



Australian Government
Department of Health

Serious Incident Response Scheme for Commonwealth funded residential aged care

Finer details of operation – Consultation Paper

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Making a submission

This paper has been prepared by the Department of Health (the department) as a basis for consultation on the details of a Serious Incident Response Scheme (SIRS) for Commonwealth funded residential aged care.

The department is keen to consult widely and engage with as many individuals and organisations (with an interest in the SIRS) as possible. These include:

- consumers, their families and carers
- key sector groups
- aged care providers
- staff of aged care providers, health and disability services providers
- advocacy groups
- other government stakeholders

The department invites your comments on this consultation paper.

The department will consider all comments carefully and use the information received to inform the further development of the SIRS (discussed in more detail in this paper) and advice to Government. With your consent, your comments will be made publicly available.

You can submit your comments via the department's consultation hub at <https://consultations.health.gov.au/>

If you are having difficulty completing an online submission, please contact SIRS@health.gov.au for assistance.

You must ensure that the department receives your comments by 23 September 2019.

Late submissions will not be accepted.

Thank you for your interest and taking the time to provide your feedback.

Context and purpose of this consultation paper

Context

Australians have a right to live free from abuse and neglect as a matter of human rights, current law and a reasonable community expectation. Older Australians also have specific rights and expectations when receiving Commonwealth funded aged care services.

Regulatory context

Approved providers operate in the context of the aged care legislative framework, some of which are specifically outlined below. Providers and consumers are also subject to the broader range of Commonwealth, state and territory laws.

Under the Charter of Aged Care Rights consumers have the right to “live without abuse and neglect”.¹ Aged care providers are required to uphold these rights and ensure their consumers understand their rights under the Charter.

The Aged Care Quality Standards require aged care providers to have effective risk management systems and practices to identify and respond to abuse and neglect of consumers.² Providers are also expected to adopt an open disclosure process when things go wrong.³

The Aged Care Quality and Safety Commission (the Commission) accredits and monitors providers' performance against the Standards, and helps consumers resolve complaints about a provider's responsibilities or actions, including those in the Charter. This is part of the Commission's function to 'protect and enhance the safety, health, well-being and quality of life of aged care consumers'.⁴

Existing compulsory reporting requirements

Approved providers of residential aged care are currently required to report incidents of alleged, suspected or actual reportable assaults, including unreasonable use of force or unlawful sexual contact with an aged care consumer. Under the Aged Care Act 1997 (the Act), providers of residential care are required to report these to the police and the department within 24 hours of receiving an allegation, or suspecting on reasonable grounds a reportable assault has occurred.

In limited circumstances, approved providers are not required to report alleged, suspected or actual assaults. Approved providers do not need to report when:

- the alleged assault is perpetrated by a resident with an assessed cognitive or mental impairment, and care arrangements are put in place to manage the behaviour within 24 hours; or
- previous reports of the same or substantially the same incidents have been made to the police and the department⁵

¹ *User Rights Principles 2014*, post 1 July 2019 Schedule 1, right #4.

² Aged Care Quality Standards, 2019, Standard 8, requirement 8(3)(d)(ii).

³ Aged Care Quality Standards, 2019, Standard 6, requirement 6(3)(c).

⁴ *Aged Care Quality and Safety Commission Act 2018*, s16(1)(a).

⁵ *Accountability Principles 2014*, s.53

Given these exemptions, there is currently limited visibility of the nature and prevalence of incidents by a resident with an assessed cognitive impairment.

A call for change

Establishing a SIRS for aged care was a recommendation of the 2017 Australian Law Reform Commission (ALRC) report *Elder Abuse - A National Legal Response* (the ALRC report), and was endorsed by the 2017 Review of National Aged Care Quality Regulatory Processes (Carnell-Paterson review). It is also consistent with the National Plan to Respond to the Abuse of Older Australians (Elder Abuse).

The ALRC recommended broadening the types of incidents to be reported in residential care, and changing the emphasis from requiring providers to report the occurrence of an alleged, suspected or actual assault, to requiring an emphasis on investigation and response to incidents by those providers. In making this recommendation (4-1), the ALRC recommended design of the SIRS be informed by the Disability Reportable Incidents Scheme for disability services in New South Wales (NSW), and the (then) planned reportable incident requirements for the National Disability Insurance Scheme (NDIS).

The 2018-19 Budget measure *Better Quality of Care – Improving Aged Care Quality Protection* included funding for the development of options and costings for a SIRS in Commonwealth funded aged care.

On 29 March 2019, the report developed by KPMG, *Strengthening Protections for older Australians, Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers* (the KPMG report), was publically released by the former Minister for Aged Care and Senior Australians, the Hon Ken Wyatt AM MP.

The KPMG report affirmed recommendations from both the ALRC report and the Carnell-Paterson review with respect to the need to broaden the type of conduct that is reportable.

With the current definition of a reportable assault not including neglect, inappropriate physical or chemical restraint, intentional or reckless behaviour by staff, or inadequate personal care, the KPMG report found that:

“...there may be serious incidents occurring in residential aged care that are not being reported through current arrangements and therefore over which the Department does not have visibility.”⁶

⁶ KPMG, 2019, *Strengthening protections for older Australians – Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers*, p.8.

