Submission in response to the Australian Government Department of Health

'Serious Incident Response Scheme in Commonwealth funded In-Home Aged Care Final Consultation Paper'

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About Carers Australia

Carers Australia is the national peak body representing the diversity of the 2.65 million Australians who provide unpaid care and support to family members and friends with a disability, chronic condition, mental illness or disorder, drug or alcohol problem, terminal illness, or who are frail aged.

In collaboration with our members, the peak carer organisations in each state and territory, we collectively form the National Carer Network and are an established infrastructure that represent the views of carers at the national level.

Our vision is an Australia that values and supports all carers, where all carers should have the same rights, choices and opportunities as other Australians to enjoy optimum health, social and economic wellbeing and participate in family, social and community life, employment and education.

This includes carers:

- Who have their own care needs
- Who are in multiple care relationships
- Who have employment and/or education commitments
- Aged under 25 years (young carers)
- Aged over 65 years, including 'grandparent carers'
- From culturally and linguistically diverse backgrounds
- Who identify as Aboriginal and Torres Strait Islander
- Who identify as lesbian, gay, bisexual, transgender,
- intersex (LGBTI+)
- Who are living in rural and remote Australia, and
- That are no longer in a caring role (former carers).

Carers Australia acknowledges Aboriginal and/or Torres Strait Islander peoples and communities as the traditional custodians of the land we work on and pay our respects to Elders past, present and emerging. As an inclusive organisation we celebrate people of all backgrounds, genders, sexualities, cultures, bodies and abilities.

Introduction

Carers Australia welcomes the extension of Serious Incident Reporting to home and the community, and the opportunity to comment on the 'Serious Incident Response Scheme in Commonwealth funded In-Home Aged Care Final Consultation Paper' (Consultation paper). As such, we strongly support the introduction of a Serious Incident Response Scheme (SIRS) for Commonwealth funded in-home care, noting that the prospects for abuse and neglect committed in the privacy of the consumer's home presents challenges for detection and correction.

We acknowledge that, while some proscribed behaviors are clear cut, in other cases there is a fine line between what constitutes unacceptable behavior on the part of providers and their staff, and the degree of damage such behavior may result in. We have included some examples in this submission.

We are also very aware of the need to balance consumer rights to choice, control and dignity of risk against mandatory reporting by providers. Where care is being provided in the consumer's own home it is particularly important to get this balance right. While people can become more vulnerable as they age, this does not mean that they lose the ability to make judgements and decisions, and take action on their own account if they feel they are being mistreated, neglected or prevented from making decisions which impact on their own wellbeing. This may go to consumer refusal of service and unwillingness for provider staff to report to external authorities about suspected abuse outside the direct provision of formal care.

The *Carer Recognition Act 2010*[1] (Commonwealth) aims to increase recognition and awareness of carers and acknowledge the valuable contribution they make to society. The cornerstone of the Act is the Statement for Australia's Carers, which sets out ten principles that articulate how carers should be treated and considered. This includes that the relationship between carers and the persons for whom they care should be recognised and respected, and carers should be considered as partners with other care providers in the provision of care, acknowledging the unique knowledge and experience of carers. It is with the Statement for Australia's Carers in mind that Carers Australia provides input, noting definitions referenced in this response are taken from the Consultation Paper.

Ideally, Carers Australia would want family and friend carers to be notified as soon as an incident is reported to the provider. However, we also acknowledge that in some cases consumers will not want their family involved and their wishes should be respected. The exception being in cases where the consumer lacks cognitive capacity, where we believe providers must immediately report to family and friend carers or other representatives of the consumer as well as to the Aged Care Quality and Safety Commission (Commission).

Provider requirements to notify the police and other persons or bodies

The Consultation Paper notes that fully adopting the definition of 'incident' used in residential care would mean if a consumer discloses to a staff member providing in-home services that they have been harmed by others, such as family, friends, neighbors or a member of the public, the staff member/provider would be expected to manage this incident. It also notes that this might not be in the home care provider's capacity to address.

Carers Australia would add that it also might not be the consumer's desire or in their interests for the provider or staff member to intervene on their behalf without their consent, especially in circumstances

[1] Australian Government, *Carer Recognition Act 2010,* No.123,2010 [accessed online]

where the incident is only suspected or alleged. In these circumstances it would be sound practice to assist a consumer who wanted to report the event to do so, but not to pre-empt their wishes.

In cases where the consumer lacks cognitive capacity, it would be appropriate to notify the consumer's representative and/or family, assuming that they had not been accused of perpetrating the abuse. If representatives and or family members are identified as likely perpetrators, the reporting requirements may be more aligned with those for mandatory reporting of child abuse or neglect. While examples of abuse and neglect and who must report them vary slightly between states and territories, mandatory reporting usually attaches to people employed in occupations who provide some form of care in their interactions with the child.[2]

Providers' responsibility to notify the Commission of reportable incidents

Carers Australia agrees that home care providers have the same overarching responsibility to notify the Commission of reportable incidents as residential aged care providers.

