



Systems for the Protection and Advocacy for Persons with Disabilities in the U.S.

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[Abstract]

“Adult protection” is a broad term encompassing a number of activities carried out by state or local entities that focus on protecting vulnerable adults (primarily the elderly and those with physical or cognitive disabilities) from abuse and exploitation. Adult Protective Services (APS) encompass both the protective activities of state or local agencies charged with investigating allegations of abuse and exploitation against the vulnerable elderly and persons with disabilities, and the federally mandated Long Term Care Ombudsman programs in each state, and the investigatory. While APS entities receive some federal funding through grants under the Older Americans Act and other legislation, it should be noted that the design and administration of APS schemes are almost exclusively a matter of state law.

Keywords: Adult protection, Adult Protective Services, Long Term Care Ombudsman programs

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I. Introduction

“Adult protection” is a broad term encompassing a number of activities carried out by state or local entities that focus on protecting vulnerable adults (primarily the elderly and those with physical or cognitive disabilities) from abuse and exploitation. Adult Protective Services (APS) encompass both the protective activities of state or local agencies charged with investigating allegations of abuse and exploitation against the vulnerable elderly and persons with disabilities, and the federally mandated Long Term Care Ombudsman programs in each state, and the investigatory. While APS entities receive some federal funding through grants under the Older Americans Act and other legislation, it should be noted that the design and administration of APS schemes are almost exclusively a matter of state law.

II. Adult Protective Services(APS)

1. Adult Protective Services Provided Under State Law

The victimization of vulnerable adults through neglect, financial exploitation, physical and sexual abuse, and related conduct is a widespread problem in the United States, as it is in virtually every part of the world. For the most part, the investigation and prosecution of those who perpetrate such abuse is a matter of state, not federal, responsibility. Although a few federal laws reference elder and vulnerable adult abuse, none directly regulate this area.¹⁾ This section will discuss state APS laws and their implementation

1) For an overview of federal laws that make reference to abuse and neglect of vulnerable adults, see Center for Elders and the Courts, Elder Abuse Basics, Laws <http://www.eldersandcourts.org/elder-abuse/basics/elder-abuse-laws.aspx>.

through APS agencies that are usually the first responders to allegations of abuse or exploitation of persons considered to be vulnerable due to age or disability.

The term “adult protective services” refers to the systems implemented in the various states that are intended to prevent and rectify instances vulnerable adult victimization. Although every state’s system is different, they share a number of characteristics. These include:

- Definitions of “vulnerable adults” and “abuse” that pertain to persons covered by the APS laws;
- A county- or state-based agency that is staffed with social workers who are knowledgeable about the signs of and remedies available when abuse of an elderly person or an adult with a disability is suspected;
- An “abuse hotline” telephone number or numbers that are specifically structured to take reports of abuse and refer them to the appropriate agency for follow up;
- In most states, statutes that designate certain members of certain professions (such as bankers, physicians and nurses, social workers, and the clergy) as so called “mandated reporters”—that is, persons who are required by law to report suspected abuse to authorities;
- Limited immunity from claims of defamation to persons who report suspected abuse based on a good faith belief that abuse is in fact occurring;
- Limited investigatory authority to contact possible victims and suspected perpetrators for the purpose of determining the validity of reports of abuse. This authority may include limited subpoena power to obtain records;
- Various means of acting to remove the victim from harm, such as by obtaining an emergency temporary guardianship.

The statutory schemes for APS are embedded with the civil law. These laws define the structure, authority, and limitations of adult protection agencies. APS laws often reference criminal law, but adult protection agencies are not part of law enforcement and lack the investigatory powers of the police and prosecutors. Adult protection agencies do not have authority to prosecute abusers whose conduct violates state criminal law. Rather, they work closely with law enforcement agencies to obtain evidence and otherwise assist police and prosecutors to prepare the criminal case.