The KPMG report identified five policy options for the regulatory components of the proposed SIRS:

Option 1	No change to the current arrangements (residential care only)
Option 2	Developing guidance material to better enforce the current arrangements (residential care only)
Option 3	Introducing a new reportable conduct scheme for all aged care service providers to report abuse and/or neglect by staff
Option 4	Expanding Option 3 to include unexplained serious injury in residential aged care
Option 5	Expanding Option 3 to include aggression and abuse between consumers in residential aged care

In describing each of the options, the following key areas were explored by KPMG:

- Whose conduct should be reportable (staff members, including contractors and other residents)?
- Who should provide reports?
- What conduct should be reportable?
- What reports should be provided and when?
- What responses should be required?
- What roles and functions should the Commission have?

Preparatory work for a SIRS

Following the KPMG report in early 2019, the Government provided \$1.5 million in funding in the 2019-20 Budget, to undertake further preparatory work for the introduction of a SIRS. This preparatory work is focussed on refining the details of a SIRS, for implementation in residential aged care in the first instance.

The initial preparatory work includes:

- Developing a consultation paper containing the parameters and finer details of the SIRS, prior to the legislation and subordinate legislation being drafted, and undertaking consultation on this;
- Developing the legislative amendments to the Act, Aged Care Quality and Safety Commission Act 2018 and relevant subordinate legislation;
- Procuring a research study into the prevalence of aggression between residents, which is currently exempt from current reporting, to inform an expanded definition of serious incidents;
- Undertaking a scoping study for a possible register of staff for the aged care industry; and
- Organisational design to support the development of a costed operating model within the Commission.

This consultation paper pertains to the first element of preparatory work above.

Further consultations are expected to be undertaken on the detailed design elements of the SIRS.

Purpose of this consultation paper

This consultation will assist in the development of the finer details of the SIRS and further advice to Government including the structure and operation of the scheme, legislative requirements and resourcing implications.

Proposed Serious Incident Response Scheme

The intent of a SIRS is to strengthen the governance of the risk of harm arising from abuse and neglect of older people in residential aged care, by building provider capacity to better respond to incidents if and when they occur and ensure consumers are supported appropriately.

Overview

Identifying, managing and resolving serious incidents that occur in residential aged care should be dealt with as part of an approved provider's internal governance arrangements. This contributes to continuous improvement, risk management and the delivery of safe and quality care at a service level.

Reporting incidents including actions taken in response to an incident, under a defined national scheme provides assurance to the Australian community that providers are being held to account to provide a safe environment for aged care consumers.

A SIRS that enables identifying, managing and resolving serious incidents and the provider's response in residential aged care contributes to:

- continuous improvement at the system level, including through education and capacity building of providers, as well as sector-wide learning; and
- the Government's regulatory resources and efforts being targeted to the highest risks.

Proposed model

The proposed model for defining a serious incident, which is based on options 3-5 from the KPMG report, consists of two components addressing alleged, suspected or actual:

- abuse or neglect by a staff member of a Commonwealth funded residential aged care home against a consumer; and
- incidents of abuse and aggression between consumers receiving Commonwealth funded residential aged care.

This approach:

- expands the existing compulsory reporting requirements under the Act which deals with alleged, suspected or actual reportable assault; and
- removes the reporting exemptions set out above.

Unexplained absences are not within scope of a SIRS, and will continue to be administered in line with current processes.

The SIRS is not intended to capture reporting on every incident or error in residential aged care.

Reporting under SIRS is complementary to open disclosure, clinical governance, reporting against quality indicators and provider compliance with the Aged Care Quality Standards. Importantly, the SIRS is not intended to replace existing obligations to report suspected crimes to the police and other relevant authorities.

Provider responsibilities to identify, manage and resolve serious incidents

The SIRS will place an obligation on approved providers to identify, manage and resolve serious incidents.

Approved providers have a responsibility to comply with the requirements of the Aged Care Quality Standards. Under the Standards, the organisation needs to demonstrate it:

- has effective organisation wide governance systems in place, including for continuous improvement, and feedback and complaints;
- has effective management systems and practices including for managing high-impact or high prevalence risks associated with the care of consumers, and identifying and responding to abuse and neglect; and
- adopts open disclosure principles and processes;
- to ensure the delivery of safe and quality care and services.

The SIRS will place a greater focus on how providers manage and respond to serious incidents, than current arrangements. The focus of a provider's management and response to a serious incident should be on the safety, health and well-being of the consumer impacted by the incident; where relevant, on the behaviours and supports needed for the consumer who perpetrated consumer on consumer aggression; and to reduce the risk that the incident reoccurs.

The provider should have internal systems and processes in place to:

- identify, manage and resolve incidents (noting reporting is only required on serious incidents);
- plan the support and assistance to be provided to a consumer affected by an incident (including those subject to allegations) to ensure the consumer's health, safety and well-being;
- engage a consumer and others affected by an incident in the management and resolution of the incident, in line with open disclosure principles;
- conduct an investigation; and
- implement and monitor corrective actions taken.

The role of the Aged Care Quality and Safety Commission

The Commission oversees the approval, accreditation, assessment, complaints handling and monitoring of Commonwealth funded aged care providers. From 1 January 2020, the aged care regulatory functions of the department are expected to transfer to the Commission.

When implemented, the SIRS will be overseen by the Commission and administered in the context of a risk-based, end-to-end quality and safety regulatory framework.