Scope of reportable incidents and definitions

Carers Australia agrees that the scope of reportable incidents identified for residential aged care should also apply to home care, with caveats in relation to aspects of home care provisions canvassed below.

Unreasonable use of force

Defined as: Unreasonable use of force against the consumer includes conduct ranging from a deliberate and violent physical attack to use of unwarranted physical force. Examples given include, kicking, hitting, pushing, and shoving.

Comment: Carers Australia agrees with this definition, noting if, as is suggested in the Consultation Paper, the use of physical restraints is included under the unreasonable use of force, then more passive forms of force, such as restricting the consumer's mobility without actually physically engaging with them, would also need to be included within this definition - see below.

Unlawful sexual contact or inappropriate sexual conduct

Defined as: Unlawful sexual contact, or inappropriate sexual conduct, inflicted on the consumer includes:

- If the contact or conduct is inflicted by a staff member or other person providing care on behalf of the provider (such as a volunteer), the following:
    - any conduct or contact of a sexual nature inflicted on the consumer, including (without limitation) sexual assault, an act of indecency or sharing of an intimate image of the consumer;
    - or any touching of the consumer's genital area, anal area or breast in circumstances where this is not necessary to provide care or services to the consumer.
- any non-consensual contact or conduct of a sexual nature, including (without limitation) sexual assault, an act of indecency, or sharing of an intimate image of the consumer; and
- engaging in conduct relating to the consumer with the intention of making it easier to procure the consumer to engage in sexual contact or conduct.

However, this does not include consensual contact or conduct of a sexual nature between a consumer and a person who is not a staff member, including another consumer, or a volunteer providing care on behalf of the provider (other than when that person is providing care or services).

[2] Healthcare Australia, Mandatory Reporting of Suspicion of Abuse (Child and Elderly), 2015 [accessed online]

Comment: Carers Australia agrees with this definition, and that consensual contact between a consumer and a person who is not a staff member is not included. However, we are puzzled by the caveat expressed in the Consultation Paper that a volunteer providing care for a provider is also not included other than when that person is providing care or services. It is simply not clear to us why a point of difference is made between staff and volunteers in this context. Both have been introduced to the consumer and the consumer's home environment through the provision of services.

Psychological or emotional abuse

Defined as: Involves conduct of:

- taunting, bullying, harassment or intimidations;
- threats of maltreatment or retribution, including in relation to making complaints;
- humiliation;
- unreasonable refusal to interact with the consumer or acknowledge the consumer's presence;
- unreasonable restriction of the consumer's ability to engage socially or otherwise interact with people; or
- repetitive conduct or contact which does not constitute unreasonable use of force but the repetition of which: has caused the consumer psychological or emotional distress; or could reasonably have caused a consumer psychological or emotional distress.

Comment: Carers Australia agrees with the definition of psychological abuse, however we would also add 'gaslighting' to this list. That is, the act of manipulating a person by forcing them to question their thoughts, memories, and the events occurring around them.

Unexpected death

Defined as: Unexpected death of the consumer includes death in circumstances where:

- reasonable steps were not taken by the provider to prevent the death; or
- the death is the result of:
  - care or services provided by the provider; or
  - a failure of the provider to provide care or services."

Comment: While Carers Australia supports the definition of unexpected death proposed for in-home services, we agree with the proposition that home care providers cannot be held to the same standards as in residential care, given:

- less frequent contact of the home care provider with the consumer,
- the range of services provided in home care, some of which do not involve much contact with consumer or hands-on care (such as household upkeep services or the delivery or meals), and
- within residential care services are provided around the clock in the provider's establishment.

There is also a grey area around accidental death resulting from the failure of staff to turn up where the service provided is not essential to the consumer's immediate wellbeing, and the failure of service provision does not continue for a substantial period of time. In such cases, the consumer may choose risk taking behaviour which results in fatal injury, for example a consumer choosing to:

- mow a lawn themselves if this service does not attend, which compromises their physical capacity and results in an injury or heart attack, or
- shower themselves in the absence of a paid carer for a few days despite serious mobility issues, which results in fatal fall. In this case, the importance of dignity cannot be understated, also

noting for a person with severe incontinence or skin lesions and infections, waiting more than a day for a paid carer to assist them with a shower is not an acceptable option.

In these instances the risk behavior by the consumer, rather than being attributed to poor judgement, can also be seen as a considered attempt to mitigate other risks arising from the failure to provide care.

Stealing from, or financial coercion of, the consumer by a staff member

Defined as:

- stealing from, or financial coercion of, the consumer by a staff member of the provider includes stealing from the consumer by a staff member of the provider; or
- conduct by a staff member of the provider that is coercive or deceptive in relation to the consumer's financial affairs, or unreasonably controls the financial affairs of the consumer.

Comment: Carers Australia agrees that the definition is appropriate and that it is a reportable incident restricted to financial abuse by a staff a member.

