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Elder Abuse: One Report Too Many?

Results of the ACSA online survey on compulsory reporting of assaults

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Among the string of Federal Government regulatory initiatives in residential aged care in recent years was the introduction of compulsory reporting of assaults of residents from July 2007 (Productivity Commission 2009). In 2006, ABC Lateline revealed an account of sexual assault of residents in a Victorian aged care home, mixed in with dubious allegations of poor practice from disaffected staff at another facility.

As the then Minister for Ageing said, compulsory reporting "was one element of the Howard Government's $100 million response to the small number of serious instances of abuse of the elderly which came to light early in 2006." *(Senator Santoro, media release 5 January 2007).*

Compulsory reporting for residential care

Under changes to the *Aged Care Act*2, physical or sexual assaults on residents by staff, residents or others were to be reported to the new Office of Aged Care Quality & Compliance established in the Australian Department of Health & Ageing (DoHA) to oversee the new Complaints Investigation Scheme. Originally this office was funded to the tune of $90m for an additional 100 staff. As of June 2009, there were 156 staff working on the Complaints Investigation Scheme.

The new legislation required reporting of allegations or suspicions of unlawful sexual contact with a resident or unreasonable use of force with a resident to the police and DoHA within 24 hours. There is a discretion not to report alleged assaults perpetrated by residents with an assessed cognitive or mental impairment. The police investigate any criminal action, while DoHA investigates provider compliance with the *Aged Care Act.*

Providers have to require staff members to report suspicions or allegations of assaults, have an internal policy on abuse, provide training to staff and maintain records of assaults, resident assessments and behaviour plans.

Whistleblower protection provisions have been introduced for staff members or approved providers disclosing an assault in good faith. They protect a discloser from criminal or civil liability (unless they are the perpetrator), defamation, termination of employment or victimisation.

It has been difficult to obtain data on the new system. DoHA reported to the Productivity Commission (2009) that it received notification of 925 alleged reportable assaults in

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2 Implemented via the *Aged Care Amendment (Security and Protection) Act 2007.*

2007-08. Of those, 725 were recorded as alleged unreasonable use of force and 200 as alleged unlawful sexual contact. The Commission noted that DoHA did not keep records how many of these allegations resulted in arrests, charges or convictions.

Mandatory reporting internationally

Mandatory reporting is not a common policy response to the serious issue of abuse of older people. It has only been widely adopted for elder abuse in North America (44 US States and 2 Canadian Provinces). There reports are made to special Adult Protective Services or Long Term Care Ombudsmen. Less than half of reported cases are substantiated (Jogerst et al 2003; Jogerst, Daly & Hart 2005; Sadler 2006). The Canadian Network for Prevention of Elder Abuse (2009) noted most provinces treated abuse and neglect of people living in care facilities differently from abuse in the community and required some form of reporting to authorities of suspected cases of abuse in residential care.

Essentially mandatory reporting is a child protection model applied to elder abuse. In recent times, major problems with have emerged with this approach in child protection. For example, the NSW Wood Special Commission (2008) found "Too many reports are being made to DoCS [Department of Community Services] which do not warrant the exercise of its considerable statutory powers." The system is overloaded with false or less critical reports, so only 13% of reported cases received home visits.

Prior to the Howard Government's moves, mandatory reporting had been rejected by Australian State and Federal government committees looking at elder abuse (Kurrle & Naughtin, 2008). It has also been rejected by professional organisations working in the field (Australian Society for Geriatric Medicine 2004; Elder Abuse Prevention Unit 2006). A good summary of the arguments for and against mandatory reporting was made by Professor Jan Mason (1997).

MANDATORY REPORTING

Arguments for

- Ensures cases come to public attention
- Puts issue on social agenda / may attract funding
- Provides clear procedures

Arguments against

- Removes autonomy of older people
- Most cases already known to service providers
- Most reports from non-mandated sources
- Problem is not finding cases, but doing something about them
- Administratively costly and bureaucratic

Mason J (1997) *Mandatory Reporting of Abuse of Older People*. Discussion Paper 4, NSW Advisory Committee on Abuse of Older People

Based on a review of the literature, it is possible to identify some success criteria to evaluate if a mandatory reporting system is to be adopted. These are that the system:

1. Accurately identifies most serious cases
2. Doesn't result in reporting of non-cases

3. Respects the rights of older people and follows procedural fairness for all parties
4. Improves chances of obtaining criminal convictions
5. Assists in prevention of abuse.

