuse Discussion Paper* (Discussion Paper) released late 2016.

Approximately 30,000 ANMF members are currently employed in the aged care sector, and the issue of elder abuse is of great concern to these registered nurses, enrolled nurses and assistants in nursing. The ANMF therefore welcomes the ALRC Inquiry with its focus on 'safeguards and protections for the rights of older persons' (p39 DP83). Whatever might be the root cause of elder abuse (financial, emotional, physical or sexual), our members working in aged care observe first-hand the compromising effect this has on the person's ability to enjoy optimal health and well-being.

In response to the second stage of the consultation process and release of the Discussion Paper, the ANMF wishes to reiterate the position we submitted to the ALRC in August 2016. Further to the proposed changes we had recommended to legislation, regulation and/or facility-based policies, we again contend these are critical to establishing a safe working and care environment for health workers in the aged care sector, and, the elderly recipients of their care. Our response targets selected proposals/questions in the ALRC Discussion Paper (DP 83).

#### *National Plan*

#### ***Proposal 2-1: A National Plan to address elder abuse should be developed***

The ANMF supports the development of a National Plan (Proposal 2-1 DP 83) to address elder abuse. The essence of the issue is recognition that elder abuse does occur, and then the establishment of laws and policies which mitigate, and ultimately eradicate, such ill-treatment. A National Plan will ensure such recognition of elder abuse and provide a nationally consistent framework through which to establish credible reforms and actions for mitigation.

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### *Disclosure of elder abuse*

*Proposal 3-5: Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:*

- (a) liable, civilly, criminally or under an administrative process;*
- (b) found to have departed from standards of professional conduct;*
- (c) dismissed or threatened in the course of their employment; or*
- (d) discriminated against with respect to employment or membership in a profession or trade union.*

The ANMF supports the proposed reform to the powers of investigation of state and territory public advocates and guardians. This provides the reporting mechanism we requested for aged care workers (our nurse and assistants in nursing members) or elderly persons who fear risk of reprisal from their employer/aged care provider. Proposal 3-5 (DP 83) specifically provides the safeguard of non-discriminatory action on reporting a case/s of elder abuse.

### *Employment screening in aged care*

*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.*

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

Proposals 11-4 and 11-5 (DP 83) call for processes to be established on a national basis relating to criteria for screening of future employees within the aged care sector. The ANMF urges this national system should be consistent with the provisions of the *Health Practitioner Regulation National Law Act 2009* (National Law), rather than creating a parallel mechanism. Specifically, the National Law sets out at s55 the criteria for 'unsuitability to hold general registration'. As argued in our original submission, assistants in nursing (however titled), who make up an ever-increasing cohort of the aged care workforce, should be regulated under the current national regulatory systems for registered nurses and enrolled nurses – in order to protect the public.

Under the National Law, the 'fit and proper person' test is applied. The wider public has a level of trust with regard to who cares for them, their relatives or friends, in residential and community aged care. The public has a right to know that persons caring for them, their family or friends are fit and proper persons. This is a standard required of regulated health professionals<sup>1</sup>. The fit and proper

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<sup>1</sup> The fit and proper person test incorporates considerations of honesty, knowledge, and ability. Honesty to execute the role without malice or partiality; knowledge to know what should be done; and ability to execute the role diligently and not neglect it because of incapability. Considerations of "proper person" may incorporate aspects of credibility and conduct. As applied by the National Law and the NMBA *Code of Professional Conduct for Nurses in Australia* which sits under that Law. Available at these websites: [http://www.austlii.edu.au/au/legis/qld/consol\\_act/hprmla2009428/](http://www.austlii.edu.au/au/legis/qld/consol_act/hprmla2009428/) and <http://www.nursingmidwiferyboard.gov.au/Codes-Guidelines-Statements.aspx>

person test applied to an assistant in nursing (AIN) (however titled) working in aged care would include: the overall standard of educational preparation and training, knowledge, skills, experience, competence, diligence, judgement, character, honesty and integrity required to satisfactorily discharge their duties and responsibilities in performing aspects of delegated nursing care in aged care settings.

