

1 March 2017

Our reference: ADM/2015/974

Professor Rosalind Croucher AM
President
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Professor Croucher

Australian Law Reform Commission's Elder Abuse discussion paper

Thank you for the opportunity to comment on the Australian Law Reform Commission's (ALRC) comprehensive and considered discussion paper on elder abuse. We note that significant aspects of the discussion paper are consistent with information we provided in our August 2016 submission to your Inquiry.

In particular, we welcome the proposals for:

- state and territory public advocates/ public guardians to be given the power to investigate elder abuse, including the power to investigate matters on their own motion
- aged care legislation to establish a reportable incidents scheme, overseen by the Aged Care Complaints Commissioner
- a national employment screening process for Australian Government funded aged care, including establishment of a national database to record the status and outcome of employment clearances, informed by assessment of (among other things) relevant reportable incidents under the reportable incidents scheme, and
- the *Aged Care Act 1997* (Cth) to regulate the use of restrictive practices and provide for an 'official visitors' scheme for residential aged care.

We note that the Council of Australian Governments Disability Reform Council has recently released the NDIS Quality and Safeguarding Framework, which aligns with many of the above critical elements of the ALRC's proposals. In particular, the framework includes a national disability reportable incidents scheme; a nationally consistent employment screening process for people seeking to work with people with disability; and oversight of the use of restrictive practices. We are encouraged by the accord between the recommended safeguards for people with disability and older persons, and are keen to ensure that, in the areas where it would be both practicable and appropriate, this translates to a consistent approach to vulnerable adults more broadly. Our comments in relation to the ALRC's discussion paper are directed to this end.

Compulsory reporting of abuse and complaint handling

As indicated in our previous submission, we support the introduction of a mandatory reporting scheme for serious incidents in the aged care sector, including allegations of abuse between

residents of aged care facilities. In our view, the ALRC's proposed scope of the scheme is appropriately focused on enabling older persons to live free from abuse and neglect, and we support the inclusion of the reporting of employee to client incidents in relation to home care and flexible care. In this regard, we note that, while the NSW scheme is focused on people with disability in supported group accommodation, the national disability reportable incidents scheme is intended to apply to NDIS registered providers more broadly and not be limited to supported accommodation settings.

The creation of national reportable incident schemes in relation to aged care and the NDIS (as well as the roll out of reportable conduct schemes in relation to children and young people)¹ would provide an opportunity to ensure that core and common principles which would underpin these schemes, were supported by a reasonably consistent practice framework. In our view, it would be important to ensure that the schemes benchmark off each other, and adopt a collaborative approach in seeking to both align and evolve their practice. In this regard, we would be keen to see emerge a community of leaders and practitioners in this area, who develop and promote leading practice across the three schemes, as well as advance a meaningful and lasting focus on prevention, coupled with promoting a culture of 'zero tolerance' of abuse and neglect.

Treating reportable incidents as complaints

We note the ALRC's view that reportable incidents ought to be responded to as 'complaints'. While we support the proposed role of the Aged Care Complaints Commissioner in relation to the scheme, in our experience it is critical to distinguish complaints processes from the handling of reportable incidents (including the nature of the response required by service providers and the oversight body).

Outcomes from the disability reportable incidents scheme

To assist the Commission, we have attached updated data from the disability reportable incidents scheme, including information on significant outcomes arising from employee to client and client to client matters (see Attachment 1).

The snapshot of significant outcomes identifies that:

- In relation to employee to client matters, even when there may not be a remedy available via the criminal justice system (noting that it is an allegation-based scheme, and not every allegation is about criminal behaviour), there can still be effective and appropriate responses. In this regard, we note that in one-third of all matters involving abuse and/or mistreatment by a staff member towards a client, there has been a finding of unacceptable behaviour on the part of the involved employee, and a range of management action has been taken. Among other things, 90 employees have been dismissed or permitted to resign ahead of action being taken against them, and 50 employees have been subject to performance management. In the vast majority (91%) of matters, action has been taken to improve the support and circumstances of the alleged victim.

