



Australian Government

Australian Law Reform Commission

Elder Abuse— A National Legal Response

SUMMARY REPORT

This Summary Report reflects the law as at 1 May 2017.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Terms of Reference

Protecting the Rights of Older Australians from Abuse

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to:

- the principle that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse
- the principle that laws and legal frameworks should provide appropriate protections and safeguards for older Australians, while minimising interference with the rights and preferences of the person, and
- relevant international obligations relating to the rights of older people under United Nations human rights conventions to which Australia is a party.

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), the consideration of:

- existing Commonwealth laws and frameworks which seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. These should include, but not be limited to, regulation of:
 - financial institutions
 - superannuation
 - social security
 - living and care arrangements, and
 - health
- the interaction and relationship of these laws with state and territory laws.

Scope of the reference

In undertaking this reference, the ALRC should identify and model best-practice legal frameworks. The ALRC should also have regard to other inquiries and reviews that it considers relevant, including:

- the recommendations of ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws* (2014)

- the recommendations of the Senate Standing Committee on Community Affairs report on violence, abuse and neglect against people with disability (2015), and
- the recommendations of the Commonwealth House of Representatives report, *Older People and the Law* (2007).

In conducting this inquiry, the ALRC should specifically consider best practice laws, as well as legal frameworks including, but not limited to, the National Disability Insurance Scheme and the Aged Care framework, which:

- promote and support older people's ability to participate equally in their community and access services and advice
- protect against misuse or advantage taken of informal and formal supporter or representative roles, including:
 - formal appointment of supporters or representatives
 - informal appointment of support and representative roles (eg family members)
 - prevention of abuse
 - mitigation of abuse
 - reporting of abuse
 - remedies for abuse
 - penalties for abuse, and
- provide specific protections against elder abuse.

Collaboration and consultation

In undertaking this reference, the ALRC should identify and consult relevant stakeholders, including Commonwealth departments and agencies, state and territory governments, key non-government stakeholders, including advocacy and policy organisations and service providers, the Age Discrimination Commissioner and the Aged Care Complaints Commissioner.

Timeframe

The ALRC should provide its report to the Attorney-General by May 2017.

Summary Report

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Context

1.1 Preventing elder abuse in an ageing world is ‘everybody’s business’, announced the *Toronto Declaration on the Global Prevention of Elder Abuse* (2002).¹ The World Health Organization (WHO) has estimated that the prevalence rate of elder abuse in high- or middle-income countries ranges from 2% to 14%. As Australia faces the ‘inescapable demographic destiny’² of an ageing population, the potential reach of

1 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

2 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) Foreword.

elder abuse may grow. In this context, the Report and the 43 recommendations it contains are timely.

1.2 Australia's population is ageing, as people live longer and have fewer children. Approximately 15% of the population was aged 65 or over in 2014–15, and this is expected to rise to 23% by 2055. A female child born in 1900 could expect to live to 59, but in 2017 can expect to live to 85. Australians are not only living longer, they are staying healthy for longer.³

1.3 That Australians are living longer and healthier lives is great cause for celebration. In her book, *In Praise of Ageing*, Patricia Edgar writes that for many,

ageing is a liberating experience; we are consoled for any losses by a new sense of freedom and confidence—we don't fear the future and we don't worry so much about the opinions of others. But persistent assumptions about our incapacity undermine our well-being. The main mantra in the media is: 'Now that they are living longer we can't afford them; they are all going to get sick and be a drain on the rest of society.' While this myth is gathering momentum there is another side to the story. ... [It] is about active, engaged older people who are enjoying their lives and continuing to contribute.⁴

1.4 While older people should not be considered vulnerable merely because of their age, some factors commonly associated with age can make certain older people more vulnerable to abuse. Disability, for example, is more common among older people. More than 80% of people aged 85 years or over have some disability. While fewer than one in 20 Australians under 55 years have 'severe or profound core activity limitations', almost one-third of people aged 75 years or over have such limitations.⁵

1.5 The prevalence of cognitive impairment also increases with age. From age 65, the prevalence of dementia doubles every 5 or 6 years. 30% of people aged over 85 have dementia, and over 1.1 million Australians are expected to have dementia by 2056. More generally, people aged 85 years and over need significantly more assistance and care than people aged 65–84.

1.6 Vulnerability does not only stem from intrinsic factors such as health, but also from social or structural factors, like isolation and community attitudes such as ageism. All of these factors contribute to elder abuse.

