

California's Broken Long Term Care System:

- Nursing Homes
- Residential Care
- Home and Community Based Services
- Elder Abuse

What's Wrong & What Needs to Be Done

A SPECIAL REPORT BY:

California Advocates for Nursing Home Reform

650 Harrison Street, 2nd Floor San Francisco, CA 94107

(415) 974-5171 or (800) 474-1116 (Consumers Only)

www.canhr.org

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California's Nursing Homes: The Absence of Care

The Problems:

The quality of nursing home care in California has never been worse. The grave dangers facing California nursing home residents today are indisputable.

Complaints against California nursing homes are exploding. According to [publicly reported data by the Department of Public Health](#), the public filed 10,021 complaints against nursing homes in 2017-18, up 54% from just four years ago (6,517 in 2013-14). The State's backlog of complaint and entity-reported incident investigations for nursing homes grew to 15,889 cases on June 30, 2018. Astonishingly, this is several thousand cases higher than in 2014 when [a scathing state audit](#) condemned DPH for the huge backlog of complaints at that time. Many abused and neglected residents die before complaints on their mistreatment are investigated.

The [California State Auditor reported this year](#) that residents are increasingly subjected to severe neglect while profits for nursing home chains engaged in self-dealing are soaring. Between 2006 and 2015, nursing home deficiencies that caused, or were likely to cause, serious injury, harm, impairment, or death to residents increased by 35 percent. Meanwhile, nursing home payments to related parties (insider transactions) grew by 66 percent, and now exceed \$1 billion annually.

Understaffing is rampant. This summer [344 nursing homes filed waiver requests with DPH to staff below minimum staffing requirements](#). In a perversion of its mission, DPH is endorsing understaffing at California's most poorly staffed nursing homes.

Recent investigations found that residents' lives are jeopardized by [sexual abuse](#), [life-threatening infections](#), [abusive use of mind altering drugs](#), [neglect](#), [chronic understaffing](#), [illegal evictions](#), [unfit operators](#), [placement in dangerous facilities](#), [nursing home closures](#), [chemical restraint](#), [kickbacks](#), [dumping](#), [self-dealing by operators](#), [profiteering](#) and more.

Nursing home residents are in jeopardy because DPH is in the grip of the nursing home industry. Karen Smith, its Director, [has a financial interest in a large nursing home chain](#) and caters to industry interests, as have her predecessors. An egregious example of its allegiance to the industry is its capitulation to California's largest nursing home operator – who has been involved in a series of scandals – [by allowing him and his companies to operate over 20 nursing homes without having obtained licenses, and in some cases after licenses have been denied](#).

The Department's notorious Licensing and Certification Division remains dysfunctional despite having added an army of new positions since 2015.

Recommendations:

1. Appoint Consumer-Minded Leaders to Run the Department of Public Health

The most important step the Governor can take is appointing a new director and other leaders with the knowledge, skill, experience and determination to run the Department as a consumer

protection agency. It is especially important that its Center for Health Care Quality (CHCQ) – which regulates nursing homes and other licensed health facilities – be led by a consumer-minded regulator who is independent of the health care industry. Currently, the Deputy Director position for CHCQ is vacant, as is the position of the Chief Deputy Director of Policy & Programs. There is an immediate opportunity to bring in visionary leaders who will reform the Department and directly address the crisis in care nursing home residents are facing.

2. Regulate Nursing Home Chains

There are epidemic levels of elder abuse occurring in facilities owned by the for-profit chains that dominate nursing home care in California. Yet DPH has no system whatsoever to identify or regulate nursing home chains, allowing statewide patterns of neglect and abuse to go unnoticed and unpunished.

California should establish a system to identify each chain operating in the state, continually assess its performance, and use the assessments to guide licensing, oversight and enforcement actions. The system should: prevent chains from obtaining future licenses if they have poor performance histories; require operators to obtain DPH approval before they acquire and take over nursing homes; stop self-dealing schemes that chains are using to siphon off vast amounts of public funds intended for care; and require DPH to display consumer-friendly information about chain ownership, facilities and performance on its website.

3. Support Establishment of Safe Staffing Requirements for Nursing Homes

Today's nursing home residents are considerably sicker and frailer than in the past but staffing standards have not kept pace with their needs. Until this year, California's minimum staffing standard of 3.2 hours per resident day (hprd) had not been updated since 1999 despite it being dangerously deficient when it was first enacted. Under 2017 budget legislation (SB 97), a very small increase to 3.5 hprd took effect in July 2018, however, DPH is allowing most lowly staffed nursing homes to staff at the unsafe standard set in 1999.