The Commission will:

- receive reports about serious incidents, oversee and apply risk-based monitoring of how providers investigate and handle reportable incidents, including making recommendations to a provider for action to be taken;
- administer a proportionate, risk-based approach to reporting.

This expands the scope of the current powers under the existing compulsory reporting requirements administered by the department.

The proposed serious incident response model will be complimentary to and supported by the Commission's current functions namely:

- **Education**
Such as information, resources and education about matters relating to serious incidents, best practice risk management systems and how providers should identify, manage and resolve incidents.
- **Regulatory functions**
Assess and monitor a providers' performance with relevant requirements of the Aged Care Quality Standards such as risk management, open disclosure, clinical governance and the providers' systems and practices in place to prevent reportable incidents.
- **Compliance (from 1 January 2020)**
Apply a range of regulatory responses based on risk to consumers and the adequacy of the provider's own response to an incident.
- **Publication of performance information**
Publish sector trends and key risks to support systematic quality improvement and learning and capacity building in the sector and transparency of performance.
- **Complaints**
Any person may make a complaint to the Commission that goes to matters that maybe considered serious incidents. The Commission will take appropriate action to follow up provider responsibilities using its range of regulatory responses.

It is intended that under the SIRS, a greater focus is placed on assessing the actions taken by a provider to ensure the safety, health and well-being of the consumer, than is the case under the current arrangements.

Definition of a 'serious incident'

Outlined below is the proposed definition of a serious incident.

When by a staff member against a consumer:

- physical, sexual, or financial abuse;
- seriously inappropriate, improper, inhumane or cruel treatment;
- inappropriate physical and chemical restraint;
- neglect.

When by a consumer against another consumer:

- sexual abuse;
- physical abuse causing serious injury;
- an incident that is part of a pattern of abuse.

A serious incident also includes a death or serious injury that is unexplained, and/or where the perpetrator isn't known.

An act or omission that, in all circumstances, causes harm that is trivial or negligible should not be considered a 'serious incident'.

Questions

- Are there any other definitions that should be in scope for a SIRS?
- Should acts by family and/or visitors be covered by a SIRS?
- Should a SIRS include unexplained death, noting the role of Coroners?

Elements of the definition

The definition of a serious incident set out above addresses the two components: alleged, suspected or actual abuse or neglect by a staff member against a consumer; and alleged, suspected or actual incidents of abuse and aggression by consumers.

Separating out the definition of incidents by the perpetrator, minimises the chance of the SIRS criminalising people with behaviours of concern, it ensures staff members with a duty of care are held to higher standards and will reduce the volume of reporting on lower level incidents that are not likely to require reporting as part of the SIRS.

The ALRC report recommended the use of the term ‘abuse’ rather than the existing term ‘assault’ in order to capture a broader range of conduct than might constitute a criminal offence.⁷

When the matters to be included in the definition of a SIRS are resolved, specific examples will be developed to highlight the intersections with other relevant jurisdictional requirements. For example, what serious incidents should be reported under SIRS and what should be reported to State Government elder abuse entities, police or others.

Alleged, suspected or actual serious incidents by a staff member against a consumer

Staff member

The ALRC report recommended that the SIRS incorporate a number of existing definitions and protections operative in relation to the current provisions for reporting assaults in aged care. For example, staff member is defined in s63-1AA(9) of the Act to mean ‘an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services’ and the Accountability Principles 2014 extend this definition to certain volunteers of an aged care service where appropriate. The ALRC report and the KPMG report recommended that this definition be utilised for the SIRS^{8,9}

Consistent with the Accountability Principles and the Act it is proposed that this definition is used for the SIRS.

Physical abuse

Physical abuse is not specifically defined under the existing compulsory reporting requirements, however, reportable assault includes:

unreasonable use of force on a resident, ranging from deliberate and violent physical attacks on residents to the use of unwarranted physical force

Adapted from both the NDIS Quality and Safeguards Commission definition and the NSW Ombudsman’s definition, it is proposed that the following definition of physical abuse is used for the SIRS:

Unlawful contact with, or assault of, an aged care consumer, including the unreasonable use of physical force, injury, or physical coercion of an aged care consumer.

Unlawful physical contact with an aged care consumer is not a reportable incident if the contact with, and impact on, the aged care consumer is negligible. The term ‘unreasonable’ would not include reasonable management or care of an aged care consumer (taking into account any relevant code of conduct or professional standard that applied at the time), or incidents considered to be trivial or negligible conduct after being investigated and recorded as part of workplace procedures.

⁷ ALRC, 2017, *Elder Abuse – A National Legal Response: Final Report*, p.121.

⁸ ALRC, 2017, *Elder Abuse – A National Legal Response: Final Report*, Recommendations 4-6, p.125

⁹ KPMG, 2019, *Strengthening protections for older Australians – Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers*, p.29.

Sexual abuse

Sexual abuse is not specifically defined under the existing compulsory reporting requirements, however, reportable assault includes:

Unlawful sexual contact, meaning any non-consensual sexual activity towards residents in aged care facilities.

Consistent with the NSW Ombudsman's disability reportable incidents scheme definition of sexual abuse, it is proposed that the following definition of sexual abuse is used for the SIRS:

Any sexual activity inflicted on, with, or in the presence of an aged care consumer.¹⁰

The aspect of consent is not included in the proposed definition as it is never appropriate for a staff member to engage sexually with an aged care consumer.