1.7 The Attorney-General of Australia, Senator the Hon George Brandis QC, asked the ALRC to conduct this Inquiry into elder abuse in February 2016. The Inquiry forms part of a range of initiatives at the Commonwealth level towards addressing elder abuse and builds on a number of other reviews, including: the 2007 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*; the 2015 report of the Senate Community Affairs References Committee into violence, abuse and neglect against people with disability in institutional and residential settings; the 2016 research report by the Australian Institute

3 See ch 2.

4 Patricia Edgar, *In Praise of Ageing* (Text Publishing, 2013) 8.

5 Australian Institute of Health and Welfare, *Australia's Welfare 2011*, Cat No AUS 412 (2011) 11.

of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses*; and the ALRC's 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*.

What is elder abuse?

1.8 Elder abuse, as described by the WHO, is 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person'.⁶ It can take various forms, such as physical abuse, psychological or emotional abuse, financial abuse, sexual abuse, and neglect.

Types of abuse

1.9 Psychological or emotional abuse appears to be one of the most common types of elder abuse, and includes verbal abuse, name-calling, bullying and harassment. Other examples of psychological abuse include: treating an older person like a child; repeatedly telling them they have dementia; threatening to withdraw affection; and threatening to put them in a nursing home. Stopping an older person from seeing family and friends may also be psychological abuse or 'social abuse'.

1.10 Financial abuse is another common type of elder abuse, and includes: incurring bills for which an older person is responsible; stealing money or goods; and abusing power of attorney arrangements. Other behaviours that may, in some circumstances, be financial abuse include: refusing to repay a loan; living with someone without helping to pay for expenses; failing to care for someone after agreeing to do so in exchange for money or property; and forcing someone to sign a will, contract or power of attorney document.

1.11 Physical abuse might include pushing, shoving and rough handling. Australian crime statistics suggest that older people are less likely to be murdered or physically assaulted than younger people, but some types of physical abuse of older people may not be caught by these statistics—for example, the improper use of 'restrictive practices' in hospitals and residential care facilities.

1.12 Sexual abuse includes rape and other unwanted sexual contact. It may also include inappropriate touching and the use of sexually offensive language.

1.13 Neglect includes failing to provide someone with such things as food, shelter or medical care. Family members may be responsible for providing such 'necessities of life' and some may receive a social security payment for doing so. Staff in residential care facilities and others who provide in-home care may also be responsible for providing such care.

Risk factors

1.14 Further research is needed on risk factors for abuse, but there is evidence that people who suffer elder abuse are more likely to be dependent on others and have:

6 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

significant disability; poor physical health; mental disorders, such as depression; low income or socioeconomic status; cognitive impairment; and social isolation. Other risk factors include living alone with the perpetrator; and being aged older than 74 years. There is also some evidence that women are more at risk of elder abuse than men.

1.15 Risk factors for people who commit elder abuse include depression, substance abuse and financial, emotional and relational dependence.

Relationship with family violence

1.16 Elder abuse is commonly defined to refer to abuse by people ‘in a position of trust’. Although this will include paid carers, elder abuse is often committed by a family member of the older person—notably, by adult children, but also the older person’s spouse or partner. Elder abuse will therefore often also be family or domestic violence. While not as ‘gendered’ as family violence, elder abuse is suffered more often by women than men, and not only because women live longer than men. The dynamics of the abuse tend to be somewhat different, but elder abuse policy may learn much from initiatives to prevent family violence.

Framing the response—dignity, autonomy and safeguarding

1.17 The recommendations in the Report seek to balance two framing principles: dignity and autonomy, on the one hand; and protection and safeguarding, on the other. The ALRC recognises that autonomy and safeguarding are not mutually inconsistent, as safeguarding responses also act to support and promote the autonomy of older people.

1.18 Elder abuse undermines dignity and autonomy. Abuse and living in fear can inhibit a person’s ability to make choices about their own lives, to pursue what they value. Protecting older people from abuse can therefore be seen to support them to live autonomous and dignified lives. The *UN Principles for Older Persons* state:

Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status and be valued independently of their economic contribution.⁷

1.19 Sometimes, protective measures may conflict with a person’s autonomy, such as where an older person refuses to accept support, or to report abuse to police. Where possible, the ALRC has sought to recommend changes to the law that both uphold autonomy and provide protection from harm, but where this is not possible, greater weight is often given to the principle of autonomy. Older people, like most adults, prize their freedom and independence, and do not wish to be treated like children or sheltered from all risk. The autonomy of older people should not be afforded less

⁷ *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [17]–[18].

respect than the autonomy of others. However, in limited cases, where there is particularly serious abuse of vulnerable people, protection should be given additional weight.