It is worth noting that APS statutes were modeled after the basic approach in place for investigating claims of child abuse. In the context of the abuse of adults, this approach is problematic. First, the historical goal of the child abuse protection schemes was preservation of the family unit. Although they may involve temporary removal of an abused child from the home, the primary goal of child protection laws is family reconciliation. State authorities are reluctant to prosecute parents or relatives engaged in child abuse, not always for the best reasons. In a sense, the child abuse model decriminalizes behaviors that in any other context would call for serious criminal charges, such as assault or criminal neglect. When this philosophy is applied in the context of elder and vulnerable adult abuse, what would normally be considered crimes are frequently regarded, and handled, as merely “family matters” or civil wrongs not redressable in the criminal justice system.

The following sections elaborate on the basic elements of state APS systems as set out in the bullet points above.²⁾

Definition of “vulnerable adult”. Most state laws take one of two approaches

2) Many states have civil statutes that allow persons who have been the victims of abuse, and/or their family members, to seek civil damages –in some cases treble damages- and other remedies. While these civil provisions are an important component of the overall enforcement scheme respecting vulnerable adult abuse, I do not discuss them in this article.

in defining the concept of a vulnerable adult. In some jurisdictions, vulnerability is assumed by virtue of a status, such as age or disability. For example, North Dakota law states “A vulnerable adult is any adult [who] has a substantial mental or functional impairment.”³⁾ Utah’s statute provides that any person age 65 or older is considered to be a vulnerable adult.⁴⁾ In other jurisdictions, vulnerability may be defined by reference to a combination of conditions or by reference to particular services that are otherwise provided to a person. Thus, in the state of Washington

(21) "Vulnerable adult" includes a person:

- (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
- (b) Found incapacitated under [CW]; or
- (c) Who has a developmental disability ... or
- (d) Admitted to any facility; or
- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed ... or
- (f) Receiving services from an individual provider; or
- (g) Who self-directs his or her own care and receives services from a personal aide⁵⁾

Definition of abuse. Again, state law varies respecting the definition of “abuse” of an elder or vulnerable adult. For example, Illinois’ vulnerable adult statute provides:

(a) "Abuse" means causing any physical, mental or sexual injury to

3) N.D. Cent . Code § 50-25.5-01.17

4) Utah Stat. § 76-5-111(s).

5) Wash. Rev. Code § 7.34.020(21).

an eligible adult, including exploitation of such adult's financial resources . . . Nothing in this Act shall be construed to mean that an eligible adult is a victim of abuse because of health care services provided or not provided by licensed health care professionals.⁶⁾

In other states, the concept of abuse is more particularly defined. For example, Georgia's abuse statute provides:

As used in this chapter, the term:

(1) "Abuse" means the willful infliction of physical pain, physical injury, mental anguish, unreasonable confinement, or the willful deprivation of essential services to a disabled adult or elder person.

* * *

(9) "Exploitation" means the illegal or improper use of a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for another's profit or advantage.

(10) "Neglect" means the absence or omission of essential services to the degree that it harms or threatens with harm the physical or emotional health of a disabled adult or elder person.⁷⁾

Variations in the statutory definition of abuse affect the nature and scope

6) 320 I 11.Comp. Stat. § 20/2.

7) Ga.Code §§ 30-5-3(1), (9), and (10). For Links to the abuse statues of all fifty states, see National Center on Elder Abuse, State Resources, <https://ncea.acl.gov/resources/state.html>

of APS responsibilities in individual states.

Reporting abuse; immunity from civil liability. Most investigations of alleged abuse of a vulnerable adult being when a member of the public reports his or her suspicions that a vulnerable individual is being victimized. To facilitate public involvement and encourage such reports, most states have established a centralized telephone number, or “abuse hotline”, through which reports are processed and sent to the appropriate APS entity or, if appropriate, to law enforcement, for further investigation. Centralized hotlines also enable data collection and follow up of local APS investigators’ response to a report.⁸⁾ Non-emergency reports will be prioritized and processed in accordance with intra-agency guidelines. Unfortunately, due to funding issues many reports are not investigated until days or even weeks after the initial report is made.

