



**Australian Government**

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**Australian Law Reform Commission**

Mr Tim Brennan  
Inquiry Secretary  
Standing Committee on Health, Aged Care and Sport  
Department of the House of Representatives  
PO Box 6021; R2.118 Parliament House  
Canberra ACT 2600  
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6 February 2018

Dear Mr Brennan,

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to the Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia.

The ALRC completed an inquiry into elder abuse on 31 May 2017: *Elder Abuse—A National Legal Response* (ALRC Report 131). The concerns of that Inquiry had considerable overlap with the Committee's current Inquiry into the quality of care in residential aged care. This submission outlines relevant recommendations from the Elder Abuse Inquiry for the Committee's information.

The ALRC recommended a number of reforms to aged care laws and legal frameworks to address abuse and neglect in aged care. It recommended:

- establishing a serious incident response scheme in aged care legislation;
- reforms relating to staffing in aged care;
- regulating the use of restrictive practices in aged care;
- reforms relating to decision making in aged care; and
- national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.

As with prevalence of elder abuse in the community, there is limited research about the rates of abuse of those receiving aged care. Nevertheless, the ALRC received submissions which include reports of many instances of abuse of people receiving aged care. These included reports of abuse by paid care workers and other residents of care homes, as well as by family members and/or appointed decision makers of care recipients. The ALRC also received reports of other forms of abuse, including sexual and financial abuse. Restrictions on movement and visitation were also reported. Many submissions also identified neglect of care recipients.

**Responses to serious incidents of abuse and neglect**

The existing requirements for reporting allegations of abuse were criticised by most submitters to the ALRC on the basis that the requirements are ineffective in preventing assaults and that the requirements focus too much on reporting abuse rather than responding to, and addressing, incidents of abuse. Accordingly, the ALRC recommended a new approach to serious incidents of abuse and neglect in aged care that focuses on requiring an investigation and response to incidents by aged care providers. This investigation and response should be monitored by an independent oversight body.<sup>1</sup> The recommended design of the scheme is informed by the

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<sup>1</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 83 (2016) recs 4–1, 4–2.

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disability reportable incidents scheme for disability services in NSW—overseen by the NSW Ombudsman—and the serious incident reporting scheme planned for the National Disability Insurance Scheme (NDIS).

The recommendations extend the incidents required to be reported under the current regime. The effect of the recommendations is to:

- require home care providers to report and respond to serious incidents, when committed by staff;
- extend the types of incidents to be reported to include financial abuse—and, in residential care, seriously inappropriate, improper, inhumane or cruel treatment, as well as unexplained serious injury and neglect;
- require the reporting of instances of resident-on-resident violence in residential aged care, where they reach a higher threshold of seriousness.<sup>2</sup>

The ALRC also recommended that acts or omissions causing harm that is trivial or negligible not be considered ‘serious incidents’, to respond to concerns that time and resources would be unduly used to respond to and oversee the management of non-serious matters if a reporting regime applied to them.<sup>3</sup>

The ALRC notes that in October 2017 an independent review of national aged care quality regulatory processes, led by Ms Kate Carnell AO and Professor Ron Paterson ONZM (the Carnell/Paterson review), endorsed the ALRC’s recommendation that there be a serious incident response scheme in aged care.<sup>4</sup>

### **The aged care workforce**

A safe, qualified aged care workforce in sufficient numbers is an essential safeguard against elder abuse in aged care. Significant concerns were raised in the Inquiry that current staffing practices in residential aged care involve staffing levels that are so inadequate as to result in neglect of care recipients. The ALRC recommended that the Department of Health (Cth) should commission an independent evaluation of research on optimal staffing models and levels in aged care. The results of this evaluation should be made public and used to assess the adequacy of staffing in residential aged care against legislative standards.<sup>5</sup>

The ALRC recommended that unregistered aged care workers who provide personal care should be subject to state and territory legislation giving effect to the National Code of Conduct for Health Care Workers.<sup>6</sup> The National Code of Conduct will set national standards against which disciplinary action can be taken and, if necessary, a prohibition order issued, in circumstances where a health care worker’s continued practice presents a serious risk to public health and safety.