The information sought on 'relevant disciplinary proceedings or complaints' under Proposal 11-4 )c) (DP 83), is already available for regulated health professionals – including registered nurses and enrolled nurses, within the publicly accessible national database retained by the Australian Health Practitioner Regulation Agency (AHPRA). Were AINs to be similarly regulated, as the ANMF has argued for some time should occur, information would likewise be available on disciplinary proceedings or complaints made against this ever-increasing cohort of unregulated aged care workers.

The Professional Practice Framework (PPF)<sup>2</sup> which governs the practice of registered nurses and enrolled nurses under their national regulation, provides a nationally consistent risk mitigation mechanism for those who work in aged care. National regulation of AINs would afford a similar risk assessment mechanism.

Regarding 11-4 (a) the ANMF notes that this point only concerns a person's **national** criminal history. We refer to the Australian Health Practitioner Regulation Agency (AHPRA) Registration standard: Criminal history<sup>3</sup> for regulated health practitioners which includes national and international criminal history: "...when making a declaration about criminal history, applicants and registered health practitioners must declare their entire criminal history, from Australian and any other country, including any spent convictions."

Given that around one-third of unregulated health workers who are employed in direct care work within the aged care sector (both residential and community) were born outside Australia<sup>4</sup> the ANMF considers the criminal history declaration for this group must also encompass national and international convictions.

### *Code of conduct for aged care workers*

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<sup>2</sup> The NMBA Professional Practice Framework (PPF) includes national:

- minimum mandatory standards of education and qualifications
- standards for practice
- scope of practice
- Decision Making Framework
- Code of Ethics, Code of Professional Conduct, and professional boundaries guidelines
- registration (with publicly available register)
- mandatory reporting of misconduct by other health professionals
- notifications of unprofessional practice or health impairments affecting practice
- Registration Standards, including: Recency of Practice; Continuing Professional Development; Criminal History; Professional Indemnity Insurance Arrangements for Nurses; English Language Skills

All elements of the Framework are available at NMBA website: <http://www.nursingmidwiferyboard.gov.au>

<sup>3</sup> Australian Health Practitioner Regulation Agency. Registration standard: Criminal history. Available at: <http://www.ahpra.gov.au/Registration/Registration-Standards.aspx>

<sup>4</sup> King, D., Mavromaras, K., and Wei, Z. et al. 2012. *The Aged Care Workforce*. Canberra: Australian Government Department of Health and Ageing. (particularly sections 3.7 and 5.1.4)

*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.*

Rather than attempting to develop and apply a nationally consistent code of conduct for unregulated health care workers, efforts should be focused on appropriate inclusion of those workers within the existing regulation scheme through expanding the coverage of the National Law. A national system, consistent with the provisions of the National Law, would obviate the need to create a parallel code of conduct.

As stated, the National Law and professional practice frameworks developed in accordance with the provisions of the National Law, form the ideal model for assistants in nursing (however titled), who comprise the bulk of the aged care workforce in residential and community settings.

The ANMF agrees with the statement in the DP 83 p.234 that – “The National Code of Conduct is a ‘negative licensing scheme.’ Under this system it must be shown that harm has been perpetrated against a person, in this instance by one of the many forms of elder abuse, before any action can be taken. The ANMF argues that this retrospective mechanism for managing abusive conduct is inadequate in the protection of Australia’s frail elderly citizens who are the recipients of residential or community aged care.

Conversely, the PPF referred to above, under which registered nurses and enrolled nurses practice, provides a positive and prospective approach by including adherence to a Code of Conduct in the requirements for regulation. In addition, an annual declaration of criminal history status on renewal of registration and a formal process for complaints combine to form a robust prospective risk mitigation mechanism. The ANMF argues that as assistants in nursing provide direct care services in aged care (and this is acknowledged in the Discussion Paper, p.235) they should be covered under the same National Law and its regulations, as registered nurses and enrolled nurses working in aged care.

