Elder Care Watch

Submission on Law Reform Commission Elder Abuse Discussion Paper 83

February 2017

The Executive Director
Australian Law Reform Commission
Email: elder_abuse@alrc.gov.au

This submission relates to chapter 11 of the Discussion Paper and covers the following proposals:

Reportable incidents scheme (Proposal 11-1 to 11-3)

Employment screening (proposal 11-4 & 11-5)

Code of conduct for aged care workers (Proposal 11-6)

Restrictive practices (Proposal 11-7)

Community visitors (Proposal 11-9)

Official visitors (Proposal 11-10 & 11-11)

Reportable incidents scheme *(Proposal 11-1 to 11-3)*

The establishment of a compulsory reporting scheme with a broad definition of issues is supported by Elder Care Watch with the following qualifications:

Lack of penalties

Elder Care Watch advocates dedicated penalties for non-compliance.

The absence of penalties in this proposal, that is, penalties specific to this scheme, compounds the existing weakness in the Aged Care Complaints Scheme namely, the absence of penalties worthy of the name. It is noted that the proposed scheme would operate alongside, presumably in the same offices as, the Complaints Scheme.

Even if cases (incidents) are referred to the Department of Health, penalties in the *Aged Care Act,* such as notices of non-compliance and sanctions, are not likely to be invoked for single incidents. It is the experience of Elder Care Watch that relatives who lodge complaints just despair at the absence of penalties. It is all very well to advocate an educational function for the office of Aged Care Complaints Commissioner *"to support and advise the provider to ensure best practice ...." (Discussion Paper, para. 11.59)* but where is an equivalent concern for the sense of justice for the wronged party in cases where an adverse finding is made or a complaint upheld?

Generally, there is an imbalance in the regulation of aged care between support for *continuous improvement* and *penalties for non-compliance.* In the view of Elder Care Watch, the scales are tipped very much in favour of helping the provider. Such help is immediate. For the care recipient, penalties imposed on the provider are either non-existent or are a 'gentle slap on the wrist'. They also take time to be imposed. *(See below* ***Restrictive practices*** *for an example of the absence of penalties).*

Insufficient emphasis on transparency

Elder Care Watch advocates including a requirement of transparent reporting in the text of the proposal. The purpose is to emphasise the importance of transparency, an emphasis which is sorely needed.

The Discussion Paper states: *"The Commissioner should have the power to make recommendations, as well as publicly report on any of its operations, including in respect of particular incidents or providers" (para. 11.85).* Presumably reporting on the reportable incidents scheme would appear in the Annual Report of the Aged Care Complaints Commissioner.

Currently reporting on the Complaints Scheme is bland and fully protective of providers. The Annual Report does include case studies which help to illuminate the reality of care. However, the straightforward, sanitised cases cited belie the statement that complaints *"...continued to be highly complex, involving multiple issues"(Annual Report, 2015-2016:9).* There is no mention of broken bones, major infections or medication errors which feature prominently in anecdotal and documentary evidence. Also, no home or provider is ever identified, in colloquial terms there is no 'naming and shaming'. It is reasonable to assume that, without express requirements for transparent reporting, similar opaque reporting would occur with the operation of a reportable incidents scheme.

A proposal which included express reference to transparency in reporting on "reportable incidents" would recognise the high value of transparency to those receiving aged care and to their families and other advocates.

Employment screening *(Proposal 11-4 & 11-5)*

Elder Care Watch supports this proposal but believes that the most critical factor in effective employment screening is competent human resource management implemented by conscientious managers.

The Discussion Paper implicitly recognises this with the comment that *"Approved providers would still take other steps to establish a person's suitability, including by conducting reference checks with a person's previous employers" (para. 11.203).* This statement could be given greater emphasis because remarkably, approved providers do not always do this.

The Quakers Hill fire case

The 2011 fire at the Quakers Hill Nursing Home resulted in the deaths of 14 residents. The registered nurse who was convicted of lighting the fire had a written record of drug affected behaviour at work and gaps in his employment record. The NSW Coroner's findings note that prior to his employment at Quakers Hill the employment gap was not checked and no one from Quakers Hill got in touch with his referees or his previous employers *(Coroners Court, New South Wales, Inquiry: Fire at Quakers Hill Nursing Home, Hambledon Rd, Quakers Hill, 9 March 2015, paras. 62, 65,70-72).*

In the above instance, critical information was available from the person's previous employer but was not sought by managers.

If there is to be a national screening agency then one reportable incident that should result in the refusal of a work clearance is any incident which includes drug affected behaviour by an employee. It cannot be assumed that such an incident would always result in disciplinary proceedings and be captured in that component of the screening agency's database.

Code of conduct for aged care workers *(Proposal 11-6)*

Elder Care Watch believes that establishing a licensing system for aged care workers who provide direct care is the preferred response to the need for safety of those receiving care. Adoption of a national code of conduct is preferable to no action but it is a second-best solution.