The ALRC also recommended that people wishing to work or volunteer in Commonwealth-regulated aged care should be required to undergo employment screening by a screening agency. The employment screening process should assess a person’s criminal history, any adverse findings made about the applicant that resulted from the reporting of a serious incident, as well as any findings from disciplinary or complaint action taken by registration or complaint handling bodies.<sup>7</sup>

### **Restrictive practices**

There was widespread concern in submissions to the ALRC that restrictive practices, and especially chemical restraint, are inappropriately used in aged care. The ALRC recommended that the use of these practices in residential aged care facilities be regulated in the *Aged Care Act* to discourage the use of restrictive practices and set a clear and high standard, so that the practices are subject to proper safeguards and only used when strictly necessary. In addition to explicitly recommending that restrictive practices only be used as a last resort, the

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<sup>2</sup> Ibid rec 4–3.

<sup>3</sup> Ibid rec 4–5.

<sup>4</sup> Kate Carnell and Ron Paterson, *Review of National Aged Care Quality Regulatory Processes* (Department of Health (Cth), 2017) 112, rec 6.

<sup>5</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 83 (2016) rec 4–7.

<sup>6</sup> Ibid rec 4–8.

<sup>7</sup> Ibid rec 4–9.

ALRC also recommended that they be used only to prevent *serious* physical harm.<sup>8</sup> This would mean that restrictive practices are used less frequently and only when appropriate.

The ALRC also recommended the consideration of further safeguards including:

- establishing an independent Senior Practitioner for aged care, to provide expert leadership on and oversight of the use of restrictive practices;
- requiring aged care providers to record and report the use of restrictive practices in residential aged care; and
- consistently regulating the use of restrictive practices in aged care and the National Disability Insurance Scheme.<sup>9</sup>

The ALRC notes that the Carnell/Paterson review made similar recommendations relating to the regulation of restrictive practices.<sup>10</sup>

### **Decision making**

In its 2014 Report, *Equality, Capacity and Disability in Commonwealth Laws*, the ALRC recommended that aged care laws and legal frameworks should be amended consistently with the National Decision-Making Principles that were developed in that Report.<sup>11</sup> These Principles emphasise the equal rights of all adults to make decisions that affect their lives, and prescribe that the will, preferences and rights of a person who may require decision-making support must direct these decisions.

In the *Elder Abuse* Report, the ALRC recommended that the Australian Government further consider amending aged care legislation in line with the National Decision-Making Principles.<sup>12</sup> Doing so would provide a consistent approach to supported decision making, and offer an important safeguard against abuse for older people receiving aged care. It would provide clear statutory guidance for decision making, with the starting point that the older person's will, preferences and rights should guide decisions made regarding their care.

The ALRC also recommended that aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.<sup>13</sup> The ALRC considered that, while advance planning for decision-making support in aged care should be encouraged, appointing a representative decision maker should not be *required* as a condition of receipt of aged care.

### **Community visitors scheme**

The 'community visitors scheme' (CVS) is a scheme in which recipients of both residential and home care, who are socially isolated or at risk of social isolation, are matched with volunteer visitors. Volunteers are coordinated by organisations funded by the Australian Government (auspices). Community visitors are not advocates, and are directed to report any concerns they have about care to their auspicing organisation. The ALRC did not recommend any change to the community visitors' primary function—providing companionship. However, it did recommend that national guidelines applying to the CVS be developed, with standardised policies and procedures for visitors to follow where they become aware of abuse or neglect.<sup>14</sup>

We trust this submission is of assistance. If you require any further information, please do not hesitate to contact the ALRC.

Yours sincerely,

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<sup>8</sup> Ibid rec 4–10.

<sup>9</sup> Ibid rec 4–11.

<sup>10</sup> Carnell and Paterson, above n 4, rec 7.

<sup>11</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 6–2.

<sup>12</sup> Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 83 (2016) rec 4–12.

<sup>13</sup> Ibid rec 4–13.

<sup>14</sup> Ibid rec 4–14.