215. Name withheld

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Proposal 2–1

Agree, but wording should be very carefully considered and concern for the rights of the older person balanced by consideration of the human rights and well-being of carers and others who may be abused either "inadvertently" by the older person, or by injustices or inadequacies of "the system".

As the Alzheimers Australia submission No. 80 to the Issues Paper states:

“The highest level home care packages provide an average of 14 hours per week of direct care. This is insufficient for many people with dementia...”

In my experience the effectiveness of the 14 hours of care can be limited by the practices and policies of a care provider which do not take into account the needs of a dementia sufferer or their family.  For instance, the rostering of a large number of different care workers and a policy banning them from directly contacting family members - everything must be done through their office.  This means, for example, a family member needs to leave their workplace to help find an important item, such as dentures, when they could have suggested several likely places for the carer to check if able to talk to them directly.

The Alzheimers Australia submission goes on to point out that

...Caring for a person with dementia can lead to increased rates of stress, depression, and anxiety, as well as having a negative impact on physical health. Caring can have a profound emotional impact, with carers reporting feelings of guilt, sadness, anger, lack of control, worry, and even grief. Caring for a person with dementia can also put carers at risk of social isolation; and often has significant negative financial impacts".

These concerns are also reflected in the submission by Carers Australia (No. 157) which describes the circumstance of the person under care refusing the formal services or being averse to the use of alternate care to provide a break for their carer. I believe refusal of formal services could be overcome by the care provider rostering a smaller number of care workers, with whom the person could become more familiar.

Proposal 2–2

Wouldn't resources be better applied elsewhere, such as in combatting scams and identity theft?

Proposal 3–1

Agree, but it should be noted that a person whose appearance, or living conditions suggest they are being neglected may be quite aggressively resisting the best efforts of others, whose "interference" is felt by the person to be a violation. According to the UN, forcing them to conform to community standards is a violation of their human rights.

In any publicising of the need to report elder abuse, this should be kept in mind.

Proposal 3–2

These proposals need to be reworded to acknowledge the reality of dementia which is a degenerative disease, robbing the person of an awareness of their actual state (for example in terms of their living conditions or personal hygiene)  which may be becoming one which would have distressed them greatly before having their current level of dementia.

(a) The statement that "older people experiencing abuse or neglect have the right to refuse support, assistance or protection" seems based on the UN Convention of the Rights of Persons with Disabilities (UNCRPD) view on mental capacity  -- a view which is surely perplexing to anyone dealing with the consequences of a definite loss of mental capacity. The UN Committee's views were reported in the Centre for Disability Law and Policy NUI Galway's submission No. 130 to the ALRC's 2014 Discussion Paper  Equity Capacity and Disability.  On page 4 of the submission the UNCRPD is quoted as saying

 "Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon"1

Is the UN Committee saying then that a loss of capacity, even in the form advanced dementia, cannot be diagnosed by any means including CT scans and that the concept of mental incapacity should be scrapped?  As I understand it, any removal of the concept of  mental incapacity will have far-reaching effects in many areas and I expect will lead to more abuse.

It is not enough to limit an advanced dementia's sufferer’s responsibilities only when it comes to signing legal papers on the grounds they do not understand them. They should not be considered responsible for many other aspects of their lives.

b) The person's right to make their own decisions must be balanced not only with the need to promote their own sense of well-being but also with their actual well-being and safety as well as the well-being and safety of others (who may themselves be elderly).  Indeed, allowing the person to pursue their own wishes may lead to a public nuisance, the most obvious example being a tendency to wander, leading to a police and community search operation.

The Australian Guardianship and Administration Council (AGAC) discusses this issue on page 4 of their submission to the ALRC's 2014 inquiry into Equality, Capacity and Disability in Commonwealth Laws (Submission No. 91). They point out that "the views of the person might lead to outcomes that are considerably detrimental to the person's health and welfare.. In these circumstances, recognition of the representatives authority to make decisions contrary to the wishes of the person is essential...

There is a need to respect the views of family and supporters, they say, and "the difficulty in achieving balance between the person's views and support network's views needs to be acknowledged."

c) With dementia, expressed wishes regarding an issue may vary day to day or hour by hour. As noted above, their "chosen" way of life may lead to consequences they are not at all aware of  and be in direct contradiction to their heartfelt plea some years before to "please make sure I never get like that".

Proposal 3–3

Agree, however those reported as possibly perpetrating elder abuse should be treated with sensitivity and respect.  They may have difficulties or delays in complying due to the need to first arrange alternative temporary care for the elderly person.  Documents may be in another location (such as at their home, perhaps interstate); they may have transport problems or lack computer or scanning facilities while living remotely; be ill themselves or already under considerable stress.