An example that would not constitute 'sexual abuse' is a staff member giving an aged care consumer a hug to comfort them if they were upset or distressed.

Financial abuse

Financial abuse is not addressed in the existing compulsory reporting requirements or in any comparable reportable incident scheme. For this reason, the below definition has been adapted from the definition in Section 6 of the Victorian Family Violence Protection Act 2008 and it is proposed that this definition is used for the SIRS:

Behaviour that is coercive, deceptive, or unreasonably controls the finances of an aged care consumer.¹¹

The term 'abuse' is used to capture a broader range of conduct by staff members, not just incidents that may reach the threshold of a criminal offence.

Seriously inappropriate, improper, inhumane or cruel treatment

These matters are not addressed in the existing compulsory reporting requirements. The ALRC report recommended this be included in a SIRS for residential aged care as a flexible category intended to capture a range of serious abuse by staff members. The below definition includes elements from the NSW Ombudsman reportable incidents scheme and is proposed to be used for the SIRS:

Unreasonable behaviours against a consumer that constitutes a serious breach of the duty of care, and/or any relevant code of conduct or professional standard that applies(ied) to the staff member.

¹⁰ Adapted from the NSW Ombudsman's, *Guide for services: Reportable incidents in disability supported group accommodation*

¹¹ Adapted from the definition in Section 6 of the *Family Violence Protection Act 2008* (Vic)

The focus will be on the alleged conduct rather than the actual effect of the conduct, and could include:

- emotional/psychological abuse;¹²
- making excessive and/or degrading demands;
- a pattern of hostile or unreasonable and seriously inappropriate, degrading comments or behaviour; or
- threats, insults or taunting.

The ALRC report included examples of practices identified in the Oakden Report of staff members leaving a resident on the floor in considerable distress if staff formed the view that intervening to assist was not needed immediately.

Question

- Is this definition of seriously inappropriate, improper, inhumane or cruel treatment appropriate?

Inappropriate physical and chemical restraint

This is not addressed in the existing compulsory reporting requirements. The proposed definition of inappropriate physical and chemical restraint for the SIRS is:

The use of physical or chemical restraint that does not meet the requirements of the Quality of Care Amendment (Minimising the Use of Restraint) Principles 2019.

From 1 July 2019, the Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019 apply new requirements on approved providers of residential care to minimise the use of physical and chemical restraint. Only when providers have explored alternatives to restraint, and satisfied a number of conditions, can either form of restraint be used.

An example of inappropriate physical or chemical restraint would be where a provider uses physical restraint on an aged care consumer, without meeting the requirements set by the new Principles.

Neglect

Neglect is not addressed in the existing compulsory reporting requirements. Adapted from the NSW Ombudsman's disability reportable incidents scheme, the following definition is proposed for the SIRS:

*Intentional or reckless failure in the duty of care for an aged care consumer that may also be a gross breach of professional standards.*¹³

¹² NDIS, 2019, *Reportable incidents - Detailed Guidance for Registered NDIS Providers*, pp18-19.

¹³ Adapted from NSW Ombudsman submission to the ALRC Review on Elder Abuse (describing the level of neglect that warrants treatment as a serious incident).

Behaviour that would be categorised as neglect would be that which: has the potential to result in death or significant harm; and/or involves depriving a consumer of the basic necessities of life.

An example of neglect could be advanced pressure sores said to be caused by failures in wound care.¹⁴

Alleged, suspected or actual serious incidents between aged care consumers

Sexual abuse

It is proposed that the following definition be used to define sexual abuse between consumers for the SIRS:

Any sexual activity inflicted on, with, or in the presence of an aged care consumer without their consent.

It is important to note that this definition includes the term 'consent'. Residents of aged care services have the right to sexual freedom and to give and receive affection. The aspect of consent is included in the new proposed definition in line with the new Charter of Aged Care Rights, specifically the right to:

"have control over and make choice about my care and personal and social life, including where the choices involve personal risk"

Physical abuse causing serious injury

It is proposed that the following definition of physical abuse causing serious injury between aged care consumers is used for the SIRS:

Unlawful contact with, or assault of, an aged care consumer, including the unreasonable use of physical force, injury, or physical coercion of an aged care consumer.

An incident that is part of a pattern of abuse

Adapted from the ALRC report, it is proposed that the following definition is used for the SIRS:

Repeated behaviour towards an aged care consumer that forms part of a pattern of abuse (whether or not against the same or different consumers), but may not be seen as instances of abuse in isolation.

While the behaviour may not cause significant harm or suffering to the individual in each instance, the repetitive nature of the behaviour (over time or simultaneously) has a cumulative effect which intensifies the level of harm to the individual or in some circumstances individuals.

¹⁴ ALRC, 2017, *Elder Abuse – A National Legal Response: Final Report*, p.122.

Questions

- Are there any additions or refinements required to the definitions? If so, what?
- Are there any definitions that require specific thresholds? Which ones and what should the threshold be?

Unexplained death or serious injury

While unexplained death or serious injury are not specifically defined under the existing compulsory reporting requirements, providers of residential aged care are currently required to report all allegations or suspicions of reportable assaults. A suspicion is where there is no actual allegation, or where an actual assault may not have been witnessed but there are signs that an assault may have occurred. The ALRC report recommended that the SIRS include unexplained injury.

Based on the NSW Ombudsman's disability reportable incident scheme, it is proposed that the following definition is used for the SIRS:

A serious incident also includes a death or serious injury that is unexplained, and/or where the perpetrator isn't known.