Through legislation, California should establish a safe staffing standard that would require each skilled nursing facility to provide at least 4.1 nursing hours per resident day, including at least 1.3 hours of care by licensed nurses (RNs and LVNs), of which the RN component would be at least 0.75 hprd. This approach would adopt the recommendations made in a 2001 report ordered by Congress that, although dated and far from ideal, would bring far-reaching improvements in nursing home care throughout California.

California’s Residential Care Facilities: Still Unsafe and Unaccountable

The Problems:

The trends of the last twenty years continue: elderly and disabled Californians lack meaningful choices about where to receive care and how to pay for it. Residents of California assisted living facilities (Residential Care Facilities for the Elderly – “RCFEs”) are older, sicker, and have more complex medical and care needs, and now resemble nursing home residents of years past. Complaints filed with the state have risen 45% since 2012. Despite these red flags, California’s approach to regulating RCFEs remains based in an outdated “social” model of care that ignores some of the most important health and safety needs of the residents.

California’s current “one size fits all” approach to regulating RCFEs is clearly inadequate, given the growing acuity levels of RCFE residents. A broken inspection system, inadequate staffing and staff training requirements and “paper tiger” resident rights provisions that provide no enforcement power to residents - all contribute to a system that is unsafe for RCFE consumers, while leaving RCFEs essentially unregulated and unaccountable for their actions. California must update its model of care to ensure that the health and safety of RCFE residents takes priority.

Recommendations:

1. More Money for DSS Inspections and Oversight

The Department of Social Services’ (DSS) Community Care Licensing Division is responsible for regulatory oversight of over 74,000 different facilities statewide, 7,240+ of which are RCFEs. Although DSS, CCL is clearly dedicated to its mission of consumer protections, the DSS budget was cut to the point that inspections had to occur only once every five years. DSS lacks the funds to meaningfully inspect and oversee California’s RCFEs which house over 152,000 frail elders. DSS is required to go to annual inspections in 2019. Because of its lack of resources, DSS already relies on a “key indicator” inspection system in lieu of more time-intensive and effective comprehensive inspections. With DSS having to double its inspection activities, it will likely further sacrifice quality for quantity, leaving residents with deficient “drive-by” visits. Residents deserve a fully funded and comprehensive regulatory oversight system to ensure compliance with the rules designed to protect them, and DSS deserves to have the funding needed to do its job.

2. Create Minimum Staffing Requirements

RCFEs are required to have staff “in sufficient numbers” to meet residents’ care needs. Other than this, the current minimal staffing requirements for RCFEs are almost nonexistent. The majority of complaints by resident and family members are directly related to the lack of adequately trained staff people to meet residents’ needs. These lax rules led to the unfathomable situation during last year’s Sonoma County fires where 228 residents of Oakmont Varena were under the care of only two staff members who were unable to evacuate them. In these extremely dire circumstances, residents were rescued by heroic family members

and emergency responders, who had to kick down locked doors to evacuate residents as the facility filled with smoke.

CANHR recommends minimum staff-to-patient ratios be adopted as is required in nursing homes and that at least one licensed nurse be on call for each shift for residents with complex medical conditions.

3. Adopt a Standard Admission Agreement and Limit Rent Increases

One-sided admission agreements that dictate all terms to residents have been a problem in RCFEs for decades. Facilities give themselves total discretion to increase rates and assess additional charges, evict residents and impose stifling restrictions on quality of life. In particular, facilities claim residents need more services and must pay more money after they have moved in, knowing residents will have difficulty moving out. California needs a standard RCFE admission agreement, as it has with nursing homes, and laws that protect residents from unjustified and frequent rate increases.

4. Raise the SSI Board and Care Rate

Federal disability discrimination laws require states to fund home and community based care options in lieu of institutional care as much as possible. However, California spends a significantly higher amount on nursing home care than it does on less institutional RCFE care. The current SSI board and care rate, which pays for RCFE basic services for poor residents, is only \$1,173 a month, which is about five times less than what Medi-Cal pays for nursing home residents. The state's funding priorities force long term care consumers to obtain care in institutional nursing homes rather than community based settings. The SSI board and care rate should be doubled to give consumers a meaningful option to receive care in an RCFE, and to save the state the cost of paying for unnecessary nursing home care.