Proposal 3–4

Confused:  the wording needs to be clearer.  Is this abuse suspected by the public advocates/guardians after investigation?  Or does it refer to the initial suspicion or alert?  If abuse is suspected after investigation, obviously some further action needs to be taken, with the situation reviewed later.

Shouldn't "perpetrator" here be replaced by "alleged perpetrator"?

Again, special consideration should be given to those lacking competency.  Who will represent them?

Proposal 3–5

Agree absolutely.

Proposal 5–1

Agree with some reservations.  What information would the register include?  Simply details identifying the principal, type and date of instrument and whether it has been activated? The actual documents themselves would need to be examined to determine the exact rights of the various nominated attorneys/guardians etc. Shouldn't signatures on the legal documnt be examined and compared with the relevant paperwork presented?   Also, including too much detail on the register itself would be a violation of privacy.

When these problems are sorted out,  the proposed national online register will only reduce fraud if

* The legal instruments (documents) themselves are not fraudulent,
* Information on the register itself isn't misused or inappropriately shared by those with access.

One important thing in favour of establishing a national register would be that someone carefully checking documents for legitimacy so they can be added to a register soon after being signed (rather than when they become active) will assist all parties by ensuring all is in order before a principal is considered incapable of signing any needed replacement.

All signatories (after proving identity) should be able to check that the register entry regarding their own instrument is correct.

Proposal 5–2

Surely the document itself must be valid (if identities of signatories are not in question and it is validly witnessed). If it is only valid when registered, possible interference with the process of having it registered would be a breach of rights.  There should be some other mechanism for ensuring prompt registration of documents - this would ideally be done by a solicitor -- should it be done by the same solicitor involved as a witness? I think this would be OK as I understand solicitors face serious penalties for any malpractice.

Parties named in an earlier document but not party to the new arrangements should be informed. Perhaps they should also be given advice if they wish to challenge the new arrangements - for example they may have evidence that the witness is not a disinterested party and that the principal may indeed have been coerced into signing.

Proposal 5–3

As the ALRC is aware, setting up the register will be complicated by the different form of documents currently used in different states. For example, Queensland includes enduring guardianship in the same document as enduring financial attorney, whereas in NSW these are separate.  Residents in border areas or who have moved interstate may have documents from two states where the more recent doesn't cover all the aspects included in the earlier document, so cannot fully replace it. Meanwhile the principal may have lost competency to sign a new document covering those aspects - in other words, a reliable witness such as a solicitor, is not willing to sign that the person now understands the new document covering those matters.

This situation can at present occur because a person in fairly early stages of dementia may well understand their inability to cope with financial matters and wish to hand over responsibility for that while increasing paranoia means they get angry and upset by any discussion of health and lifestyle issues. With mutual recognition of documents between states, isn't the earlier, interstate document which covers these aspects still legitimate when dealing with those particular issues?  If so, how will registration reflect that fact?

Question 5–1

It depends on the level of detail included on the register. Any detailed knowledge of what is included in the legal instruments themselves should be strictly limited on a "needs to know" basis.

Question 5–2

Some principal's financial affairs are complicated so an audit of an attorney's management could be very time-consuming, and also involve third parties such as financial advisers.

Also many principals would feel this is a breach of privacy.  An elderly relative, in the past, expressed suspicion about any outside bodies prying into their financial affairs.  Does their inability to understand and object now mean their objections should be over-ridden?   Evidence of their objection could be that they never applied for a Senior's Health Card for that reason, though eligible for one.

Wouldn't such random checks be an enormous amount of work for the organisations involved and require a lot of extra funding?  Is it worth it if no complaint has been received?  Also it would be yet another burden for many attorneys who are also carers.  Again, other family members or supporters' approval of the attorney's behaviour should be a sufficient check.

Proposal 5–4

While having two witnesses seems desirable, it may be difficult to arrange all such parties to be present at once.   As it is usually (or ideally) a solicitor who draws up the document after discussing it with the parties, this solicitor would ideally be one of the witnesses. Often they have a partner or staff member who is also a legal practitioner or JP.

Witnesses should also be required to be confident of the identity of the signatories.  Are they given training in detecting fraudulent material such as fake drivers licences or passports?

Can a witness be related to the principal, attorneys or guardians (and how closely related?)

Proposal 5–5

I'm not sure what the tribunals' powers should be.  The alleged offender should have the right to present their case before a normal court of law.

Proposal 5–6

From my point of view the matter of perceived "conflicts of interest" is actually quite a grey area.

Take for example the case where a family member needs to live in the elderly person's home specifically in order to care for them and importantly, gain a better understanding of their health and ability to cope. Doesn't that person have the right to a safe environment and reasonable standard of comfort as well as functional household facilities?

Some carers occasionally need a lockable room where they can be safe from assault.  Who should pay the locksmith?