¹ Recently, there has been a call for the reportable conduct scheme to be rolled out nationally. Relevant to this issue, in August 2016, the ACT Government passed legislation to establish a reportable conduct scheme. We understand that Victoria intends to commence its own scheme this year. We have also been approached by Queensland in relation to the potential for the scheme to be rolled out in that State. All of these initiatives have been taking place in the context of the COAG resolution on 1 April 2016, which stated: 'COAG welcomed Chief Minister Barr's proposal for nationally harmonised reportable conduct schemes to improve oversight of responses to allegations of child abuse and neglect. COAG agreed, in-principle, to harmonise reportable conduct schemes, similar to the current model in operation in NSW and announced in the ACT and Victoria.'

- In relation to client to client matters, a range of outcomes have been achieved to better support people with disability living in supported accommodation. These outcomes include enhanced risk assessment and management strategies; obtaining new accommodation better suited to the needs of the client; improved behaviour, medical, and psychological support; and better supervision.

The scheme has also prompted changes in the way that services conduct investigations, and respond to risk, when allegations of abuse or neglect of a person with disability arise. In many cases, the scheme has led to improved outcomes for the involved residents.

Employment screening

We are pleased to see the proposed inclusion of a national employment screening system for Commonwealth funded aged care, and remain of the view that there is strong merit in developing a consistent national approach to screening in relation to people seeking to work with vulnerable people more broadly (children, aged care, and disability support). While we appreciate that this is beyond the scope of the ALRC's inquiry, it will be important to ensure that the development of the aged care employment screening system is informed by the scope and operation of screening systems relating to children/ vulnerable people, including the planned screening system for the NDIS. In the absence of a national screening system for vulnerable people, we are keen to see alignment between the screening systems operating across the states and territories – including in relation to the issues raised by the Commission regarding assessment of risk, the barring of employees, and the proposed duration of employment clearances.

National Plan

We appreciate the attendance of key ALRC staff at our forum on *Addressing the abuse, neglect and exploitation of people with disability*, which was held in late November 2016. Over 500 people attended the event, which included sessions on the abuse, neglect and exploitation of people with disability in community settings (such as the family home). These sessions noted the need for an effective framework to respond to these issues in order to better protect those who are vulnerable and living in the community. In response, we made a commitment to do what we could to advocate for a more robust framework for this particularly vulnerable cohort. Should it assist the Commission, we would be happy to brief a representative of your agency on the action we have taken consistent with our commitment.

We welcome the ALRC's proposal for the development of a National Plan to address elder abuse, including its principal goal to promote the autonomy and agency of older people. However, we consider that there is a significant opportunity to explore the potential of a national plan to address the abuse of vulnerable adults more broadly. As indicated at our forum, a standing Inquiry that we have been conducting into the abuse, neglect and exploitation of adults with disability who are living in the community,² illustrates why any overarching policy and practice framework which is developed to respond to vulnerable adults, should not be limited to vulnerable older people.

Our Inquiry has also shown that providing an effective interagency response to this issue can be relatively straightforward, provided that the body taking the lead role has access to the right information, adequate powers, and the cooperation and support of key government and non-government stakeholders. In this regard, we strongly support the ALRC's proposals for improving the response to suspected elder abuse by expanding the role of state and territory

² Inquiry conducted under section 11(1)(e) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

public advocates/guardians to include an investigative function, with appropriate powers to require the provision of information. In our view, it will be important to ensure that the investigative role of public advocates/guardians is not limited to suspected elder abuse, but also applies to other vulnerable adults in the community (including those people with disability who are experiencing, or at risk of, abuse, neglect, and/or exploitation).

Communication intermediaries

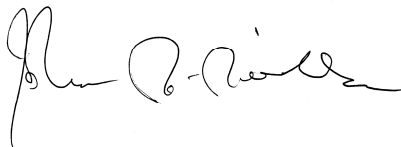
As you would be aware, the NSW Government is currently piloting the use of witness intermediaries for children and young people in relation to sexual abuse cases.³ The attendees at our abuse and neglect forum in November heard from senior members of the NSW Police Force that the current trial in relation to children and young people is producing highly positive outcomes. In addition, this issue is being considered by the Royal Commission and we are also examining the use of intermediaries as part of our current review of Joint Investigative Response Teams.⁴

A key issue raised in the forum was the need for intermediaries in adult criminal investigations/prosecutions involving people with disability in need of communication support. It appears that this would also be an important resource for older persons who require communication support. In our view, there would be merit in the ALRC considering the inclusion of communication intermediaries as a key element of the proposed National Plan.