Both unexplained death and serious injury have been included as they may point to incidents (or patterns) of neglect, physical or sexual assault, and the link may not be identified until the matter is undergoing investigation.

Questions

- Should this be included in the definition of a serious incident?
- What is an appropriate threshold for 'serious injury' that would ensure reporting is appropriately targeted?

Class and kind exemptions

It is proposed that there will be exemptions to certain classes or kinds of serious incidents from mandatory reporting. While these matters will still be defined as serious incidents and subject to approved provider internal governance and reporting arrangements, it may be possible to exempt certain types of incidents from being reported. This will enable thresholds to be set, to balance the need to capture incidents against the Government's regulatory resources and efforts being targeted to the highest risks. It is proposed that the Commission has powers to review an approved provider's records of exempt serious incidents and examine the approved provider's investigation and response to the incident.

The ALRC Elder Abuse Inquiry's proposed definition of reportable conduct by staff members includes a broad exemption that excludes the need to report acts or omissions when the harm caused to a consumer is trivial or negligible. It is proposed that these matters are also exempted from the SIRS.

Question

- Should the ability to exempt certain classes or kinds of incidents be a power of the Commission or the Minister?

What won't be considered a serious incident?

It is proposed that a serious incident would not include:

- reasonable management or care of an aged care consumer taking into account any relevant code of conduct or professional standard that applied at the time; or
- matters held to be trivial or negligible conduct after being investigated and recorded as part of workplace procedures.

Examples include:

- touching an aged care consumer to attract their attention, to guide them, or to comfort them if they are distressed;
- if a staff member raises his or her voice to attract attention or speak with an aged care consumer who has hearing difficulties; or
- when there is accidental contact.

The provider must consider all allegations of serious incidents, but may determine that some are not required to be reported following the consideration of guidance material provided by the Commission.

Question

- Are these examples appropriate and clear on what would not be considered a serious incident?

Rationale and evidence

The KPMG report found that the scope of incidents reportable under current arrangements may exclude certain serious incidents from being reported. Expanding the scope of what constitutes a serious incident under a SIRS compared to current arrangements aims to ensure all incidents of a serious nature are reported and are therefore visible by the oversight body (the Commission). It would also strengthen the legislative obligations on providers to take an appropriate and

considered response to all incidents of a serious nature, and therefore reduce risk for all consumers receiving Commonwealth funded residential aged care.

As outlined in the ALRC report, the definition of a serious incident is a critical factor in a SIRS. In addition, if the threshold for a reportable incident is set too low, this could unreasonably divert services' resources away from direct care responsibilities; and dilute the Commission's ability to efficiently and effectively identify incidents of significance.

Who must/will be able to report

The approved provider of residential care will be responsible for reporting serious incidents to the Commission. Staff members of the residential aged care service will be responsible for alerting the provider of alleged, suspected or actual serious incidents.

Any person, including staff who are concerned that the care of any consumer is being compromised, should raise their concerns directly with the aged care provider in the first instance. Matters are able to be escalated to the Commission if required. The Commission provides a free service for anyone to raise a concern or make a complaint about the quality of care or services provided to people receiving Commonwealth funded aged care services. There are strict confidentiality and anonymity provisions within aged care legislation that ensures people who request confidentiality are protected from having their identity disclosed.

It is not expected that providers engage in technical legal analysis of whether conduct amounts to a criminal offence. Providers should notify state and territory authorities, including police where appropriate.

What protections will be available for those providing information or reports?

The whistleblowing protections in section 96-8 of the Act may need to be expanded to provide appropriate protections for the SIRS.

Rationale and evidence

During consultation for the development of the KPMG report, stakeholders commented on the need for mechanisms to allow any person with a reportable conduct allegation to make a notification.

Within the NDIS reportable incidents scheme, the requirement to notify the NDIS Commission of reportable incidents is a registration obligation on registered providers. The NDIS Commission encourages staff and members of the public to raise any concerns through complaints channels, where complaints staff, in addition to managing the matter as a complaint in its own right, escalate through internal processes as a reportable incident.

Questions

- Is there a need to define 'key personnel' that can report an incident on the approve provider's behalf?
- If so, who should be considered 'key personnel'?

Timeframes and information to be provided for reporting

A two-stage approach for reporting of serious incidents is being proposed, consistent with the timeframes of the NDIS reportable incidents scheme:

- **Incident notification (Part A)**
To be provided to the Commission within **24 hrs** of the aged care provider becoming aware of the incident
- **Incident status report (Part B)**
To be provided to the Commission within **five business days** of the date of incident notification

A final report may also be required by the Commission within 60 business days of submitting the incident status report (or a different period specified by the Commissioner). The Commission will advise a provider if this is required.

Questions

- Are the proposed reporting timeframes appropriate?
- If not, what changes should be made?

Information to be provided at each stage

Part A - Incident notification (within 24 hrs)

It is proposed that information to be provided at this stage be modelled on the current Reportable Assault Report notification form, however information provided at this stage of notification could either be in writing or by telephone (by exception). The form requires the following information to be provided:

- Contact details for the person making the notification;
- The approved provider and service details;
- A description of the incident, including the impact on the consumer;
- Whether the incident has been reported to the police and what action (if any) the police have taken;
- Whether the family and/or decision maker have been notified;
- Details on alleged offender and the alleged victim; and
- What action has been taken to manage or minimise the risk relating to the incident.