Overview of Report

1.20 As stakeholders observed, elder abuse is ‘complex and multidimensional’ and requires a ‘multi-faceted response’. In the Report, the ALRC contributes to that response with a set of recommendations—traversing laws and legal frameworks across Commonwealth, state and territory laws—aimed at achieving a nationally consistent response to elder abuse. The ALRC has looked to the horizon and developed a conceptual template to guide future reform, and has identified immediate strategies and specific reforms to support older people’s autonomy and to safeguard against abuse.

A National Plan to combat elder abuse

1.21 In **Chapter 3** the ALRC recommends that a National Plan be developed to combat elder abuse. It is a capstone recommendation of the Report and provides the basis for a longer term approach to the protection of older people from abuse. The Plan will provide the opportunity for integrated planning and policy development. In a practical sense, much work already undertaken and in train, both at the Commonwealth level and in states and territories, together with recommendations throughout the Report, may be seen to constitute strategies in implementation of a commitment to combat elder abuse.

1.22 A national planning process offers the opportunity to develop strategies beyond legal reforms, including: national awareness and community education campaigns; training for people working with older people; elder abuse helplines; and future research agendas.

1.23 Concerning research, the ALRC particularly recommends that a national prevalence study of elder abuse be conducted, to improve the evidence base and inform policy responses. The Australian Government has already committed to a prevalence study,⁸ and steps have been taken in this direction with the completion of a scoping study by the Australian Institute of Family Studies in May 2017.

Aged care

1.24 Older people receiving aged care—whether in the home or in residential aged care—may experience abuse or neglect. Abuse may be committed by paid staff, other residents in residential care settings, family members or friends.

8 *The Coalition’s Policy to Protect the Rights of Older Australians* <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>; Senator the Hon George Brandis QC, Attorney-General, ‘Protecting the Rights of Older Australians’ (Media Release, 15 June 2016).

1.25 In **Chapter 4** the ALRC recommends reform to enhance safeguards against such abuse, including:

- establishing a serious incident response scheme in aged care legislation;
- reforms relating to the suitability of people working in aged care—enhanced employment screening processes, and ensuring that unregistered staff are subject to the proposed National Code of Conduct for Health Care Workers;
- regulating the use of restrictive practices in aged care; and
- national guidelines for the community visitors scheme regarding abuse and neglect of care recipients.

1.26 The ALRC also addresses decision making in aged care and recommends that aged care laws be reformed consistently with the Commonwealth Decision-Making Model in the ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws* (2014). The ALRC also recommends that aged care agreements should not require that a person has formally appointed a substitute decision maker.

Enduring appointments

1.27 Enduring powers of attorney and enduring guardianship (together referred to as ‘enduring documents’) are important tools that allow people to choose who will make decisions for them, should they later lose decision-making ability. These decision-makers can play an important role in protecting people with impaired decision-making ability from abuse.

1.28 However, these arrangements may also facilitate abuse by the decision maker themselves. In **Chapter 5**, the ALRC recommends reforms to laws relating to enduring documents, including: adopting nationally consistent safeguards; giving tribunals jurisdiction to award compensation when duties are breached; and establishing a national online register

Family agreements

1.29 Some ‘family agreements’ involve an older person transferring the title to their home, or the proceeds from the sale of the home or other assets, to an adult child in exchange for ongoing care, support and housing. These ‘assets for care’ arrangements are typically made without legal advice and are often not put in writing. There can be serious consequences for the older person if the promise of ongoing care is not fulfilled, or the relationship breaks down. The older person may even be left without a place to live.

1.30 The ALRC recommends in **Chapter 6** that tribunals be given jurisdiction over disputes within families with respect to these arrangements. Tribunals provide a low cost and less formal forum for resolving such disputes. The ALRC also recommends that the *Social Security Act 1991* (Cth) be amended to require that assets for care agreements (which give what is described as a ‘granny flat interest’) be expressed in writing, for the purpose of calculating the Age Pension.

Superannuation

1.31 A significant proportion of the wealth of older people is held in superannuation funds. Elder abuse may include using deception, threats or violence to coerce someone to contribute, withdraw or transfer superannuation funds, for the benefit of the abuser. Improperly influencing superannuation investment decisions might also be abuse.

1.32 As discussed in **Chapter 7**, there is much uncertainty and ambiguity concerning ‘binding death benefit nominations’ (BDBNs), particularly regarding whether an enduring attorney may sign a BDBN on behalf of a member. The ALRC recommends that these uncertainties and ambiguities need to be resolved in a focused review of the provisions. The central legal issue concerns the ability of fund members to direct trustees with respect to the payment of funds on the member’s death.

1.33 Self-managed superannuation funds (SMSFs) are subject to limited regulation. This may present problems when a fund comes under the control of someone with impaired decision-making ability. The ALRC’s recommendations in relation to SMSFs are designed to:

- better facilitate the process for appointing a person’s enduring attorney as trustee/director of their SMSF in the event of a legal disability;
- improve planning for a potential legal disability as part of the operating standards of an SMSF; and
- ensure the Australian Taxation Office is notified when an enduring attorney has taken over as trustee/director of the SMSF following the principal suffering a legal disability.

