**I AUSTRALIAN LAW REFORM COMMISSION: ISSUES PAPER 47 ELDER ABUSE**

**QUESTION 21**

**What other changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?**

**A *Introduction***

1. My name is Tom Lettenmaier; I have a Bachelor of Philosophy from the University of Notre Dame and am in my final year of study of a Bachelor of Laws from Murdoch University. I am interested in ethics and human rights.

**B *Submissions***

1. The following submissions to the Australian Law Reform Commission (the “ALRC”) address question 21.
2. Aged care’s legal framework inadequately protects the sexual rights, and therefore sexual health, of aged care users. This failure causes harm and distress and constitutes an abuse.
3. The law surrounding sexual rights and aged care should be reformed to provide a safeguard against elder abuse.

**1 *Legislative framework***

1. Aged care is regulated by the *Aged Care Act 1997* (Cth) (the “AC Act”). The *User Rights Principles 2014* and *Quality of Care Principles 2014* (the “UR Principles” and “QC Principles” respectively)are legislative instruments made under the AC Act. Section 54-1 of the AC Act requires aged care providers to provide care and services in accordance with the UR and QC Principles.[[1]](#footnote-1)

**2 *Sexual rights***

1. Elderly people have sexual needs.[[2]](#footnote-2) Sexuality and intimacy are fundamentally important to a person’s life. The World Health Organisation described sexuality as “a central aspect of being human throughout life intimacy”[[3]](#footnote-3) In the same report, sexual health was defined as requiring a positive and respectful approach to sexual relationships, and the possibility of having pleasurable and safe sexual experiences, as well as the absence disease or dysfunction.

**3 *Elder abuse***

1. As set out by the ALRC, the World Health Organisations defined elder abuse as:[[4]](#footnote-4)

Elder abuse can be defined as ‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person’.

1. Presently the law fails to protect the elderly’s sexual rights whilst in aged care. Regardless of whether by intentional act or omission the failure to meet a basic need causes harm and distress and is abuse. This is because sexual health is fundamentally linked to the physical and mental health of all people, including the elderly.[[5]](#footnote-5) Negatively affected sexual activity is a strong predictor of depression.[[6]](#footnote-6) It should be given the utmost consideration when determining adequacy of care for the elderly.
2. Some examples of failures by aged care providers are:
   1. separating partnered residents into different rooms or single beds;
   2. not respecting privacy eg. refusing to allow doors to be closed, ignoring ‘do not disturb’ signs; and
   3. chemical depression of sexual activity. [[7]](#footnote-7)
3. The majority of aged care providers do not have any institutional policy or information regarding sexual rights. Sexual rights are not being given institutional recognition.[[8]](#footnote-8)

**4 *Reform***

1. The ALRC has already recognised the importance of protecting a person’s sexual rights in their investigation into Equality, Capacity and Disability. These submissions draw on those comments.[[9]](#footnote-9) However, in that report the Commission did not make recommendations as the issues arose at a state and territory level and therefore were out of the scope of the report, and the key to addressing them was outside the limits of the law and required cultural change.[[10]](#footnote-10)
2. However, the ALRC should make recommendations in this case. Firstly, the issue is within the responsibility of the ALRC, as Commonwealth law plays a significant role in aged care. Secondly, whilst countering prejudicial attitudes does require cultural change; legislative change is an important lever on society and can be a step to engendering cultural change.[[11]](#footnote-11) In that respect it should be noted that the legislation already works to protect two important aspects of sexual rights:
   1. reporting sexual assaults;[[12]](#footnote-12) and
   2. the special needs of LGBTI people in aged care.[[13]](#footnote-13)
3. The ALRC should have serious regard to the following government sources as set out in the article *Conflicting Agendas: The Politics of Sex in Aged Care[[14]](#footnote-14)*:
   1. 1974-77: Royal Commission on Human Relationships in which former High Court Justice, Commissioner Evatt found that aged care providers “too often ignore [old people’s] sexual needs, even to the point of separating husbands and wives” recommending that institutions provide information, rehabilitation and education in sexual matters; and
   2. 1982-87: Residents’ rights which found that partnered residents in aged care had the right to have their sexual needs accepted and treated with respect.
4. Despite the findings of those two commissions there has been no substantial improvement in regulatory protection of sexual rights of the elderly: the legal framework for aged care still fails to adequately protect the sexual rights of aged care users.
5. The following recommendations should be considered:
   1. the AC Act and UR and QC Principles should be amended to expressly provide for care and consideration to be given to sexual rights;[[15]](#footnote-15) and
   2. government policy should promote aged care providers having comprehensive institutional policies to promote and respect sexual rights.[[16]](#footnote-16)

**BIBLIOGRAPHY**

**A *Articles/Books/Reports***

Alison Rahn et al, ‘*Conflicting agendas: the politics of sex in aged care*’ 10 *Elder Law Review* 1, 3 and 7

Catherine Barrett, ‘Auditing organisational capacity to promote the sexual health of older people’ (2011) 7(1) *Electronic Journal of Applied Psychology* 31

Kenworthey Blitz and Janice Nadler, ‘Law, Moral Attitudes and Behavioral Change to appear in the Oxford Handbook of Behavioral Economics and the Law’ (Public law and Legal Theory Research Paper 13-25, Northwestern University School of Law, June 2013)

Lynelle Briggs, *Changing behaviour: A public policy perspective* (14 December 2015) Australian Public Service Commission < http://www.apsc.gov.au/publications-and-media/archive/publications-archive/changing-behaviour>