Part B - Incident status report (within five business days)

It is proposed that information to be provided at this stage would be modelled on the NDIS five day notification form. This form builds on the information supplied above, with the provision of the following additional information in writing:

- Details on a support person for the impacted person;
- Details of any witnesses;
- Further details on, or the outcome of, any investigation;
- Further details on the action/s that have been taken or are being considered;
- If a risk assessment has been undertaken in response to the incident;
- Details if the incident resulted in a death; and
- Details of the inappropriate use of restraint.

Final report (if required)

A final report may also be required by the Commission within 60 business days of submitting the incident report (or a different period specified by the Commissioner).

As proposed in the KPMG report (and reflected in current NDIS requirements), where required, this final report should be submitted to the Commission in writing and include, if known, details of any internal or external investigation or assessment that has been undertaken in relation to the reportable conduct including:

- The name and position of the person who undertook the investigation;
- When the investigation was undertaken;
- Details of any findings made;
- Details of any corrective or other action taken, the outcome of this and ongoing actions to prevent recurrence of the incident, since the incident notification;
- A copy of any report of the investigation or assessment;
- Whether consumers affected (or their representative) have been kept informed of the progress, findings and actions relating to the investigation or assessment in line with open disclosure requirements;
- Any other information required by the Commission.

Further consultations may be undertaken with the sector on opportunities to leverage or integrate with existing systems and processes to minimise administrative burden.

Questions

In relation to the information provided at each stage:

- Is the proposed level of information to be provided at each stage appropriate?
- What changes should be made and why?
- Does the proposal adequately cater for incidents between consumers?
- If the incident is between consumers, what additional information should be reported at each stage (e.g. details of any cognitive impairment that had been assessed by an appropriate health professional)?

In relation to the timeframes for reporting:

- Would providers know the relevant information needed within these timeframes to allow reporting to be met?
- What changes should be made and why?

Proportionate reporting

It is proposed that the Commission will be able to apply a risk-based approach to regulation and establish proportionate reporting based on provider risk profile and performance. It is proposed that the Commission have powers to exempt certain matters from being reported, by agreement with providers if the Commission is satisfied the exemption will not increase the risk of harm to consumers.

This will allow providers that have demonstrated a satisfactory level of competence in responding to serious incidents to carry out investigations into exempted matters without having to report to the Commission in the manner set out above. This will allow the Commission to focus its efforts on serious matters and on providers that have not demonstrated a satisfactory level of competence in handling serious incidents.

Providers will need to show a growth and maturity in handling serious incidents to enter into such agreements. Class or kind agreements should be tailored to the expertise and experience of the provider.

Questions

- Should proportionate reporting have time limits?
- Are there any incident types that should not be included?
- Are there any specific limitations that should be applied? If so, what?

Rationale and evidence

The ALRC (and the KPMG report) considered that:

“...the timeframe for reporting a serious incident should be extended from the requirement for notification within 24 hours that exists under the reportable assaults scheme. A requirement to notify the oversight body as soon as possible, and no later than 30 days may be more appropriate to allow a provider to demonstrate a considered response to an allegation or suspicion of a serious incident.”¹⁵

A two-stage approach is consistent with recommendations in the ALRC report:

“The ALRC recommends that the provider be required to report...a serious incident and any findings or actions taken in response to it. The appropriate response...will require a process of information gathering to enable informed decisions about what further actions should be taken.”¹⁶

Under the NDIS model, most reportable incidents must be notified to the NDIS Commission within 24 hours of a provider’s key personnel being made aware of it, with a more detailed report about the incident and actions taken in response to it to be provided within five business days.

The unauthorised use of restrictive practice must be notified to the NDIS Commission within five business days of a provider’s key personnel being made aware of it. If there is harm¹⁷ to a participant, it must be reported within 24 hours.

A final report may also be required within 60 business days of submitting the five-day report. The NDIS Commission advises providers whether a final report is required.

Proportionate reporting and exemptions for some providers is consistent with the NSW, Victoria and Australian Capital Territory reportable conduct schemes for child protection services.¹⁸

Record keeping requirements

There is no change proposed to the existing requirements for record keeping set out in the Records Principles 2014, beyond minor changes to terminology, definitions and responsibilities.

Providers will continue to need to make records available to the Commission to enable the Commission to fulfil its assessment, monitoring and complaints handling functions.

Providers will also continue to make records available to the Commission regarding class or kind exemptions and matters held to be trivial or negligible conduct after being investigated and recorded as part of workplace procedures. Behaviour between consumers which does not cause significant harm or suffering to the individual in each instance should also be recorded where, if repeated may constitute a pattern of abuse to be reported under a proposed SIRS.

¹⁵ ALRC, 2017, *Elder Abuse – A National Legal Response: Final Report*, p.116.

¹⁶ ALRC, 2017, *Elder Abuse – A National Legal Response: Final Report*, p.115.

¹⁷ NDIS define ‘harm’ as “...the resulting impact of the act, omission, event or circumstance that occurs, and can include physical, emotional or psychological impacts such as physical injuries, emotional impacts such as fear or poor self-esteem, and psychological impacts such as depression or impacts on a person’s learning and development.

¹⁸ KPMG, 2019, *Strengthening protections for older Australians – Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers*, p.44.