5. Give Residents a Remedy: Private Right of Action

Residents' rights are frequently violated in RCFEs and the victims have to rely on slow and uncertain DSS investigations to receive any resolution. Nursing home residents, by contrast, have a private right of action, to enforce their rights without intervention by state regulatory agencies. This disparity means that RCFEs are often unaccountable to residents for poor or unsafe care or violations of their rights. One way to increase enforcement without requiring any additional expenditure of state resources is to give RCFE residents a private right of action to remedy violations of care standards and resident rights. From an enforcement perspective, residents, family and friends are best suited to monitor care and pursue appropriate remedies.

6. Continuing Care Retirement Communities (CCRCs) – New Laws and New Rights for Residents Needed

California currently has 110 approved Continuing Care Contract Communities with approximately 25,000 residents. CCRCs, generally provide independent living, residential care/assisted living and skilled nursing care in one location. All CCRCs must obtain a certificate of authority to operate as a CCRC and be licensed as a Residential Care Facility for the Elderly by the Department of Social Services. Residents of CCRCs are required to make

a substantial investment in entrance fees (often their life savings), to pay considerable monthly payments and to assume considerable risk of losing it all as providers appropriate “surpluses” from entrance fees to construct new facilities – scrimping on care, food and other amenities previously promised. The problems with California’s CCRC industry cannot be overstated, and are not helped by weak statutory laws written for and by the CCRC industry and their lobbyists and a weak regulatory environment. This must change.

Home & Community Based Services: Cost Saving Alternatives

The Problems:

California's Medi-Cal program is the primary payor for 65% of the state's nursing home residents, spending roughly \$5 billion annually on nursing home care, despite pervasive reports of neglect and abuse in these institutions. Older adults overwhelmingly prefer to access care in more home-like settings, at a fraction of the cost of nursing home care.

California offers a limited number of Home and Community-Based Service (HCBS) programs, which provide long-term services in the community as an alternative to nursing homes. Countless studies show that when states invest in HCBS, they reduce overall long-term care spending.¹ Yet, California consistently fails to take advantage of the potential cost savings, due to its failure to meaningfully shift resources to HCBS. Instead, HCBS programs are often difficult to access due to limited slots, strict enrollment caps, and waitlists that are several years long.

Recommendations:

1. Fund Assisted Living for Medi-Cal Beneficiaries

Assisted living facilities are replacing nursing homes as the primary option for residential care. Currently, Medi-Cal funds assisted living only through the Assisted Living Waiver (ALW) program, which is limited to 5,700 slots in 15 counties (with a growing waitlist of over 5,000 individuals.) There is widespread, bipartisan support to expand the ALW, as evidenced by the nearly unanimous passage of [AB 2233](#) in 2018, which was vetoed by Governor Brown. California should significantly expand the ALW, with the long-term goal of funding assisted living broadly, following the lead of states like Oregon and Washington.

2. Increase Provider Rates

Provider rates across many HCBS programs remain low enough to discourage provider participation. For example, ALW provider rates have remained essentially stagnant over the past ten years, even while the nursing home industry has enjoyed annual compounded rate increases through [AB 1629](#). ALW providers are forced to offer care at ¼ the cost of their nursing home counterparts. Lack of provider participation remains a huge barrier to expanding the ALW program and other HCBS programs.

¹ Harrington, Ng, & Kitchener. Do Medicaid home and community based service waivers save money? <https://www.ncbi.nlm.nih.gov/pubmed/22106902>.

Kaye, LaPlante & Harrington. Do Noninstitutional Long-Term Care Services Reduce Medicaid Spending? <https://www.healthaffairs.org/doi/10.1377/hlthaff.28.1.262>

3. Eliminate Waitlists for all HCBS Programs

Many HCBS programs currently have waitlists that are over two-years long. This is simply unacceptable, considering these programs serve frail and elderly adults who may die while waiting for a slot, or be forced into costly nursing homes.

4. Streamline the Application Process

There are more than one dozen HCBS programs in California, each with a unique application and assessment process. California should create a single point of entry for all HCBS programs through a universal assessment tool, streamlining the application process, reducing inefficiencies and reducing administrative costs for all of the HCBS programs.

5. Amend Medi-Cal Eligibility Rules that Incentivize Nursing Home Care

California must prevent implementation of the January 1, 2019 sunset date for expanded spousal impoverishment protections. The sunset would constitute a huge step backward for California, forcing the state to revert to a system where more stringent eligibility requirements apply to Medi-Cal beneficiaries at home, versus Medi-Cal beneficiaries in a nursing home. In other words, implementing the sunset would create a perverse incentive favoring nursing home care.