Michael Bauer et al, ‘Catering to Love, Sex and Intimacy in Residential Aged Care: What Information is Provided to Consumers?’ (2009) 27(1) *Sexuality and Disability* 3-9

*Old-age ‘tsar promotes sex* (13 September 2001) BBC News < http://news.bbc.co.uk/2/hi/health/1541706.stm>

Samantha Selinger-Morris, *The seniors leading Australia’s latest sexual revolution* (2 August 2016) ABC News < <http://www.abc.net.au/news/2016-08-02/seniors-leading-australias-sexual-revolution/7681008>>;

Sharron Hinchcliff, *When it comes to older people and sex, doctors put their heads in the sand* (19 June 2015) The Conversation < https://theconversation.com/when-it-comes-to-older-people-and-sex-doctors-put-their-heads-in-the-sand-43556>

Winnie Hu, ‘Too Old for Sex? Not at this Nursing Home’, *The New York Times* (online), 12 July 2016 < http://www.nytimes.com/2016/07/13/nyregion/too-old-for-sex-not-at-this-nursing-home.html?\_r=1>

**B *Legislation***

*Aged Care Act 1997* (Cth)

*User Rights Principles 2014* (Cth)

*Quality of Care Principles 2014* (Cth)

**C *Other***

‘Defining sexual health: Report of a technical consultation on sexual health’ (Research Report, World Health Organisation, 28-31 January 2002)

Australian Law Reform Commission, *Elder Abuse* Issues Paper No 47 (2016)

Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* Report No 124 (2014)

Policies and Procedures concerning sexual expression at the Hebrew Home at Riverdale April 2013, Bauer, M., Fetherstonhaugh, D., Nay, R., Tarzia, L. & Beattie, E (2013). Sexuality Assessment Tool (SexAT) for residential aged care facilities

1. See eg. QC Principles Sch.1 [↑](#footnote-ref-1)
2. See Samantha Selinger-Morris, *The seniors leading Australia’s latest sexual revolution* (2 August 2016) ABC News < <http://www.abc.net.au/news/2016-08-02/seniors-leading-australias-sexual-revolution/7681008>>; Sharron Hinchcliff, *When it comes to older people and sex, doctors put their heads in the sand* (19 June 2015) The Conversation < https://theconversation.com/when-it-comes-to-older-people-and-sex-doctors-put-their-heads-in-the-sand-43556> and Winnie Hu, ‘Too Old for Sex? Not at this Nursing Home’, *The New York Times* (online), 12 July 2016 < http://www.nytimes.com/2016/07/13/nyregion/too-old-for-sex-not-at-this-nursing-home.html?\_r=1> [↑](#footnote-ref-2)
3. ‘Defining sexual health: Report of a technical consultation on sexual health’ (Research Report, World Health Organisation, 28-31 January 2002) 5 quoted in Catherine Barrett, ‘Auditing organisational capacity to promote the sexual health of older people’ (2011) 7(1) *Electronic Journal of Applied Psychology* 31 [↑](#footnote-ref-3)
4. Australian Law Reform Commission, *Elder Abuse* Issues Paper No 47 (2016), [15] [↑](#footnote-ref-4)
5. Catherine Barrett, ‘Auditing organisational capacity to promote the sexual health of older people’ (2011) 7(1) *Electronic Journal of Applied Psychology* 31, 31, see also *Old-age ‘tsar promotes sex* (13 September 2001) BBC News < http://news.bbc.co.uk/2/hi/health/1541706.stm> [↑](#footnote-ref-5)
6. Ibid, 32. [↑](#footnote-ref-6)
7. Alison Rahn et al, ‘*Conflicting agendas: the politics of sex in aged care*’ 10 *Elder Law Review* 1, 3 and 7 [↑](#footnote-ref-7)
8. Michael Bauer et al, ‘Catering to Love, Sex and Intimacy in Residential Aged Care: What Information is Provided to Consumers?’ (2009) 27(1) *Sexuality and Disability* 3-9 [↑](#footnote-ref-8)
9. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* Report No 124 (2014), 11.47-11.49 [↑](#footnote-ref-9)
10. Ibid [↑](#footnote-ref-10)
11. Kenworthey Blitz and Janice Nadler, ‘Law, Moral Attitudes and Behavioral Change to appear in the Oxford Handbook of Behavioral Economics and the Law’ (Public law and Legal Theory Research Paper 13-25, Northwestern University School of Law, June 2013), 1 and Lynelle Briggs, *Changing behaviour: A public policy perspective* (14 December 2015) Australian Public Service Commission < http://www.apsc.gov.au/publications-and-media/archive/publications-archive/changing-behaviour> [↑](#footnote-ref-11)
12. AC Act Part 4.3 [↑](#footnote-ref-12)
13. Ibid s.11-3 [↑](#footnote-ref-13)
14. Rahn et al, above n 7, 8-11 [↑](#footnote-ref-14)
15. See Rahn et al, above n7 21 [↑](#footnote-ref-15)
16. See eg. Policies and Procedures concerning sexual expression at the Hebrew Home at Riverdale April 2013, Bauer, M., Fetherstonhaugh, D., Nay, R., Tarzia, L. & Beattie, E (2013). Sexuality Assessment Tool (SexAT) for residential aged care facilities and Barrett, as above n 5, Appendix A [↑](#footnote-ref-16)