Neglect

Defined as:

- a breach of duty of care owed by the provider, or a staff member of the provider, to the consumer, or
- a gross breach of professional standards by a staff member of a provider providing care or services to the consumer.

Comment: While Carers Australia agrees with definition, we also agree that instances of neglect should be moderated according to the impact the neglect has on the consumer's wellbeing and, importantly, if the failure to provide care results from a refusal by the consumer to receive certain services and care.

The failure to find replacement staff in the very short-term for services such as cleaning, shopping, outings or even assistance with showering may be an inconvenience, but not necessarily pose significant risk the consumer's health and wellbeing. In other cases where, for example, the consumer is incontinent and unable to attend to their own hygiene needs, the failure of staff to turn up poses a more serious breach of the duty of care. The question is: who makes the decision on the level of impact an incident or incidences of service provision has on the consumer and the necessity to treat it as a reportable incident?

With regards to where consumers refuse care, we suggest mechanisms that keep a record of the consumer's refusal. In cases where the consumer lacks cognitive capacity, the provider should bring this refusal to the attention of their carer, family representatives or other representative.

Inappropriate use of restrictive practices

Examples: While not defining the use of restrictive practices (other than referencing the legislation applying to residential care) the Consultation Paper provides the following examples:

- A staff member of the provider tying (physically restraining) a consumer to a park bench on a community outing, without consent or alternatives considered, while the consumer was unaccompanied for a period of time.
- A staff member of the provider giving a consumer sedative medication that was not prescribed for the consumer, to assist with administering personal care during a home visit.

Comment: Without a clear explanation, the Consultation Paper suggests the use of restrictive practices in home care might best be dealt with under other reportable incidents, such as unreasonable use of force or neglect, rather than under the legislative requirements on restrictive practices for residential care.

If this option is adopted, the definition of unreasonable use of force will need to move beyond the direct use of physical force against the consumer. It will also need to include the unwarranted use of a device to restrict the consumer's movement (including the removal of mobility equipment or placing it out of reach and other measures taken to restrict the consumer's movements) as is the case for residential care.[3]

We note that the deliberate use of unprescribed medications (or indeed the overuse of prescribed medications) to control the behaviour of consumers is not an easy fit under "neglect," to the extent that it involves deliberative action as opposed to the failure to perform an action. We also note that it can count as an instance of psychological abuse. However, again the guidelines against these reportable incidents as stand-ins for the specific restrictive practices legislation in residential care need to be made explicit.

Unexplained absence

Comment: Carers Australia agrees with the Consultation Paper in that the unexplained absence of a consumer in circumstances where services and care are being provided in their home should not be a reportable incident, unless the provider believes there are reasonable ground to report it to the police.

We also agree that an unexplained absence should be a reportable incident in some cases where care is being provided in the community outside the home, such as cases where the consumer lacks cognitive capacity - dedicated respite facilities and day care are cases in point.

Reporting timeframes and priority categories

Questions: Should tiered reporting categories be adopted under a SIRS for in-home aged care services?

- If yes, should the reporting timeframe remain 24 hours for priority 1 reportable incidents?
- If no, should all incidents be reported within 24 hours if tiered reporting were removed?
- If not, what other timeframe would you suggest and why?

Comment: Carers Australia agrees with the general principle that incidents be grouped into two levels of priority based on the severity of the impact of the incident on the consumer.

In many cases the level of severity will be obvious and non-contestable, however it is not clear who determines the level of impact or how it is determined in borderline cases. If it is the providers judgement, they may have a vested interest in minimising the impact. In such cases the consumer can by-pass provider decisions by reporting directly to the Commission but may not have the knowledge or the confidence to do this. With this context, we suggest it should be within the power of advocate services, such as the Older Persons Advocacy Network (OPAN), to do this on their behalf.

We also agree that ideally providers should report the incident within 24 hours of becoming aware of it. However, we also accept that it may take longer than this to establish the basic facts. Perhaps a system should be in place to notify within 24 hours that an alleged incident has been reported and is being investigated by the provider, which can then be escalated as appropriate to an established incident once more information is available.

[3] The Royal Commission into Aged Care Quality and Safety, 'Restrictive practices in residential aged care in Australia' Background Paper 4, May 2019 [accessed online]

Whistleblower protections

Carers Australia welcomes the inclusion of "current and past consumers, their families and others supporting them including volunteers and advocates" under whistleblower protection in the Consultation Paper. We note that consumers and their family carers can be reluctant to report incidents for fear that providers may withdraw necessary services or that care staff may retaliate in a range of ways against the authors of adverse reports pertaining to themselves and their provision of care.

Next steps

As the proceedings of the Aged Care Royal Commission highlight, it is often family members and friends who initiate investigations of serious incidents in residential care. We note that further consultations are expected with key stakeholder groups. Family and friend carers have a direct and informed interest in the development of a Serious Incident Reporting Scheme for Home Care.

Carers Australia request involvement in future consultations, highlighting that to-date there has been no engagement.