6. Allow Nursing Home Residents to Afford to Go Home

Under current law, a Medi-Cal eligible nursing home resident has to pay all of his/her income, minus \$35, to the nursing home in a share of cost, unless a doctor certifies that the resident could return home within 6 months. Even then, the most that the resident can keep to pay the rent or mortgage payment is \$209, so there is often no home left to go to. California needs to modify the “Home Upkeep Allowance” in order for Medi-Cal beneficiaries to maintain their residences so they can return home when they no longer need care. The current allowance of \$209 per month has not been updated in three decades, and is not nearly enough to maintain a home of any kind in California. The result of this poor public policy is having Medi-Cal pay for thousands of dollars per month in costly nursing home care, rather than allowing the resident to retain sufficient funds to be able to return home.

Institutional & Financial Elder Abuse: Consumer Rights and Remedies

The Problems:

Elder abuse and neglect are very serious problems in California nursing homes. Every year California inspectors document hundreds of instances of abuse and neglect and many more incidents go undetected. Many studies, including the California State Auditor, have documented harm to nursing home residents due to neglect and abuse and recommended stronger enforcement of the law. The California Department of Public Health annually issues thousands of deficiencies and hundreds of citations as a result of inspection and complaint investigation findings. To help combat this problem, California enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) in 1991. (SB 679, Mello, Chapter 774)

Until that time, California protections from elder abuse were weak and difficult to enforce. Despite the prevalence of abuse and neglect, nursing homes were rarely sued and faced few consequences for their notorious misconduct. In enacting the EADACPA, the California Legislature declared its intentions to change this situation:

(h) The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.

(j) It is the further intent of the Legislature... to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.

The EADACPA gives elder and disabled Californians important but strictly limited opportunities to seek remedies for elder abuse in court. It provides a private, civil cause of action for individuals who are abused. To ensure that abusers do not benefit from the death of their victims, it allows recovery for pain and suffering even when the victim dies before final judgment.

Under EADACPA, victims of elder abuse must meet rigorous requirements. To qualify for non-economic damages, victims must prove by clear and convincing evidence that they were harmed by egregious abuse or neglect that involves recklessness, oppression, fraud or malice by the health care provider. This requirement, combined with a stringent evidence code and a heightened burden of proof, deter most elder abuse victims from seeking justice in court and prevent the majority from finding legal representation. Because elder abuse cases are extraordinarily complex and expensive to pursue, often involving thousands of dollars in out-of-pocket expenses, attorneys are unlikely to take on any case that cannot meet the high burden imposed under the Elder Abuse statute, much less one of a "frivolous" nature.

Elderly and disabled victims of abuse and neglect in nursing homes deserve to be fully compensated for their injuries. Curbing the right to sue, limiting damages or suppressing evidence of abuse and neglect won't solve the problem of a mismanaged and manipulated insurance market, nor will it decrease liability premiums or improve quality of care. We support reforms that will

address the systemic problems of abuse and neglect of elders and persons with disabilities and that will improve the quality of care for all of California's nursing home residents.

Recommendations:

1. Lower the Burden of Proof in Elder Abuse Cases:

The Elder Abuse laws have worked well to provide some elderly and disabled nursing home residents with legal remedies not previously available. It has not worked so well, however, in carrying out the intent of the law: "...to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." The burden of proof in elder abuse cases, i.e., clear and convincing evidence of oppression, fraud, malice or recklessness, is so high that few of the thousands of abuse and neglect cases are ever filed, much less litigated. Indeed, the very small number of lawsuits and the ability of so many chronically substandard nursing homes to escape any legal action indicate that the evidentiary standard set by the EADACPA is so high that few elders and disabled adults can avail themselves of this remedy. We strongly recommend that the burden of proof in elder abuse cases be lowered to a "preponderance of the evidence."

2. Increase Residents' Rights Remedies

The only remedy available for violation of residents' rights in California is a private cause of action authorized under Health and Safety Code §1430(b). Unfortunately, fewer than five such actions have been filed since this law was enacted in 1982. Although the remedies available under this law include injunctive relief - an important remedy for violation of residents' rights - the \$500 limit on damages so reduces the likelihood of legal representation, any opportunity for relief is moot. Thus, residents who are illegally evicted, denied phone calls or visitors or subjected to humiliation by being paraded naked through the facility, are denied any relief. We strongly recommend that the damages available under the residents' rights provisions of Health and Safety Code Section 1430(b) be increased and that the law be clarified to provide for per violation damage awards.

3. Elder Financial Abuse: Undue Influence:

California's Penal Code should be expanded to include the crime of theft through undue influence when a predator wrongfully manipulates and takes advantage of an elder to take their property unfairly.