ACSA Survey

Aged & Community Services Australia conducted a national online survey on elder abuse reporting during August 2009. Information was sought on cases in the two years from July 2007 to June 2009.

There were 243 responses from all states and the ACT, but with a majority (57%) coming from NSW (largely due to different promotion of the survey by the State Association via direct email to members). Other respondent characteristics:

- 55% were providers with only 1 aged care home; 25% ran 2-4 homes; 11% ran 5-10 homes; 9% ran more than 11 homes
- 51% were operating in regional areas; 37% in large metropolitan areas; 30% in regional cities; 5% in remote areas
- Three quarters of responses were completed by facility management.

147 respondents recorded 682 reportable assaults in reports to DoHA and the police:

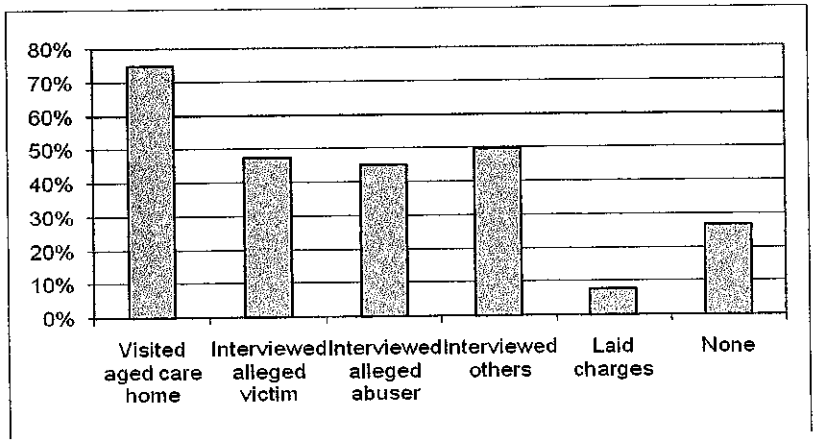
- 87% physical; 5% sexual; 8% both
- Alleged perpetrator 75% resident; 20% staff; 5% visitor
- 23 alleged cases involved more than 1 victim.

The highest number of reports came from allegations from a staff member, followed by identification in resident records or incident reports. It was less common for reports to come from alleged victims or abusers, and rare for reports to come from other residents or visiting health professionals.

Respondents indicated they reported the majority of cases to the police and DoHA within the legislated 24 hour timeframe.

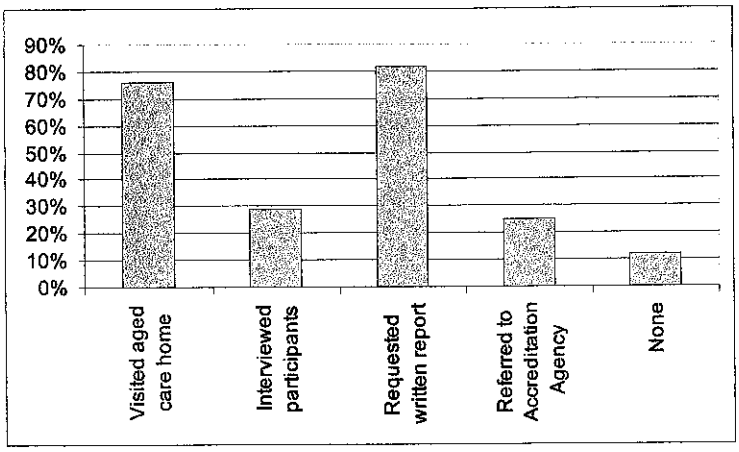
Actions taken by the police following receipt of reports are listed in Chart 1.

Chart 1 – Action by Police



Actions taken by DoHA following receipt of reports are listed in Chart 2.

Chart 2 – Action by Department of Health & Ageing



Analysis against the success criteria
So how does the new Australian system measure up against the success criteria?

Success Criterion 1 - Accurately identifies most serious cases

- Initial concern was to respond to serious assaults by staff.

