

CHAPTER 3 INVESTIGATION AND MANDATED REPORTING OF ELDER AND DEPENDENT ADULT ABUSE AND NEGLECT

I. Introduction

This chapter establishes the requirements for Long-Term Care (LTC) Ombudsman staff and volunteers as both investigators and mandated reporters of elder and dependent adult abuse and neglect, the definitions of abuse and neglect, and reporting requirements of the National Ombudsman Reporting System (NORS).

The LTC Ombudsman Program receives and investigates reports of alleged and suspected abuse or neglect of elder and dependent adults occurring in LTC facilities. Complaints, referrals, and reports are received from LTC facility residents, the public, private agencies, mandated reporters, other service providers, and individuals who suspect that the safety or well-being of an elder or dependent adult is in danger. Ombudsman representatives must act only with the consent of the victim or the victim's legal representative and must not disclose confidential information or the identity of the victim or complainant unless consent to disclose is given by the victim, the victim's legal representative, or pursuant to court order. Cross-reports of abuse and neglect to law enforcement and licensing agencies must conceal the victim's identity unless the Ombudsman representative has received consent from the victim or the victim's legal representative.

In addition, California law designates LTC Ombudsman staff and volunteers as mandated reporters of suspected elder and dependent adult abuse and neglect. LTC Ombudsman representatives are required to report instances of abuse that they ***directly observe***.

Based upon recommendations found in the document, "Coordination Between Long-Term Care Ombudsman and Adult Protective Services Programs and Related Issues – Report on a Meeting Sponsored by the Administration on Aging on October 25–26, 1993 in Washington, D.C.," and consistent with the history and practice of the program, as a ***mandated reporter***, Ombudsman representatives who directly observe abuse should cross-report it, regardless of whether consent is obtained from the resident or legal representative.

As ***investigators of abuse***, Ombudsman representatives shall act only with the consent of the victim or legal representative and shall disclose confidential information only after the victim or legal representative gives consent to disclose or disclosure is pursuant to court order.

An Ombudsman Jurisdiction and Referral Chart (OSLTCO S201) that delineates the facility types in which the LTC Ombudsman Program has jurisdiction, to which agencies abuse allegations or suspicions are reported, and to which agencies

Ombudsman representatives make referrals is available in the Access and Jurisdiction folder of the forms section of the Coordinator Resources page on the CDA Website (www.aging.ca.gov) or upon request from the OSLTCO. The Ombudsman Program investigates elder and dependent adult abuse and neglect in LTC facilities where a regular presence is required by Ombudsman staff and volunteers, and in community care facilities such as adult day programs and adult residential facilities. (See the Jurisdiction and Referral Chart and the Ombudsman Facility Presence Chart on the Coordinator Resources Webpage under Forms/Access and Jurisdiction.)

II. Legal Authority

FEDERAL Title 42 United States Code sections 3058d and 3058g(a)(3)(A)(ii),

STATE Welfare and Institutions Code sections 9725 and 15600-15650

III. Receipt and Investigation of Elder and Dependent Adult Abuse Report

Upon receipt of a report of suspected abuse or neglect, an Ombudsman representative must first visit the resident and obtain consent from the resident to investigate the suspected abuse. In the event that the resident does not have capacity to give consent, the Ombudsman representative shall seek consent from the resident's legal representative prior to conducting an investigation or making cross-reports. After receiving consent to investigate, the Ombudsman representative conducts an investigation to determine whether the abuse or neglect has occurred [Welf. & Inst. Code §15650(f)]. If, as a result of the investigation, the suspected abuse or neglect is verified (the circumstances described in the report are generally accurate), the Ombudsman representative obtains consent from the resident or his or her legal representative to cross-report the verified complaint to appropriate agencies for further action as necessary [Welf. & Inst. Code §§15640(d), 15650(f)]. A licensing agency investigation does not relieve the Ombudsman Program from the responsibility of investigating the report.

On occasion, an investigation by the LTCOP may be done cooperatively with other investigatory agencies, e.g., local law enforcement, licensing agencies or Adult Protective Services (APS). For example, the licensing or law enforcement agency may have simultaneously received the report of abuse or neglect and may request the Ombudsman's presence during the resident interview to help minimize trauma to the resident. Law enforcement agencies retain the exclusive responsibility to investigate alleged criminal acts. They may request the assistance of the Ombudsman Program in their investigation [Penal Code § 368.5(b)]. Local Ombudsman Programs are encouraged to develop Memoranda of Agreement (MOU) with local law enforcement agencies to clarify the role of each agency in abuse investigations. A template MOU for this purpose is available on the Coordinator Resources Webpage.