Rationale and evidence

When outlining record keeping requirements for service providers, the KPMG report recommended that:

“There should...be a clear recordkeeping requirement for providers to record and maintain appropriate records in line with the requirements of the reportable conduct scheme. Record keeping requirements, including retention periods, should align with existing requirements under the Act and Records Principles 2014.”

The Records Principles 2014 require that each consolidated record includes:

- the date when the approved provider received the allegation, or started to suspect on reasonable grounds, that a reportable assault had occurred;
- a brief description of the allegation or the circumstances that gave rise to the suspicion; and
- information about whether a report of the allegation or suspicion has been made to a police officer and the department; or whether the allegation or suspicion has not been reported to a police officer or the department because subsection 63-1AA(3) of the Act applies.

Questions

- Are there more expansive changes needed to the proposed record keeping arrangements?
- If so, what changes?

Powers of the Commission in relation to reportable incidents

The Commission’s role is to protect and enhance the safety, health, well-being and quality of life of people receiving aged care. The Commissioner has functions including consumer engagement, the handling of complaints, regulation and education.

The department’s aged care regulatory functions are expected to transfer to the Commission from 1 January 2020.

The Commission is adopting a risk based approach to regulation, within an end-to-end quality and safety regulatory framework. The SIRS will be administered within that context, with a focus on education and support for providers with regulatory resources and efforts being targeted to the highest risks.

The Commission will focus on continuous improvement at the system level, including through education and capacity building of providers, as well as sector-wide learning.

Under the Commission's education powers, it will provide information, resources and education about matters relating to serious incidents, for example:

- clear guidance on best practice risk management systems and how providers should identify, manage and resolve incidents including for example:
 - What incidents need to be recorded and what information needs to be reported to the Commission.
 - Organisational reporting arrangements and reporting lines, including who must be notified when an incident occurs; when police or emergency services should be notified; when guardians, family members or carers should be notified; internal notifications; and reporting to the Commission.
 - How to support and provide assistance to a consumer affected by an incident (including those subject to allegations) to ensure the consumer's health, safety and well-being;
 - Applying the principles of open disclosure to engage impacted consumers in the management and resolution of an incident.
 - Principles of investigation to establish the cause of an incident, its effect and any operational issues that may have contributed to it occurring;
 - When corrective actions should be taken and the nature of such action;
- matters which may be out of scope of reporting under a SIRS.

The regulatory powers of the Commission will be reviewed and, where necessary, amended for the administration of the SIRS, including:

- a function to receive reports from providers related to their obligations under the SIRS;
- information gathering powers including to enable to the Commission to request further information from providers about how they have responded to the incident;
- investigation powers for the Commission to review serious incidents including class or kind exemptions and a provider's response to that incident;
- powers to direct a provider to comply with their responsibilities;
- powers to make a finding in relation to an approved provider's response to a direction;
- with powers to use information received for risk profiling;

Any proposed changes to the Commission's powers will be subject to further consultation.

Compliance action by the Commission for failure to meet the requirements of a SIRS is expected to align with approaches taken to compliance in relation to other approved provider responsibilities. The same regulatory powers will be used for enforcement.

Questions

- Are the proposed powers for the Commission adequate, for example in relation to investigation and the ability to respond to reports?
- What compliance and enforcement responses should the Commission have for example, civil penalties, sanctions, enforceable undertakings?
- Should these penalties be able to be applied to individuals or approved providers or both?

Rationale and evidence

The administration of the current compulsory reporting requirements under the Act are expected to transfer to the Commission from 1 January 2020.

The KPMG report recommended a core range of powers¹⁹ for the Commission to operate a SIRS:

- keep under scrutiny the systems providers have in place to prevent staff members from engaging in reportable conduct including by auditing service providers
- oversee and monitor how providers investigate and handle reportable conduct
- on its own initiative, conduct an investigation of reportable conduct
- make recommendations to a service provider for action to be taken
- exempt certain conduct from being reportable by agreement with services providers if the Commission is satisfied the exemption would not increase the risk of harm to consumers
- undertake capacity building and practice development in relation to responses by service providers to reportable conduct
- share information to enable the prevention and early detection of abuse and the safety of consumers
- support interaction with the criminal justice system and police
- make public reports and be required to publicly report on an annual basis on the operation and effectiveness of the SIRS
- cause an independent review of the operation of the SIRS every five years.

Public reporting by the Commission on SIRS

Public reporting of SIRS information is intended to increase transparency and information to the sector and consumers on performance. Reporting should aim to be incisive and informative, include quantitative (e.g. analysis) and qualitative analysis and help the sector, policy makers and regulators understand current trends and emerging issues.

¹⁹ KPMG, 2019, *Strengthening protections for older Australians – Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers*, p.42.

Information publicly reported on the operation of the SIRS may include annual and trend reporting on information such as the:

- number of reports received annually, by type;
- action taken by the Commission, e.g. number of Notices of Non-Compliance/sanctions; and
- types of action taken by the provider to resolve/manage the incident.

Rationale and evidence

The department currently reports on the number of reportable assaults within the annual Report on the Operation of the Aged Care Act, published on the GEN-Aged Care Data website.

Questions

- Is there additional information the Commission should publish? If so, what?
- Should individual providers be required to publicly report SIRS data? If so, what and how often?
- What might be the consequences of requiring public reporting by approved providers?