Wills

1.34 Pressuring someone to make or change their will may, in some cases, be financial abuse. To help combat elder abuse and to reduce undue influence in the making of wills, the ALRC recommends in **Chapter 8** that there be a national coordinated response to improving lawyers’ understanding of the potential for elder abuse using wills, through national best practice guidelines. Other professionals, such as financial advisers, may also benefit from improved understanding.

1.35 The ALRC also recommends community education about the dangers and difficulties associated with ‘do-it-yourself’ wills and discusses other aspects of succession law that might benefit from further review.

Banking

1.36 Banks and other financial institutions are in a good position to detect and prevent the financial abuse of their older and at-risk customers. In **Chapter 9**, the ALRC recommends that the *Code of Banking Practice* be amended to require banks to take ‘reasonable steps’ to identify and prevent the financial abuse of vulnerable customers.

1.37 Steps include training staff in how to respond appropriately to elder abuse and setting up systems to detect unusual transactions and other avenues for abuse. Banks should also speak with vulnerable customers directly, or otherwise check arrangements, when a form purports to authorise another person to operate someone's bank account. They should also warn customers, train staff, and take other steps to ensure people are not being financially abused when they guarantee a loan.

Guardianship and administration

1.38 **Chapter 10** considers how guardianship and financial administration schemes can safeguard against elder abuse. The ALRC recommends that private guardians and private financial administrators be required to sign an undertaking about their obligations and responsibilities. The ALRC also recommends that state and territory tribunals take additional measures to help people who are the subject of an application for a guardianship or financial administration order to participate in the process to the greatest extent possible.

Health and National Disability Insurance Scheme

1.39 Health professionals play an important role in identifying and responding to elder abuse. While no recommendations are made in **Chapter 11**, the ALRC discusses how health professions might be encouraged to take advantage of the opportunity to respond to elder abuse, for example through: training health professionals about recognising elder abuse and relevant privacy considerations; improving referral pathways; and developing multidisciplinary responses to elder abuse.

1.40 The chapter also discusses the National Disability Insurance Scheme, but the ALRC considers that it is too early to determine whether the scheme is an avenue for elder abuse or to test the effectiveness of the safeguards.

Social security

1.41 Engaging with social security through Centrelink is a part of life for most older Australians. This gives Centrelink a distinct opportunity to assist with the detection and prevention of elder abuse—especially financial abuse through, for example, Carer Payments and payment nominee arrangements.

1.42 In **Chapter 12**, the ALRC recommends that monies paid to nominees should be required to be kept separately from the nominee's own funds and that Centrelink speak directly with people of Age Pension age when they enter into arrangements with others that concern their social security payments. More generally, the ALRC recommends that the Department of Human Services (Cth) develop an elder abuse strategy.

Criminal justice responses

1.43 **Chapter 13** discusses the criminal justice response to elder abuse, but makes no recommendations for reform. The ALRC concludes that existing criminal laws adequately cover conduct which constitutes elder abuse, and does not recommend the enactment of new offences for 'elder abuse', 'elder neglect' or 'misuse of powers of attorney'.

1.44 The chapter discusses other ways to improve the criminal justice response to elder abuse, including in relation to how police respond to such abuse, and helping witnesses who need support to participate in the criminal justice system.

Safeguarding adults at risk

1.45 In **Chapter 14**, the ALRC recommends the introduction of adult safeguarding laws in each state and territory. Most public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability, but there are other vulnerable adults who are being abused, many of them older people. The ALRC recommends that these other vulnerable adults should be better protected from abuse.

1.46 Safeguarding services should be available to ‘at-risk adults’, which should be defined to mean adults who: (a) need care and support; (b) are being abused or neglected, or are at risk of abuse or neglect; and (c) cannot protect themselves from the abuse. Some, but by no means all, older people will meet this definition.

1.47 In most cases, safeguarding and support should involve working with the at-risk adult to arrange for health, medical, legal and other services. In some cases, it might also involve seeking court orders to prevent someone suspected of abuse from contacting the at-risk adult. Where necessary, adult safeguarding agencies should lead and coordinate the work of other agencies and services to protect at-risk adults.

1.48 Existing public advocates and public guardians have expertise in responding to abuse, and may be appropriate for this broader safeguarding function, if given additional funding and training. However, some states or territories may prefer to give this role to another existing body or to create a new statutory body.