Result

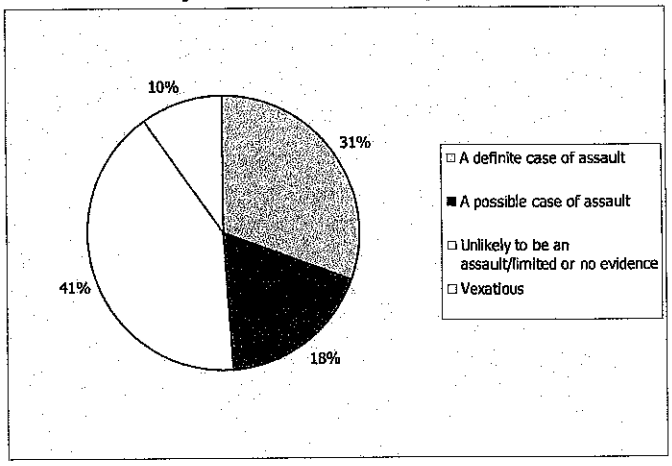
- Three quarters of reportable assaults are resident-to-resident incidents. Behaviour management plans are the most common action taken by a provider (in nearly 50% of cases), suggesting the reporting system is primarily capturing dementia and mental health problems.

Success Criterion 2 - Doesn't result in reporting of non-cases

Result

- Providers believe half of "reportable assaults" unlikely to actually be assaults or are vexatious.

Chart 3 – Providers' analysis of status of alleged or suspected assault



Success Criterion 3 - Respects the rights of older people and follows procedural fairness for all parties

Result

- Older people have been denied right to say "No" to police or DoHA involvement.
- Three quarters of breaches issued to providers were for missing the arbitrary 24 hour reporting deadline.
- No similar timeframe is applied to DoHA or police.
- A common outcome is suspension (40% of cases), dismissal (18%) or resignation (10%) of a staff member. Anecdotal feedback from survey respondents indicated some staff experienced very negative personal outcomes, sometimes accentuated by the original allegation being unsubstantiated or vexatious.
- Providers indicate major concerns with procedural fairness and balancing conflicting responsibilities (such as maintaining whistleblower protection and rights under industrial relations legislation to know the content of complaints against a staff member).

Success Criterion 4 - Improves chances of obtaining criminal convictions

Result

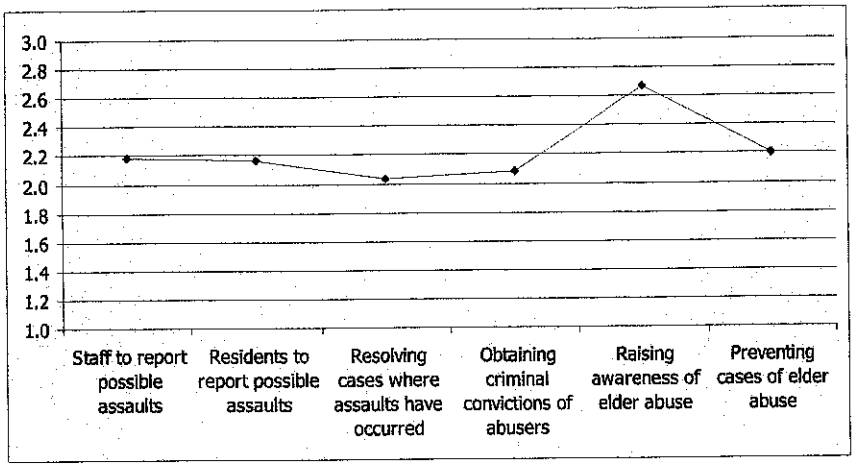
- Only 1 in 100 reports result in charges being laid (7 charges laid by police - 1% of reportable assaults).
- Only 1 in 200 reports result in criminal convictions (3 court convictions - 0.4% of reportable assaults).
- The reporting system is six times more likely to result in legal action (such as formal breaches or notices of non-compliance under the *Aged Care Act*) against aged care providers than against the alleged abuser.

Success Criterion 5 - Assists in prevention of abuse

Result

- Providers confirm success in raising awareness of abuse and in implementing improvements to procedures for responding to abuse.
- However, a poor experience of fairness and effectiveness of investigation processes is discouraging reporting. Many respondents indicated problems with disruptive unannounced visits from DoHA, feeling they had to prove they were innocent of wrongdoing rather than being assumed innocent until proved guilty, and bossy and judgmental behaviour by Departmental officers. Where providers believed there really had been an assault, there was frustration that the police found it difficult to lay charges when the victim had dementia and could not provide evidence.