IV. LTC Ombudsman Representatives as Mandated Reporters

State law defines LTC Ombudsman representatives as mandated reporters of suspected elder and dependent adult abuse [Welf. & Inst. Code §15610.17(s)]

A. Definition of Mandated Reporters

1. In Welfare and Institutions Code section 15630(a), a mandated reporter is defined as “any person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult, whether or not that person receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any dependent adult care custodian, health practitioner, clergy member, or employee of a county adult protective services (APS) agency or a local law enforcement agency.”
2. Under Welfare and Institutions Code section 15610.17(s), LTC Ombudsman representatives are labeled “care custodians” and, as such, are mandated reporters.

B. Reporting Requirements for Mandated Reporters

1. General Reporting Requirements

Any mandated reporter who, in his or her professional capacity, or within the scope of his or her employment, has observed or has knowledge of an incident that reasonably appears to be physical abuse, abandonment, abduction, isolation, financial abuse or neglect, shall report the known or suspected instance of abuse by telephone immediately or as soon as is practicably possible, and by written report sent within two working days. In addition, a mandated reporter who is told by an elder or dependent adult that he or she has experienced behavior, including an act or omission, constituting physical abuse, abandonment, abduction, isolation, financial abuse, or neglect, or reasonably suspects that abuse, shall report the known or suspected instance of abuse by telephone immediately or as soon as is practicably possible, and by written report sent within two working days. [Welf. & Inst. Code § 15630(b)(1)]

2. For Abuse Occurring in LTC Facilities

- a) The general requirement is that if the alleged abuse is not physical abuse and has occurred in a LTC facility, except a state mental health hospital or a state developmental center, the report shall be made to the local Ombudsman or the local law enforcement agency. [Welf. & Inst. Code §15630(b)(1)(D)]

- b) For the purpose of investigation of elder and dependent adult abuse, “Long-Term Care Facility” has a different definition than it does for traditional Ombudsman complaint investigation and regular presence visits. In addition to Skilled Nursing Facilities (SNFs), Intermediate Care Facilities (ICFs), and Residential Care Facilities for the Elderly (RCFEs), LTCs for abuse investigation include ICFs for the Developmentally Disabled (all types), Congregate Living Health Facilities, Adult Residential Facilities (including those for Persons with Special Health Care Needs), Adult Day Programs, and Adult Day Health Care Facilities.

3. Special Requirements for Reporting Physical Abuse in LTC Facilities

- a) If the physical abuse results in serious bodily injury defined as *“injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including, but not limited to, hospitalization, surgery, or physical rehabilitation”* (Welf. & Inst. Code § 15610.67), the mandated reporter must report by telephone to the local law enforcement agency immediately, but no later than within two hours of learning of the abuse. The mandated reporter must send a written report to the local law enforcement agency, the local LTCOP, and the appropriate licensing agency within two hours of learning of the physical abuse.
- b) If the physical abuse does not result in serious bodily injury, the mandated reporter must report by telephone to the local law enforcement agency within 24 hours of learning of the abuse and must follow up with a written report to the local law enforcement agency, the local LTCOP, and the appropriate licensing agency within 24 hours of learning of the physical abuse.
- c) If the physical abuse is allegedly caused by a resident with a physician’s diagnosis of dementia and does not result in serious bodily injury, the mandated reporter must report to the local LTCOP or the local law enforcement agency by telephone immediately or as soon as practicably possible, and follow with a written report within 24 hours.
- d) Abuse reporting requirements in LTC facilities are summarized in the Mandated Reporter flow chart, which can be found in the Forms section of the Coordinator Resources page on the CDA Website, www.aging.ca.gov.

4. Abuse Occurring Outside of LTC Facilities

- a) If the alleged abuse has occurred in a state mental hospital or a state developmental center, the report shall be made immediately, but no later than within two hours, to designated investigators of the Department of State Hospitals or the State Department of Developmental Services, or to the local law enforcement agency. Except in an emergency, the local law enforcement agency shall, as soon as practicable, report to the Bureau of Medi-Cal Fraud and Elder Abuse any case of known or suspected criminal activity. [Welf. & Inst. Code § 15630(b)(1)(E)]
- b) If the alleged abuse occurred any place other than a LTC facility, a state mental hospital, or a state developmental center, the report shall be made to the county APS agency or the local law enforcement agency. [W&I Code §15630(b)(1)(C)]

5. Written Abuse Reports

Mandated reporters submit written abuse reports on form SOC 341, Report of Suspected Dependent Adult/Elder Abuse. Reports of suspected financial abuse of an elder or dependent adult are submitted by employees of financial institutions on form SOC 342, Report of Suspected Dependent Adult/Elder Financial Abuse. These reporting forms are located on the California Department of Social Services Website (www.cdss.ca.gov). Links to the forms are included on the Coordinator Resources Webpage.