1.49 The ALRC recommends that consent should be obtained from the at-risk adult, before safeguarding agencies investigate or take action about suspected abuse. This avoids unwanted paternalism and shows respect for people’s autonomy. However, in particularly serious cases of physical abuse, sexual abuse or neglect, the safety of an at-risk person may sometimes need to be secured, even without their consent. Where there is serious abuse, safeguarding agencies should also have coercive information-gathering powers, such as the power to require people to answer questions and produce documents.

1.50 The chapter also recommends statutory protections from civil liability, workplace discrimination laws and other consequences that might follow from reporting suspected abuse to authorities. Protocols about reporting abuse should also be developed for certain professionals who routinely encounter elder abuse.

The law reform process

1.51 The scope of each ALRC inquiry is defined by the Terms of Reference. The recommendations for reform must sit within this scope and need to be built on an appropriate conceptual framework and evidence base.

1.52 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.⁹ Pursuant to s 38 of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.

1.53 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry, as set out in the Terms of Reference. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC’s website.

Community consultation

1.54 Following ALRC established practice, two consultation documents were released to facilitate focused consultations in a staged way throughout the Inquiry: an Issues Paper, *Elder Abuse* (IP 47), was released on 15 June 2016, to coincide with World Elder Abuse Awareness Day; and a Discussion Paper, *Elder Abuse* (DP 83), on 12 December 2016. Both consultation documents can be downloaded free of charge from the ALRC website, and hardcopies were provided if requested.

1.55 National stakeholder consultations were conducted following the release of each of the consultation documents amounting to 117 consultations. The list of those consulted is included as Appendix 3 to the Report.

1.56 The ALRC received 458 submissions,¹⁰ from a wide range of people and organisations, including: individuals in their private capacity; academics; lawyers; law societies and representative groups; community legal centres; advocacy groups; peak bodies; and state and federal government agencies. Submissions from advocacy groups and community legal centres included many case studies, drawn from their experiences on the frontline, working with people who had been subjected to abuse. Such examples are included as illustrative case studies throughout the Report. The ALRC recognises that, particularly in small community-based organisations with limited resources, such involvement can have a significant impact and we thank all stakeholders for the important contribution they have made to our evidence base.

1.57 Special mention must be made of the many submissions from individuals, who generously shared with the ALRC personal stories of heartache and frustration, of families torn apart by elder abuse and who live with the painful knowledge that their loved ones suffered at the end of their lives. One individual referred to their submission as an ‘introduction to a nightmare’; another said, ‘I am a broken person’. These stories

9 Brian Opeskin, ‘Measuring Success’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 202.

10 This includes 60 confidential, four anonymous, and nine oral submissions. The public submissions are published on the ALRC website.

present a devastating picture of ongoing grief, loss, anger and powerlessness. The ALRC is indebted to the many individuals who made the dynamics and experiences of elder abuse painfully clear to us and so powerfully put the need for action, for something to be done.

1.58 The ALRC acknowledges the contribution of all those who have participated in the Inquiry. It is invaluable to the work of the ALRC and greatly enriches the law reform process. The ALRC records its deep appreciation to all stakeholders for this contribution.

Appointed experts

1.59 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also received by the ALRC from members of its Advisory Committee and part-time Commissioners. The Advisory Committee for this Inquiry comprised seven members, who provided crucial input in relation to the consultative documents and final Report. Advisory Committee members also contributed to the Report by way of critical reading in the final stages. The ALRC was also able to call upon the expertise and experience, as part-time Commissioners, of the Hon Justice John Middleton and the Hon Nye Perram of the Federal Court of Australia. In addition, significant input was provided by a number of expert readers who commented on certain chapters of the Report. Their names appear in the list of participants for this Inquiry.

1.60 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a panel of experts as an Advisory Committee, and the enlisting of other expert readers, are invaluable aspects of ALRC inquiry processes—assisting in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform recommendations. The ALRC acknowledges the considerable contribution made by the Advisory Committee, the part-time Commissioners and the expert readers and expresses its gratitude to them for voluntarily providing their time and expertise.

Implementation

1.61 Once tabled in the Australian Parliament, the Report becomes a public document.¹¹ ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2015–16 records that 60% of ALRC reports are substantially implemented and 26% are partially implemented, representing an overall implementation rate of 86%.¹²

11 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

12 Australian Law Reform Commission, *Annual Report 2015–2016*, Report No 130 (2016) 17.

1.62 Quite apart from such statistics, an assessment of the contribution that law reform work makes must have a long view. Law reform inquiries have a far bigger impact than just the implementation of recommendations, some of which may occur shortly after a report is released, some many years later. But whether or not recommendations are implemented, ALRC reports provide enormous value. Each ALRC report provides not only a mapping of law as at a particular moment in time, but in reviewing the submissions and consultations, the reports also give a snapshot of opinion on the issues being considered—providing a considerable contribution to legal history and a rich resource for policy makers, locating the issues within their particular social and legal contexts at a given time.