As noted in our previous submission, we are currently undertaking substantial work to develop guidance for investigators on obtaining 'best evidence' from people with cognitive impairment who are the subject of, or witnesses to, alleged abuse – including engaging Professor Penny Cooper, an international expert on communication intermediaries, to assist with this work. We would be happy to provide further information to the Commission about our work in this area, and our discussions with relevant parties about a communication intermediary scheme for adults who require communication support.

Please contact Kathryn McKenzie, Director Disability, on kmckenzie@ombo.nsw.gov.au or 9286 0984 if you have any questions or require further information.

Yours sincerely



**Professor John McMillan AO
Acting NSW Ombudsman**



**Steve Kinmond
NSW Community and Disability Services Commissioner
Deputy Ombudsman**

³ Section 88 of the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*

⁴ Joint Investigative Response Teams (JIRTs) are NSW's multi-agency teams for responding to the most serious forms of child abuse.

Attachment 1: NSW disability reportable incidents scheme data

Table 1: Disability reportable incident notifications, 3 December 2014 – 21 February 2017

Type of reportable incident	No. notifications	%
Employee to client	734	50%
Client to client	522	35%
Unexplained serious injury	220	15%
Breach of AVO	5	0%
Total	1481	100%

Table 2: Employee to client notifications, 3 December 2014 – 21 February 2017⁵

Alleged conduct	No. notifications	%
Physical assault	237	37%
Neglect	177	28%
Ill-treatment	116	18%
Sexual offence	52	8%
Sexual misconduct	32	5%
Fraud	18	3%
Reportable conviction	1	0%
Total	633	100%⁶

⁵ This table excludes 101 employee to client notifications that were subsequently deemed to be outside the jurisdiction of the disability reportable incidents scheme.

⁶ As percentages have been rounded up, the total may not equal 100%.

Table 3: Client to client notifications, 3 December 2014 – 21 February 2017⁷

Alleged conduct	No. notifications	%
Pattern of abuse	244	49%
Sexual offence	107	22%
Assault causing serious injury	96	19%
Assault involving use of weapon	50	10%
Total	497	100%

Table 4: Main types of unexplained serious injuries notified, 3 December 2014 – 21 February 2017⁸

Type of serious injury	No. notifications	%
Fracture	73	33%
Serious bruising	64	29%
Serious laceration	19	9%
Head injury	10	5%
Eye injury	6	3%

Significant outcomes – allegations against employees

- Sustained findings in one-third (33%) of the matters against employees
- 22 criminal charges against 17 individuals (10 physical assaults, four indecent assaults, three acts of indecency, three fraud offences, and two sexual assaults)
- Management action taken in 76% of finalised matters, including:
 - 54 employees dismissed
 - 36 employees permitted to resign
 - 31 employees placed in restricted or altered duties
 - 32 employees issued with a warning
 - 28 employees counselled
 - 50 employees subject to performance management

⁷ This table excludes 25 client to client notifications that were subsequently deemed to be outside the jurisdiction of the disability reportable incidents scheme.

⁸ This table shows the main types of unexplained serious injuries notified under the disability reportable incidents scheme; it does not include all unexplained serious injury notifications. The percentage is based on the total of 220 unexplained serious injury notifications.

- 83 employees provided with training
- Action taken to improve support/ circumstances of the alleged victim in 91% of finalised matters

Significant outcomes – client to client notifications

Key changes and outcomes from notifications of client to client incidents have included:

- Development or review of 104 behaviour support plans
- 68 instances of increased supervision or monitoring of the client subject of allegation
- New accommodation obtained on 41 occasions
- Review of the support needs of the client subject of allegation on 41 occasions
- Increased behaviour support on 30 occasions
- Clinical/medical support obtained on 18 occasions
- Restricted practice reviewed on five occasions