Occupation a preferred basis for national code

If a national code is adopted it would be preferable for the code to be occupation based rather than industry based.

Existing industry code not appropriate for personal carers, especially in residential aged care

The major occupation among unregistered workers is that of 'personal carer', or 'nursing assistant' in some jurisdictions. The practice setting which employs the greatest number of such workers is residential care.

The work personal carers undertake is closely related to nursing. Traditionally this work is part of nursing duties and in some practice settings and circumstances may still be undertaken by registered nurses. In residential care, personal carers work under the direct supervision of registered nurses. The existing Code of conduct for health industry workers does not recognise this close functional relationship.

Many clauses in the Code are written from the perspective of the sole practitioner which is not relevant in much of aged care. Provisions which lack real world relevance will be less useful.

Code of conduct for aged care workers *(continued)*

National machinery preferable to State machinery

Elder Care Watch advocates national machinery for implementation of the Code. In other words, the same machinery in principle as the machinery which implements the codes applying to each of the health professions.

Aged care is regulated predominantly through federal laws. This is true for the work practices and ethical standards of all the health professional occupations. It is also true for most of their conditions of employment via the national Fair Work Commission. It would be preferable for the work practices of unregistered health workers to be regulated by national machinery instead of by the various State health complaints commissioners, however styled. The functions of these agencies are highly valued. Nonetheless they do not provide a good fit for implementing regulation which is focused on the work behaviour of employees.

Restrictive practices *(Proposal 11-7)*

Elder Care Watch strongly supports this proposal and its laudable aims as set out in *paras. 11.233 and 11.234.* Express provision in the statute regarding the management of various forms of restraint attaches appropriate high importance to this confronting issue so fundamental to human rights.

Again, as with the reportable incidents scheme, the proposal needs to be supplemented with penalties of substance for non compliance.

The existing Complaints Scheme does not provide appropriate penalties for unacceptable restraint. This is evident in two Complaints Scheme decisions involving physical restraint of the same resident: *Case ID 142894 (September 2013) and Case ID 149477(April 2014).* There was first a finding of restraint being used for lengthy periods and resident discomfort and subsequently a failure of the home to follow its own internal restraint procedure. The second decision stated: "*The provider has addressed this issue by reminding staff of their obligations to follow the procedure and the issue was also discussed at a staff meeting. The Nurse Unit Manager will continue to monitor staff compliance.....* This was the end of the matter *"....on the basis that the provider has addressed the issue to my satisfaction" (Case ID 149477, Decision:9).*

Elder Care Watch also advocates the inclusion of 'restrictive practices'as a discrete item in the Accreditation Standards *(Quality of Care Principles)* to increase the chances of compliance with both the law and policy on restraint.

Community visitors *(Proposal 11-9)*

Elder Care Watch strongly supports this proposal.

It is appropriate for the body which funds most aged care to be responsible for providing clear guidelines on what to do if community visitors have concerns about the quality of care. The present reliance on auspicing organisations is not satisfactory and invites inconsistency. Retention of these visitors' primary social role is also endorsed.

Official visitors *(Proposal 11-10 & 11-11)*

Elder Care Watch strongly supports this proposal.

There are so many nursing home residents who do not have regular visitors, either friends or family. These isolated elders are typically highly dependent and they do not have a voice,

Official visitors *(continued)*

sometimes literally. Official visitors could be their voice. Also, official visitors, just by their existence, could help to ensure that providers adhere to the proposed reportable incidents requirements.

Cumulative evidence of poor health care and the reduction in Quality Agency monitoring supports the case for official visitors

It is reasonable to anticipate opposition to this proposal from some provider organisations. One possible claim is that this component of the Commission's proposed safeguard strategy would be unduly intrusive for providers. There are two relevant points here. The first is the massive **cumulative evidence** of poor health care. This poor care is a form of abuse. The second point is the progressive reduction in the monitoring of care quality by the Aged Care Quality Agency and the inherent limitations of that monitoring.

Accreditation monitoring is being reduced as part of the current government's commitment to reducing 'red tape'. At least 50 homes in South Australia now have full accreditation audits only once every five years instead of the previous three years. This is occurring as a project known as the SA Innovation Hub trial. Reportedly, if the trial is deemed successful the reduced regulation is to be extended nation wide.

The Quality Agency's unannounced audits, despite their less comprehensive nature, are more likely to reveal the realities of day to day care than announced audits. However, due to the absence of an express requirement in the *Aged Care Act* for reports on these (unannounced) audits to be published, the reports are not available to the public. Elder Care Watch has made unsuccessful applications under the *Freedom of Information Act* to obtain a copy of such an audit report on specific homes.

Here again lack of transparency is an issue. The introduction of official visitors would help to increase the openness of a system which is relatively closed despite the fact that its operation is financed primarily from the public purse.