1.63 In making a submission to the Senate Standing Committee on Legal and Constitutional Affairs, when the Committee conducted an inquiry into the ALRC over the summer of 2010–2011,¹³ the Federal Court of Australia said that the Court benefits greatly from ALRC reports:

More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented.¹⁴

Outcomes

1.64 The overall effect of the ALRC's recommendations in the Report, *Elder Abuse—A National Legal Response*, will be to safeguard older people from abuse and support their choices and wishes through:

- improved responses to elder abuse in aged care;
- enhanced employment screening of aged care workers;
- greater scrutiny regarding the use of restrictive practices in residential aged care;
- building trust and confidence in enduring documents as important advance planning tools;
- protecting older people when 'assets for care' arrangements go wrong;
- banks and financial institutions protecting vulnerable customers from abuse;
- better succession planning across the SMSF sector; and
- adult safeguarding regimes protecting and supporting at-risk adults.

1.65 These outcomes should be further pursued through a National Plan to combat elder abuse and new empirical research into the prevalence of elder abuse.

13 See the inquiry report: Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Law Reform Commission*, (8 April 2011).

14 Federal Court of Australia, Submission 22 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Australian Law Reform Commission*, (2011).

1.66 This Inquiry has acknowledged that elder abuse is indeed ‘everybody’s business’. It is also everybody’s *responsibility*—a responsibility not only to recognise elder abuse, but most importantly, to respond to it effectively. The recommendations in the Report address what legal reform can do to prevent abuse from occurring and to provide clear responses and redress when abuse occurs.

1.67 Ageing eventually comes to all Australians and ensuring that all older people live dignified and autonomous lives free from the pain and degradation of elder abuse must be a priority.

Recommendations

3. A National Plan to Combat Elder Abuse

Recommendation 3–1 The Australian Government, in cooperation with state and territory governments, should develop a National Plan to combat elder abuse. The Plan should:

- (a) establish a national policy framework;
- (b) outline strategies and actions by government and the community;
- (c) set priorities for the implementation of agreed actions; and
- (d) provide for further research and evaluation.

Recommendation 3–2 The National Plan to combat elder abuse should be led by a steering committee under the imprimatur of the Law, Crime and Community Safety Council of the Council of Australian Governments.

Recommendation 3–3 The National Plan to combat elder abuse should identify goals, including:

- (a) promoting the autonomy and agency of older people;
- (b) addressing ageism and promoting community understanding of elder abuse;
- (c) achieving national consistency;
- (d) safeguarding at-risk adults and improving responses; and
- (e) building the evidence base.

Recommendation 3–4 The National Plan should take into account the different experiences and needs of older persons with respect to:

- (a) gender;
- (b) sexual orientation;
- (c) disability; and
- (d) cultural and linguistic diversity.

The Plan should also take into account the experiences and needs of:

- (a) older Aboriginal and Torres Strait Islander people; and
- (b) older people living in rural and remote communities.

Recommendation 3–5 There should be a national prevalence study of elder abuse to build the evidence base to inform policy responses.

4. Aged Care

Recommendation 4–1 Aged care legislation should provide for a new serious incident response scheme for aged care. The scheme should require approved providers to notify to an independent oversight body:

- (a) an allegation or a suspicion on reasonable grounds of a serious incident; and
- (b) the outcome of an investigation into a serious incident, including findings and action taken.

This scheme should replace the current responsibilities in relation to reportable assaults in s 63-1AA of the *Aged Care Act 1997* (Cth).

Recommendation 4–2 The independent oversight body should monitor and oversee the approved provider’s investigation of, and response to, serious incidents, and be empowered to conduct investigations of such incidents.

Recommendation 4–3 In residential care, a ‘serious incident’ should mean, when committed against a care recipient:

- (a) physical, sexual or financial abuse;
- (b) seriously inappropriate, improper, inhumane or cruel treatment;
- (c) unexplained serious injury;
- (d) neglect;

unless committed by another care recipient, in which case it should mean:

- (e) sexual abuse;
- (f) physical abuse causing serious injury; or
- (g) an incident that is part of a pattern of abuse.

Recommendation 4–4 In home care or flexible care, ‘serious incident’ should mean physical, sexual or financial abuse committed by a staff member against a care recipient.

Recommendation 4–5 An act or omission that, in all the circumstances, causes harm that is trivial or negligible should not be considered a ‘serious incident’.