V. Ombudsman Consent and Cross-Reporting of Complaints to Other Agencies

A. Consent

The LTC Ombudsman Program advocates for residents based upon the expressed wishes of the residents. Whether or not a resident wants to proceed with a complaint investigation or accept Ombudsman services is the decision of the resident. Cross-reporting and disclosure of the resident's identifying information will occur only after the complaint is verified [Welf. and Inst. Code section 15650(f)] and only if the resident or the legal representative of a resident lacking capacity provides consent to release the information. For more information about consent and who can provide it, see Chapter 5 - Confidentiality.

1. Ombudsman representatives must meet State requirements for consent to disclose records before cross-reporting a complaint to law

enforcement or licensing agencies. Welfare and Institutions Code, section 9725 states:

“All records and files of the office relating to any complaint or investigation made pursuant to this chapter [Chapter 11 State Ombudsman] and the identities of complainants, witnesses, patients, or residents shall remain confidential, unless disclosure is authorized by the patient or resident or his or her conservator of the person or legal representative, required by court order, or release of the information is to a law enforcement agency, public protective service agency, licensing or certification agency in a manner consistent with federal laws and regulations.”

In addition, Welfare and Institutions Code section 15636(a) asserts:

“Any victim of elder or dependent adult abuse may refuse or withdraw consent at any time to an investigation or the provision of protective services by an adult protective services agency or long-term care ombudsman program. The adult protective services agency shall act only with the consent of the victim unless a violation of the Penal Code is alleged. A local LTC Ombudsman shall act only with the consent of the victim and shall disclose confidential information only after consent to disclose is given by the victim or pursuant to court order.”

2. Ombudsman representatives must meet federal requirements for consent to disclose records before cross-reporting a complaint to law enforcement or licensing agencies.

Title 42 United States Code section 3058g(d)(2) requires that State procedures

(A) provide that, subject to subparagraph (B), the files and records described in paragraph (1) [files maintained by the Ombudsman Program] may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files and records): and

(B) prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files or records unless --

- (i) the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure and the consent is given in writing;
 - (ii) (I) the complainant or resident gives consent orally; and (II) the consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such requirements as the State agency shall establish; or
 - (iii) the disclosure is required by court order.
3. Case law also addresses the protections related to disclosure of Ombudsman records. In the case of *Ombudsman Services of Northern California v. the Superior Court of Placer County* (2007) 154 Cal. App. 4th 1233; 65 Cal. Rptr. 3rd 456; 2007, the court interpreted Welfare and Institutions Code section 9725 and the Privacy Clause of the California Constitution (Cal. Const., art. I, § 1) as authority for the finding that a patient, resident, conservator or legal representative cannot authorize the disclosure of a third party's identity, statements, or information. Therefore, each party must consent to the release of his or her own identifying information in Ombudsman records. The Ombudsman has the discretion to release records with identifying information redacted.

B. Cross-Reporting Complaints to Other Agencies

1. According to State law [Welf. & Inst. Code §15630(b)(1)(D)], the Ombudsman shall cross-report the alleged abuse and/or neglect complaints immediately or as soon as practicable to the appropriate licensing and law enforcement agencies. Cross-reporting is accomplished by attaching the form SOC 341 to the form CDA 223, Complaint from the Long-Term Care Ombudsman, found in the Forms folder on the Coordinator Resources Webpage.
2. If a resident or legal representative does not provide consent to release the resident's identity, the Ombudsman representative shall not cross-report any identifying personal information about the resident to other agencies. To maintain confidentiality, the Ombudsman has the discretion to cross-report to other appropriate agencies on the form CDA 223 and the form SOC 341 by redacting all information that would identify the victim resident who did not give consent to release his or her identity.
3. After an Ombudsman representative receives consent to investigate, subsequently verifies the complaint, and receives consent from the resident or his or her legal representative to disclose information, the Ombudsman shall cross-report alleged abuse and/or neglect

complaints as soon as practicable to the following respective agencies [Welf. & Inst. Code §15630(b)(1)(D)]:

- A) California Department of Public Health (CDPH) - any case of known or suspected abuse or neglect occurring in a long-term health care facility, as defined in Health and Safety Code section 1418(a).
- B) California Department of Social Services (CDSS) - any case of known or suspected abuse or neglect occurring in a residential care facility for the elderly, as defined in Health and Safety Code section 1569.2, or in an adult day care facility, as defined in Health and Safety Code section 1502(a)(2).
- C) DPH and the California Department of Aging (CDA) Community Based Adult Services Branch (formerly the Adult Day Health Care Branch) - any case of known or suspected abuse occurring in an adult day health care center, as defined in Health and Safety Code section 1570.7(b).
- D) California Department of Justice Bureau of Medi-Cal Fraud and Elder Abuse (BMFEA) – any case of known or suspected criminal activity [Welf. & Inst. Code § 15630(b)(1)(D)(iv)]
- E) Local District Attorney's Office - The Ombudsman Program is required by law to report all cases of known or suspected physical abuse and financial abuse to the local district attorney's office in the county where the abuse occurred [Welf. & Inst. Code § 15630 (b)(1)(D)(v)].
- F) Local Law Enforcement - The Ombudsman Program may report instances of abuse to the county APS agency or to the local law enforcement for assistance in the investigation if the victim gives his or her consent [Welf. & Inst. Code § 15640(d)].

C. Reporting Abuse Occurring Outside of Long-Term Care Settings

When the Ombudsman receives a report involving suspected abuse that occurred in a setting other than a LTC facility, the Ombudsman Program should not investigate the report, but instead should forward the report to the county APS agency.

Examples of those settings include, but are not limited to, private homes, senior housing complexes that are not licensed as LTC facilities, acute care hospitals (except Distinct Parts), clinics, pediatric SNFs, and other settings that are outside the jurisdiction of the Ombudsman Program.

D. Other Community Roles

The Office of the State Long-Term Care Ombudsman encourages local Ombudsman Programs to help develop and participate in local interdisciplinary groups that work to prevent and investigate abuse. These organizations include local abuse coordinating councils, multi-disciplinary teams (MDT), financial abuse specialist teams (FAST), and elder death review teams. Members of these groups typically include staff from Ombudsman Programs, APS, the Public Guardian/Conservator, and law enforcement agencies. Many groups review difficult cases, discuss gaps and barriers in resolving problems, and work out coordinated approaches to address abuse situations. A primary focus of these groups is to define each agency's role and responsibility in the area of prevention and investigation of elder and dependent adult abuse and neglect. Contacts with these agencies can prove invaluable when making referrals or requesting assistance on cases.

Welfare and Institutions Code section 15633 and 15633.5 allow Ombudsman representatives to participate on MDTs and share confidential information about residents when they have consent from the resident or the incapacitated resident's legal representative. Additionally, an Ombudsman representative must obtain a resident's consent before taking the resident's case to an MDT for consultation if the Ombudsman representative will reveal the resident's name or any identifying information about the resident.

VI. Reporting of Elder and Dependent Adult Abuse and Neglect in the National Ombudsman Reporting System (NORS)

After an investigation is complete, the LTC Ombudsman will report elder and dependent adult abuse, neglect, and exploitation through the normal complaint reporting process in the NORS. Definitions of abuse in NORS may not be the same as definitions in California Code. The term "abuse" in NORS means the 1) *willful* infliction of injury, unreasonable confinement, intimidation or cruel punishment with resulting physical harm, pain or mental anguish; or 2) deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness. (42 C.F.R. § 488.301)

Local Ombudsman Programs report complaints in the NORS report in Section A, Abuse, Gross Neglect and Exploitation in the following categories:

1. Physical abuse: includes hitting, slapping, pinching, kicking, etc. It also includes controlling behavior through corporal punishment.

2. Sexual abuse: includes, but is not limited to, sexual harassment, sexual coercion, or sexual assault.
3. Verbal/Psychological abuse (including punishment, seclusion): Use of oral, written or gestured language that includes disparaging and derogatory terms to residents or to their families, or within their hearing distance, to describe residents, regardless of their age, ability to comprehend or disability. Psychological or mental abuse includes, but is not limited to humiliation, harassment, and threats of punishment or deprivation. Involuntary seclusion means the separation of a resident from other residents or from his/her room against the resident's will or the will of the resident's legal representative. Emergency or short-term monitored separation is not considered involuntary seclusion if used for a limited period of time as a therapeutic intervention to reduce agitation as part of a care plan.
4. Financial exploitation: the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit or gain.
5. Gross neglect: the willful deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness.
6. Resident-to-Resident physical or sexual abuse: abuse by a resident against one or more other residents that meet the definitions of abuse provided above. This does not apply to unintentional harm or altercations between residents that can be prevented through better staff supervision.

Local Ombudsman programs report complaints of suspected abuse that do not meet the Section A definitions under the appropriate NORS code from Sections B-Q. To identify the complaint as suspected abuse, use the SOC 341 journal in the Ombudsman Data Integration Network (ODIN) and attach the form SOC 341 to the case record.

Refer to Chapter 12 - Information Systems for more information about NORS reporting requirements.