In its June 2017 report, the ALRC stated that:

“The oversight body should have the power to make recommendations, as well as to publicly report on any of its operations, including in respect of particular incidents or providers.”²⁰

The ALRC also stated in its report:

“The NSW Ombudsman has a range of powers to enable it to discharge its oversight and monitoring functions, including the power to: require the production of documents or statements of information; enter and inspect premises; make or hold inquiries; make recommendations; and to report to Parliament and to the public.”

To further enhance the transparency and accountability of providers in responding to reportable incidents, the Carnell-Paterson Review gave consideration to:

“...requiring providers to report the number of alleged or suspected reportable incidents that have occurred in their service on a monthly or quarterly basis to residents and their representatives, and to making the information publicly available.”²¹

²⁰ ALRC, 2017, *Elder Abuse – A National Legal Response: Final Report*, p.117.

²¹ Carnell-Paterson Review, 2017, *Review of National Aged Care Quality Regulatory Processes*, p.113.

Through consultations to develop the KPMG report, stakeholders supported some level of public reporting by the Commission but were not generally supportive of individual service providers having to report publicly, as such a requirement could result in perverse outcomes as:

- [it] may act as a disincentive to service providers notifying the Commission
- providers may refuse to accept more difficult/higher risk residents
- higher levels of reportable conduct may be an indicator of effective internal incident management systems, rather than poor quality service provision.²²

Noting that this issue should be considered as part of an independent review of a SIRS²³, the KPMG report recommended that:

“The Commission should have appropriate powers to make public reports and be required to publicly report on an annual basis on the operation and effectiveness of the reportable conduct scheme.”²⁴

Question

- Are there any additional matters of significance to consider in relation to reporting? If so, please explain further.

Any other matters

This consultation paper sets out:

- The proposed operations of a SIRS that together with other settings including the Aged Care Quality Standards, clinical governance frameworks, the Charter of Aged Care Rights and open disclosure, support providers to engage in risk management and continuous improvement activities to deliver safe quality care to residential aged care consumers.
- The Commission will administer the SIRS in the context of a risk based, end-to-end quality and safety regulatory framework, with a greater focus on assessing the actions taken by a provider to ensure the safety, health and well-being of a consumer, than is under the current arrangements.
- The proposed SIRS will place a greater focus on how providers investigate and respond to serious incidents, than current arrangements.
- The proposed model for defining a serious incident, consists of two components addressing alleged, suspected or actual:
 - abuse or neglect by a staff member of a Commonwealth funded residential aged care against a consumer; and

²² KPMG, 2019, *Strengthening protections for older Australians – Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers*, p.24.

²³ KPMG, 2019, *Strengthening protections for older Australians – Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers*, p.24.

²⁴ KPMG, 2019, *Strengthening protections for older Australians – Development of models and options for a Serious Incident Response Scheme (SIRS) for Commonwealth funded aged care service providers*, p.47.

- incidents of abuse and aggression between consumers receiving Commonwealth funded residential aged care,

which expands the existing compulsory reporting requirements and removes the current exemptions under the Act.

- The proposed record keeping and reporting arrangements for a SIRS.

Questions

- Are there any other matters of significance that need to be defined for the design or operation of a SIRS?
- If so, please explain further.

Glossary

Term	Definition
<i>Aged Care Act 1997</i> (the Act)	The Act is the overarching legislation that outlines the obligations and responsibilities that aged care providers must follow to receive subsidies from the Australian Government.
Aged Care Quality and Safety Commission (the Commission)	The role of the Commission is to protect and enhance the safety, health, well-being and quality of life of people receiving aged care. The Commission independently accredits, assesses and monitors aged care services subsidised by the Australian Government, and also resolve complaints about these services.
Aged Care Quality Standards (the Standards)	Organisations providing Commonwealth subsidised aged care services are required to comply with the Standards. Organisations are assessed and must be able to provide evidence of their compliance with and performance against the Standards. The Standards focus on outcomes for consumers and reflect the level of care and services the community can expect from organisations that provide Commonwealth subsidised aged care services.
Approved provider	An approved provider receives subsidies for the delivery of aged care to and is responsible for making decisions about the delivery of quality care to consumers, the financial management of subsidies and for managing consumer's fees and payments.
Australian Law Reform Commission (ALRC)	The ALRC undertakes research, and provides recommendations to reform the law, on topics selected by the Attorney-General of Australia.
Clinical Governance Framework	The Standards require aged care services that provide clinical care to demonstrate the use of a clinical governance framework. Clinical governance is an integrated set of leadership behaviours, policies, procedures, responsibilities, relationships, planning, monitoring and improvement mechanisms that are implemented to support safe, quality clinical care and good clinical outcomes for each consumer.
Disability Reportable Incidents Scheme for disability services in NSW	The disability reportable incidents scheme operating in New South Wales.
National Disability Insurance Scheme (NDIS)	The NDIS provides funding for supports and services to people with a disability, their families and carers.

Term	Definition
Open disclosure	The open discussion that an aged care provider has with people receiving aged care services when something goes wrong that has harmed or had the potential to cause harm to a person receiving an aged care service.
Residential aged care	Provides a range of care options and accommodation for older people who are unable to continue living independently in their own homes.
Staff member	Staff member is defined in s63-1AA(9) of the Act to mean 'an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services' and the Accountability Principles 2014 extends this definition to certain volunteers of an aged care service where appropriate.