Recommendation 4–6 The serious incident response scheme should:

- (a) define ‘staff member’ consistently with the definition in s 63-1AA(9) of the *Aged Care Act 1997* (Cth);
- (b) require the approved provider to take reasonable measures to require staff members to report serious incidents;
- (c) require the approved provider to ensure staff members are not victimised;
- (d) protect informants’ identities;

- (e) not exempt serious incidents committed by a care recipient with a pre-diagnosed cognitive impairment against another care recipient; and
- (f) authorise disclosure of personal information to police.

Recommendation 4–7 The Department of Health (Cth) should commission an independent evaluation of research on optimal staffing models and levels in aged care. The results of this evaluation should be made public and used to assess the adequacy of staffing in residential aged care against legislative standards.

Recommendation 4–8 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

Recommendation 4–9 There should be a national employment screening process for Commonwealth-regulated aged care. The screening process should determine whether a clearance should be granted to a person to work in aged care, based on an assessment of:

- (a) a person’s criminal history;
- (b) relevant incidents under the recommended serious incident response scheme; and
- (c) relevant disciplinary proceedings or complaints.

Recommendation 4–10 Aged care legislation should regulate the use of restrictive practices in residential aged care. Any restrictive practice should be the least restrictive and used only:

- (a) as a last resort, after alternative strategies have been considered, to prevent serious physical harm;
- (b) to the extent necessary and proportionate to the risk of harm;
- (c) with the approval of a person authorised by statute to make this decision;
- (d) as prescribed by a person’s behaviour support plan; and
- (e) when subject to regular review.

Recommendation 4–11 The Australian Government should consider further safeguards in relation to the use of restrictive practices in residential aged care, including:

- (a) establishing an independent Senior Practitioner for aged care, to provide expert leadership on and oversight of the use of restrictive practices;
- (b) requiring aged care providers to record and report the use of restrictive practices in residential aged care; and
- (c) consistently regulating the use of restrictive practices in aged care and the National Disability Insurance Scheme.

Recommendation 4–12 The Australian Government should further consider Recommendation 6–2 of ALRC Report No 124 *Equality, Capacity and Disability in Commonwealth Laws*, that aged care laws and legal frameworks should be amended consistently with the National Decision-Making Principles set out in that Report.

Recommendation 4–13 Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

Recommendation 4–14 The Department of Health (Cth) should develop national guidelines for the community visitors scheme. The guidelines should include policies and procedures for visitors to follow if they have concerns about abuse or neglect of care recipients.

5. Enduring Appointments

Recommendation 5–1 Safeguards against the misuse of an enduring document in state and territory legislation should:

- (a) recognise the ability of the principal to create enduring documents that give full powers, powers that are limited or restricted, and powers that are subject to conditions or circumstances;
- (b) require the appointed decision maker to support and represent the will, preferences and rights of the principal;
- (c) enhance witnessing requirements;
- (d) restrict conflict transactions;
- (e) restrict who may be an attorney;
- (f) set out in simple terms the types of decisions that are outside the power of a person acting under an enduring document; and
- (g) mandate basic requirements for record keeping.

Recommendation 5–2 State and territory civil and administrative tribunals should have:

- (a) jurisdiction in relation to any cause of action, or claim for equitable relief, that is available against a substitute decision maker in the Supreme Court for abuse, or misuse of power, or failure to perform their duties; and
- (b) the power to order any remedy available to the Supreme Court.

Recommendation 5–3 A national online register of enduring documents, and court and tribunal appointments of guardians and financial administrators, should be established after:

- (a) agreement on nationally consistent laws governing:
 - (i) enduring powers of attorney (including financial, medical and personal);

- (ii) enduring guardianship; and
 - (iii) other personally appointed substitute decision makers; and
- (b) the development of a national model enduring document.

6. Family Agreements

Recommendation 6–1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.

Recommendation 6–2 The *Social Security Act 1991* (Cth) should be amended to require that a ‘granny flat interest’ is expressed in writing for the purposes of calculating entitlement to the Age Pension.

7. Superannuation

Recommendation 7–1 The structure and drafting of the provisions relating to death benefit nominations in ss 58 and 59 of the *Superannuation Industry (Supervision) Act 1993* (Cth) and reg 6.17A of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be reviewed. The review should consider:

- (a) witnessing requirements for making, amending and revoking nominations;
- (b) the authority of a person who holds an enduring power of attorney in relation to the making, alteration and revocation of a nomination;
- (c) whether a procedure for the approval of a nomination on behalf of a member should be introduced; and
- (d) the extent to which other aspects of wills law may be relevant.