Chart 4 – Providers' Response to "Has legislation made it easier or more difficult?"



1 = made more difficult; 2 = no change; 3 = made easier

Another success criterion?

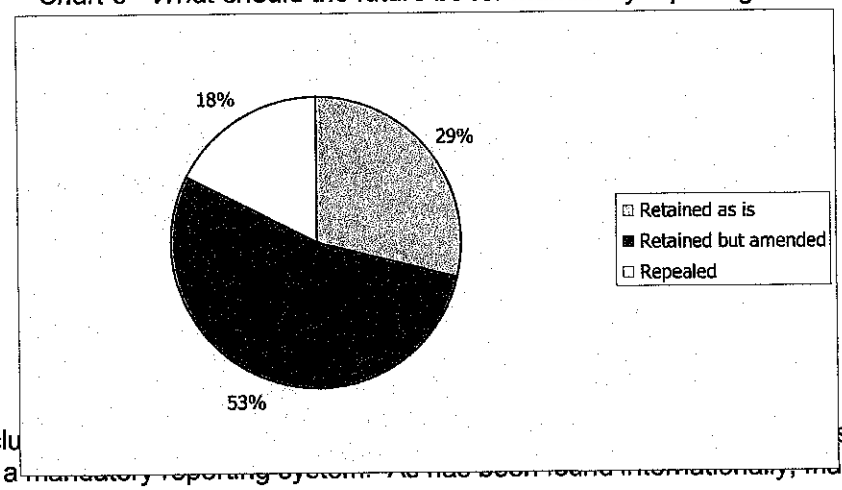
Of course it is possible the legislation actually had another purpose altogether – protecting the government of the day and the Department of Health & Ageing from bad media headlines. In this (surely cynical) view, the requirement to report to the Department within 24 hours makes sense, as it hopefully alerts the government to a possible bad news story before the media gets wind of it.

But is elder abuse really such a big media issue? In this survey, only four cases resulted in reports in the media (0.6% of reportable assaults) and in two of them the aged care home was not identified. In only one case did a relative go to the media before reporting to facility management or the Department.

Is there a better way?

When asked what they thought should happen to the mandatory reporting legislation, more than 7 in 10 respondents said it should be repealed outright or amended.

Chart 5 - What should the future be for mandatory reporting?



Their conclu success criteria for a ndatory

reporting will increase awareness of abuse and encourage better policies and procedures by service providers. But this comes at a cost of half of all reported cases being unsubstantiated, expensive additional bureaucracy and limited evidence of improvement in obtaining criminal convictions where real assaults have occurred.

It is notable that the international elder abuse mandatory reporting systems do differ in one important aspect from the Australian system – overseas reports go to entities which actually investigate the case of abuse. In Australia, reports go to the police to investigate the incident of abuse but there is an additional requirement for reports to DoHA which investigates the aged care provider.

The Australian reporting system could be amended to address some of the concerns highlighted by the survey. Options would include:

- Removing obligation to report resident-to-resident cases.
- Extending timeframe to report incidents to DoHA, so vexatious or unsubstantiated cases are excluded by preliminary investigations by police and approved provider.
- Requiring DoHA and the police to meet timeframe benchmarks for investigations.
- Resolving conflict between whistleblower protection and industrial relations due process.
- Establishing an additional aged care standard on protection of older residents from abuse and including review of systems to achieve this in the accreditation process, eliminating need for DoHA involvement entirely.

But at the end of the day, it remains questionable whether the new system has achieved any additional protection for older people. A proper review of the system would examine the perspectives of older people and their representatives, aged care staff and their unions, the police services and the aged care regulatory agencies alongside the perspectives of aged care providers reported here.

There is a better way to respond to elder abuse (Sadler 2006). Some of the steps identified by survey respondents and the international literature include:

- Commissioning research on the scope and nature of elder abuse in Australia.
- Funding training of aged care staff and police.
- Funding police checks and exploring proper staff vetting procedures.
- Making the Complaints Investigation Scheme fair.
- Recognising staff burnout is a major risk factor in residential care and therefore funding aged care adequately.
- Responding to abuse in domestic settings, where more older people are at risk.