If a report to an abuse hotline involves an emergency situation, it will generally be treated as a 911 emergency call and transferred to law enforcement and/or emergency medical personnel for immediate follow-up.

Mandated reporters. Any person may and should report suspected vulnerable adult abuse. In addition, almost all U.S. states have statutes requiring members of certain professions to report suspected abuse. The mandatory reporting statutes are aimed at individuals who are likely to have regular contact with vulnerable persons, and who should be knowledgeable of the signs and symptoms of abuse.⁹⁾ Examples of professions and persons

8) For a list of state and local abuse hotlines, and additional information, see National Center for Child Abuse and Family Violence, State Elder Abuse Hotlines, http://www.nccafv.org/state_elder_abuse_hotlines.htm

9) For a listing of each state’s mandatory reporting laws, and professionals subject to these laws, see American Bar Association Commission on Law & Aging, Elder Abuse, Mandatory Reporting Categories Charts, http://www.americanbar.org/content/dam/aba/administrative/law_aging/Mandatory

required to report under mandatory reporting laws include:

- Health care providers and personnel
- Social and mental health workers
- Members of the clergy
- Law enforcement and fire department personnel
- Paid caregivers
- Employees of institutions such as mental health facilities and nursing homes
- Employees of senior centers
- Guardians and conservators

More than half the states' mandated reporter laws require employees of financial institutions, such as banks, financial planning firms, and brokerage houses, to reported suspected financial exploitation of vulnerable adults. Oregon mandates that attorneys to report suspect abuse of a client, unless making such a report would be harmful to the client.¹⁰⁾

Mandated reporters who fail to make a report of suspected abuse are typically subject to civil penalties, although there are only a handful of cases in which a failure to report has actually resulted in sanctions. One major problem with mandated reporter statutes is that the signs and symptoms of abuse are not always understood or recognized by those charged under the statute to make such reports. For example, studies have shown that many physicians do not fully understand how physical, sexual, or emotional abuse of a vulnerable adult presents itself, and therefore are not likely to make reports even though they are covered by a mandated reporter law.¹¹⁾

ReportingCategoriesCharts.xls

10) Or. Rev. Stat. 124.050.9(r).

11) See, e.g., Deborah B. Wagenaar, et. al., Primary Care physicians and Elder Abuse:

Individuals who, *in good faith*, make allegations of suspected abuse of a vulnerable adult are protected from claims of defamation if the report later turns out to be inaccurate. This limited immunity is intended to encourage reporting even in cases where the evidence of abuse is less than clear-cut.

Investigating elder abuse. The exact procedures in place for investigating an allegation of abuse, neglect, or exploitation of a vulnerable adult depends, of course, on the jurisdiction. The scenario outlined below, based on APS procedures in Washington state, is typical.¹²⁾

- APS receives the report and investigates, assuming that APS has jurisdiction and the adult is considered a vulnerable adult under state law.
- The APS investigator(s) will (1) conduct a home visit, usually unannounced; (2) interview other individuals who may have information about the situation; and (3) offer protective services if the investigator determines abuse has occurred.
- Depending upon the situation, law enforcement may also be called upon to investigate. When law enforcement becomes involved, additional investigatory tools, such as search warrants and subpoenas, become available.
- If an investigation reveals the existence of abuse, APS works closely with other agencies and, if appropriate, the victim's family and caregivers in the community to ensure the health and safety of the vulnerable adult.

Current Attitudes and Practices, J. Am. Osteopathic Ass'n Vol.110, No.12 (December 2010), <http://jaoa.org/article.aspx?articleid=2093880>

12) This discussion based on Washington State Department of Home and Social Services, What Happens After You Contact Adult Protective Services, <https://dshs.wa.gov/altsa/home-and-community-services/what-happens-after-you-contact-adult-protective-services-aps>.

This may include such things as assigning a social worker to the vulnerable adult to determine whether care services are needed, helping the victim to obtain those services, finding emergency shelter, food, medical care, and so forth.