Recommendation 7–2 The *Superannuation Industry (Supervision) Act 1993* (Cth) should be amended to include ‘replaceable rules’ for self-managed superannuation funds which provide a mechanism for an enduring attorney to become a trustee/director where this was provided for in the enduring document and notwithstanding the terms of the trust deed and constitution of the corporate trustee or the actions of the other trustees/directors.

Recommendation 7–3 The relevant operating standards for self-managed superannuation funds in cl 4.09 of the *Superannuation Industry (Supervision) Regulations 1994* (Cth), should be amended to add an additional standard that would require the trustee to consider the suitability of the investment plan where an individual trustee or director of the corporate trustee becomes ‘under a legal disability’.

Recommendation 7–4 Section 104A of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the accompanying Australian Taxation Office Trustee Declaration form should be amended to require an individual to notify the Australian Taxation Office when they become a trustee (or director of a company which acts as trustee) of a self-managed superannuation fund as a consequence of being an attorney under an enduring document.

8. Wills

Recommendation 8–1 The Law Council of Australia, together with state and territory law societies, should develop national best practice guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they provide thorough coverage of matters such as:

- (a) elder abuse in probate matters;
- (b) common risk factors associated with undue influence;
- (c) the importance of taking detailed instructions from the person alone;
- (d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents; and
- (e) the importance of ensuring that the person has ‘testamentary capacity’—understanding the nature of the document and knowing and approving of its contents, particularly in circumstances where an unrelated person benefits.

9. Banking

Recommendation 9–1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of vulnerable customers, in accordance with the industry guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*.

The guideline should set out examples of such reasonable steps, including in relation to:

- (a) training staff to detect and appropriately respond to abuse;
- (b) using software and other means to identify suspicious transactions;
- (c) reporting abuse to the relevant authorities, when appropriate;
- (d) guaranteeing mortgages and other loans; and
- (e) measures to check that ‘Authority to Operate’ forms are not obtained fraudulently and that customers understand the risks of these arrangements.

10. Guardianship and Financial Administration

Recommendation 10–1 Newly-appointed private guardians and private financial administrators should be required to sign an undertaking with respect to their responsibilities and obligations.

Recommendation 10–2 The Australian Guardianship and Administration Council should develop best practice guidelines on how state and territory tribunals can support a person who is the subject of an application for guardianship or financial administration to participate in the determination process as far as possible.

12. Social Security

Recommendation 12–1 The Department of Human Services (Cth) should develop an elder abuse strategy.

Recommendation 12–2 Payments to nominees should be held separately from the nominee’s own funds in a dedicated account nominated and maintained by the nominee.

Recommendation 12–3 Centrelink staff should speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

14. Safeguarding Adults at Risk

Recommendation 14–1 Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting ‘at-risk adults’.

Recommendation 14–2 Adult safeguarding agencies should have a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an ‘at-risk adult’. The first step of an inquiry should be to contact the at-risk adult.

Recommendation 14–3 Adult safeguarding laws should define ‘at-risk adults’ to mean people aged 18 years and over who:

- (a) have care and support needs;
- (b) are being abused or neglected, or are at risk of abuse or neglect; and
- (c) are unable to protect themselves from abuse or neglect because of their care and support needs.

Recommendation 14–4 Adult safeguarding laws should provide that the consent of an at-risk adult must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult. However, consent should not be required:

- (a) in serious cases of physical abuse, sexual abuse, or neglect; or
- (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or
- (c) if the adult lacks the legal capacity to give consent, in the circumstances.

Recommendation 14–5 Adult safeguarding laws should provide that, where a safeguarding agency has reasonable grounds to conclude that a person is an at-risk adult, the agency may take the following actions, with the adult’s consent:

- (a) coordinate legal, medical and other services for the adult;
- (b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;

- (c) report the abuse to the police;
- (d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or
- (e) decide to take no further action.

Recommendation 14–6 Adult safeguarding laws should provide adult safeguarding agencies with necessary coercive information-gathering powers, such as the power to require a person to answer questions and produce documents. Agencies should only be able to exercise such powers where they have reasonable grounds to suspect that there is ‘serious abuse’ of an at-risk adult, and only to the extent that it is necessary to safeguard and support the at-risk adult.

Recommendation 14–7 Adult safeguarding laws should provide that any person who, in good faith, reports abuse to an adult safeguarding agency should not, as a consequence of their report, be:

- (a) liable civilly, criminally or under an administrative process;
- (b) found to have departed from standards of professional conduct;
- (c) dismissed or threatened in the course of their employment; or
- (d) discriminated against with respect to employment or membership in a profession or trade union.

Recommendation 14–8 Adult safeguarding agencies should work with relevant professional bodies to develop protocols for when prescribed professionals, such as medical practitioners, should refer the abuse of at-risk adults to adult safeguarding agencies.

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