Conclusion

Elder abuse is real, and needs to be taken seriously. Sadly, it appears the compulsory reporting system was an over-reaction due to a media-fuelled moral panic. As one respondent said, "Usual sledgehammer to crack a nut!"

The compulsory reporting legislation **must** be repealed or significantly amended. Continuing the current system would fail our obligation to protect older people effectively and maintain yet one more area of unproductive over-regulation of aged care providers.

Appendix

Comments from Survey Respondents

Positive results
"The compulsory reporting has improved our system and clarified for staff what to report. We have included compulsory reporting in our orientation program for new staff, and the compulsory reporting brochure we developed is included in the new staff kit."

"We have now moved on from our initial frustrations with the system. We have put a process in place that allows us to manage any allegations quickly and efficiently."

Whose rights?
"The right of a resident to choose NOT to have such an action reported should be reinstated. It's their life. It is and should remain only a police matter. The investigative processes undertaken by the Department are extravagant given the nature of the experiences here."

"I also believe that the department have infringed on a residents rights in one instance by insisting that the matter be reported to the attending GP against the express wishes of the resident concerned."

Gaining convictions
"We went through hell!!! No-one could help us!! We were given advice about what to do from anyone and everyone other than santa claus!!. We were unable to get the man convicted of his sexual offences because the courts do not allow third party witnesses."

Conflicting responsibilities
"There are issues around two conflicting legislations. Whistleblower protection for reporters of elder abuse - we take this seriously but had to answer an unfair dismissal case at the industrial commission which cost the facility a large amount of money because the IR legislation allows staff to be informed if a complaint is made against them. Including the name of the person making the allegation/complaint. We chose to protect the identity of the reporter of the assault and had to pay out a staff member that we dismissed over an elder abuse incident."

Why not to exercise discretion to report
"One of the ... incidents was not reportable as the resident who assaulted the other resident had dementia. We did report as a courtesy because the victim was hospitalised, but what was really disappointing was the DHA arriving on our doorstep unannounced and requiring us to drop everything for the day to participate in a very grueling investigation. They found that we acted appropriately before during & after the incident, but it was not a pleasant experience and I will certainly think twice before reporting voluntarily again."

Consequences
"When this incident occurred, a mother assaulted her son who was a resident of our facility. I as manager reported and recorded the incident as required by the law and within the terms of the legislation. However I was investigated to ensure I did not breach any of the requirements of the legislation. This investigation assumed I as manager was guilty until proven innocent. What an absurd way to ensure cases like this are reported,

how did this action by the department support me in protecting the resident? Would I be likely to report such incidents again when I know this is how I will be treated? Absolutely not unless there was a serious assault which I knew required a conviction of the assailant."

"We were breached because we did not have a register-log, despite the fact that this was our only case. I felt that was unfair."

Making it work better
"Elder Abuse reporting to the Department should be made following an internal investigation and follow up by police if necessary. Reporting to the Dept. is premature before these steps are taken. ... The reporting deadline of 24 hours needs to be changed to 1 week, whilst police are under-taken the appropriate investigation. Reporting to the Dept. should then incorporate police findings. Department should only act on those findings and not be judge and jury and police investigators all in the same breath (separation of powers required most definitely)."

"CIS system encourages vexatious and anonymous reports. These should be excluded, while confidential reports allowed."

"Please remove 'suspected' abuse. If a demented resident states that a staff member has assaulted them, a report has to be made. If there is an ongoing pattern of behaviour from such a resident with documentation and behaviour forms to prove such, the mandatory reporting process wastes everyone's time as it is only a behaviour rather than actual abuse."

"We support Police Checks and thorough staff 'screening', selection and orientation processes to assist in ensuring our staff are fully aware of appropriate and professional care standards. We believe that appropriate selection, orientation and training of staff, volunteers and contractors is a more effective process in the prevention of resident abuse."

"Improve course content of Aged Care Certificate to cover Elder Abuse in greater depth."

"There should be an elder protection register (like the child protection register) that employers have access to. At present staff members can simply get a job elsewhere as the new employer has no knowledge of previous problems."

"I feel that there should be a register for personal care workers, to allow monitoring, investigation and work restrictions as exists for div 1 and 2 nurses."

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