APS workers do not have authority to initiate any type of criminal or civil proceeding against the perpetrator(s) of abuse. Rather, in cases implicating clear violations of the criminal law, APS may report the alleged abuser to law enforcement, assist the victim to obtain an emergency protective order, an injunction to allow access to an alleged victim or referral for legal assistance. In extreme cases, APS may work with the Attorney General's office to appoint an emergency temporary guardian, with a non-emergency guardianship proceeding held later to find a permanent guardian and/or conservator.

One problem with the APS model is that intervention is not possible if the victim refuses assistance. Because the majority of vulnerable adult abuse is perpetrated by family members, caregivers, or friends, it can be difficult to obtain the consent of a suspected victim to pursue the investigation or assist with obtaining relief. For this reason, APS agencies often find themselves unable to address even clear cases of abuse or neglect. While APS might seek the assistance of law enforcement to pursue an investigation involving an unwilling victim, historically the prosecution of those who perpetrate vulnerable adult abuse has not been a law enforcement priority.

2. Long Term Care Ombudsman Program

As noted earlier, state APS entities are the primary starting point for investigating potential abuse, neglect, and exploitation of vulnerable adults. While agencies of the federal government only rarely become directly involved in combating abuse, federal law is responsible for one important aspect of APS:

the state Long Term Care Ombudsman Offices (LTCOO).¹³⁾

Long-Term Care Ombudsmen are advocates for residents of nursing homes, board and care homes, assisted living facilities, and similar adult care facilities. They work to resolve problems of individual residents and to bring about changes at the local, state and national levels that will improve residents' care and quality of life.

The first state Long Term Care Ombudsman Office was established in 1972; now, all U.S. states as well as the District of Columbia, Puerto Rico and Guam. The programs are mandated and funded by Titles III and VII of the Older Americans Act¹⁴⁾ and other federal sources. Each state has an Office of the State Long-Term Care Ombudsman, headed by a full-time state ombudsman. The bailiwick of the Long Term Care Ombudsman's Office is problems, including instances of abuse and neglect, arising within residential facilities such as nursing homes. Paid staff and many volunteers populate the programs; these ombudsmen s, assist residents and their families and providing a voice for those unable to speak for themselves.

Among the services provided to institutional residents under this program are:

- receiving, investigating, and resolving complaints arising within the institutional environment that are initiated by residents, their families, or other concerned individuals
- conducting inspections, through unannounced and announced visits, of nursing homes, l board and care homes, assisted living facilities, and residential and institutional facilities;

13) This Section derives much of its content from Administrative on Community Living, Long-Term Care Ombudsman Program, https://aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/

14) The Older Americans Act is codified at 42U.S.C. § § 3001-3058ff.

- providing training to employees of institutions on residents' rights, preventing abuse of residents, and similar topics; and
- consulting with facility management personnel, family members, and residents on a variety of topics.¹⁵⁾

According to the federal Administration on Community Living, the most frequent complaints arising in long term care facilities were, in 2013:

- Improper eviction or inadequate discharge/planning;
- Unanswered requests for assistance;
- Lack of respect for residents, poor staff attitudes;
- Quality of life, specifically resident/roommate conflict; and
- Administration and organization of medications

III . Relationship between APS and LCTOO

Because there is some overlap in the responsibilities of the state APS organization(s) and the LCTOO, coordinating their respective efforts has not always been smooth.¹⁶⁾ In a nutshell, however, APS organizations remain the primary means to initiate an investigation into allegations of abuse and neglect occurring in the community, while the LCTOO is the first responder to complaints that arise within long term care facilities. LCTOO may call in APS to

15) Administration on Community Living, Long-Term Care ombudsman Program, https://aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/

16) For an extensive discussion of this issue as it arose in the early days of overlap, see 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., available at <http://tinyurl.com/gvjdblo>.

assist in an investigation, if appropriate, and vice versa. Both entities will, in appropriate cases, involve law enforcement entities in those cases that may involve criminal conduct.

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http://www.nccafv.org/state_elder_abuse_hotlines.html.
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