*Proposal 11-7 on Restrictive practices*

*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 behavior management plan.*

The ANMF understands restrictive practices may be used as a last resource in order to protect the safety of the elderly individual. ANMF members employed in the sector advise that the use of restrictive practice occurs in an environment where aged care approved providers do not provide adequate staff with the appropriate skills mix to meet all the assessed nursing care needs of this vulnerable group of older residents.

Therefore, the ANMF contends aged care legislation must include a provision that mandates the appropriate ratios of qualified nursing staff and care staff to ensure resident safety in order to mitigate against these pervasive practices.

#### *Proposals 11-10 and 11-11 - Official visitors*

*Proposal 11-10: The Aged Care Act 1997 (Cth) should provide for an 'official visitors' scheme for residential aged care. 'Official visitors' functions should be to inquire into and report on:*

- (a) whether the rights of care recipients are being upheld;*
- (b) the adequacy of information provided to care recipients about their rights, including the availability of advocacy services and complaints mechanisms; and*
- (c) concerns relating to abuse and neglect of care recipients.*

*Proposal 11-11: Official visitors should be empowered to:*

- (a) enter and inspect a residential aged care service;*
- (b) confer alone with resident and staff of a residential aged care service; and,*
- (c) make complaints or reports about suspected abuse or neglect of care recipients to appropriate persons or entities.*

The ANMF supports Proposals 11-10 and 11-11 as outlined in the DP 83. We caution that this process should be undertaken in a respectful manner by appropriately qualified assessors so that it is seen as useful to aged care recipients and staff and not 'unduly burdensome'.

#### *Staffing issues*

The ANMF acknowledges that the Aged Care Legislated Review may be "better positioned" to consider and make recommendations on staffing issues in the aged care sector, as noted on p.235 DP83. However, as argued in our initial submission, attested to by our members<sup>5</sup>, and articulated by Emeritus Professor Rhonda Nay<sup>6</sup>, elder abuse can be perpetrated through neglect brought about by the inadequacy of staffing levels and skill mix to provide necessary care to elderly people. Adequate numbers of nurses and appropriate skills mix in health and aged care environments are critical for early identification of warning signs to implement timely interventions to mitigate the risk of elder abuse.

A recent study exploring the impact of staff numbers on care provided in residential aged care argued that inadequate staffing numbers and skills mix lead to poorer care outcomes<sup>7</sup>. The study, attached, concluded that recent changes in funding and regulation of residential aged care were *likely to*

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<sup>5</sup> For example, NSW Nurses and Midwives' Association Submission 29 as cited on p.237 of DP83.

<sup>6</sup> p. 236 DP83.

<sup>7</sup> 2016 Willis, E., Price, K., Bonner, R., Henderson, J., Gibson, T., Hurley, J., Blackman, I., Toffoli, L and Currie, T. (2016) Meeting residents' care needs: A study of the requirement for nursing and personal care staff. ISBN 978-0-9943050-3-9 Australian Nursing and Midwifery Federation

*exacerbate staffing issues through greater involvement of private-for-profit providers and reduced funding for complex health care needs despite compelling evidence of increasing resident acuity and complexity occurring alongside reduced employment of nursing staff and increasing use of AINs to deliver many aspects of care*<sup>8</sup>.

In light of the extensive submissions to the ALRC concerning the connection between staffing issues and elder abuse, the ANMF contends a mere consigning of these concerns to the Aged Care Legislated Review to be a dereliction of duty by the Elder Abuse Inquiry. Of course, the inclusion of these issues raised in submissions within the Discussion Paper does assist in raising awareness to policy makers and the public. However, we assert the ALRC Elder Abuse Inquiry has a duty of care to elderly people to include a specific proposal relating to staffing in aged care, in the final report.

This submission is augmented by the separate response provided to the ALRC by the NSW Nurses and Midwives Association (our NSW Branch).

Should you require further information on this matter, please contact Julianne Bryce, Senior Federal Professional Officer, ANMF Federal Office, Melbourne on 03 96028500 or [julianne@anmf.org.au](mailto:julianne@anmf.org.au).

Yours sincerely



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<sup>8</sup> Ibid. p. 105.