The elderly home owner, for whatever reason, may get angry at the mention of the non-functioning smoke alarm or washing machine and resist paying to have them fixed or replaced.  Perhaps they have a totally unrealistic idea of today's monetary values and their own resources.  If the carer has an active power of attorney, wouldn't reasonable people agree that she is justified in accessing the elderly's person's funds to have such things fixed,  or to "top up" the inadequate amount offered for the purpose?

Justification for using the principal's funds may not be quite so clear cut. What if the expenditure is to meet the carer's own reasonable needs?  With the ageing of the population it is increasingly likely that the carer will themselves be elderly. What if they require more accessible bathroom facilities similar to those they have in their own home?  Who should pay for those when the improvement is to the principal's home?  Perhaps the carer just wants security and insect screens on bedroom windows in order to sleep in hot weather, but with no sympathy for this need by the home owner.

Then again, the carer may really feel entitled to a decent bed rather than one which is 50 years old and sagging. Who should pay?  It is not really an improvement to the principal's home, yet the carer already has a perfectly good bed in their own home which is interstate.  She only wants new bed because she is caring for her parent and the old bed hurts her back.  If other family members (i.e. other beneficiaries to the principal's will) are happy for a new bed to be purchased and paid for by the older person (who has more than adequate resources) what business is it of anyone outside the family?  Would a tribunal doing a random check see this as elder abuse if the elder is not distressed -- perhaps not even aware of any change -- and the end result is that the carer is less stressed and happy to stay longer or more frequently.

It may be very difficult to define the attorney's "duty to the principal" in such cases where the carer is living in for the benefit of the principal (whether that is recognised by the principal or not).  It would certainly be impossible to foresee future areas of conflict between the principal's views and the attorney's so they could be covered in an Enduring Power of Attorney document.

Where the principal is incapable of making a new legal instrument covering such things, would the tribunal like to take on adjudication of such proposed transactions?  Wouldn't informal approval by other family members/friends be an adequate safeguard?  In other words, they should know they can report any suspected unreasonable use of the principal's funds to the tribunal for investigation and action.

In all considerations of "conflict of interest" and criticisms of  "feelings of entitlement" all aspects of the attorney's contribution in caring for the elderly person should be taken into account. They perhaps have incurred considerable costs to themselves financially (perhaps even in terms of travel expenses), perhaps a substantial cost to their employment opportunities, as well as to their family/social life and aspirations.  They are also likely to  have a life-style less beneficial to their own health than they otherwise would.

Both the "give" and the "take" should be considered.

Proposal 5–7

(d) why are past care workers, health or accommodation providers excluded?  What is meant by "accommodation provider"?  Could there be a time limit - eg. not within the past two years etc.?

Proposal 5–8

The wording here is a bit puzzling with regards to (f).

Proposal 5–9

Agree.  Though other types of evidence about how funds were spent should be allowable where a receipt or record has been lost.

Proposal 5–10

Absolutely! We are a mobile population and often families are spread over several states.  This would also remove hesitancy in completing documents in a particular jurisdiction if a move interstate is envisaged.

Proposal 5–11

Sounds OK.

Proposal 5–12

Agree

Proposal 5–13

See my comments to Proposal 3-2.

People with moderate to advanced dementia who are unaware of their situation should not be held responsible for their decisions - any more than they should be considered responsible to understand legal documents presented to them.

Proposal 6–1

Yes, shouldn't that be on the legal instrument  -- with them given a copy?

Question 6–1

Often it is sufficient for a solicitor to explain the duties and limitations.  ('Does this question cover those with enduring power of attorney?)

Proposal 6–2

Isn't that included on the legal instruments? If not, shouldn't it be?  It should be a condition of appointment.

Question 6–2

Does this also mean attorneys?  It would be a big imposition and perhaps a disincentive to take up the position for some.

Perhaps it should happen if other family members/supporters/benficiaries of  the person's will don't fully trust the financial administrator.

Question 6–3

The extent to which they should be included at all depends on their mental state.  Some people become irrationally suspicious or paranoid, even confusing the identity of close relatives.  In such cases, the authority should seek out and speak to family members and also to unrelated people who have known the older person and/or applicant well over time and ask them their impressions of the applicant's suitability.

Proposal 7–1

Agree

Proposal 7–2

Is this for cases other than where a relevant certified copy of a Power of Attorney document has been given to the bank and activated?  In that case, the bank may instead want evidence that the POA's activation is legitimate.

Question 7–1

Question 7–2

Proposal 8–1

Question 8–1

Proposal 9–1

Proposal 9–2

Proposal 9–3

Proposal 10–1

Proposal 10–2

Proposal 10–3

Proposal 10–4

Proposal 11–1

Proposal 11–2

Proposal 11–3

Proposal 11–4

Proposal 11–5

Question 11–1

Question 11–2

Question 11–3

Proposal 11–6

Proposal 11–7

Proposal 11–8

Proposal 11–9

Proposal 11–10

Proposal 11–11

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