The Executive Director

Australian Law Reform Commission

GPO Box 3708

Sydney NSW 2001

Email: elder\_abuse@alrc.gov.au

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**Elder Abuse Submission**

Dear Executive Director,

I am a retired WA born psychiatrist with experience of old age services in Western Australia and England. Until 1999 I held a post at Sir Charles Gairdner Hospital and Selby-Lemnos Hospital in Perth, at which time I was a member of the Aged Care Assessment Team. I then held several long- term locum consultant posts in the NHS in England. In recent years, I served on the WA Mental Health Review Board, and have just completed a PhD at the Law School of the University of Western Australia.[[1]](#footnote-1) In my study, legal aspects of deprivation of liberty for elderly people in WA mental health and aged care facilities were compared with the position in England. Elder abuse was not the principal focus of my study, but rather the lack of effective legal safeguards where detention was a consequence of mental health care or aged care placement. I have attached the thesis abstract. If anyone is interested in reading a copy of my thesis, I would be pleased to email it to them.

Brief comments:

1. National plans

These have little effect if State governments do not incorporate them into practice and provide resourcing. Compliance of governments should be independently audited. Self-reporting by government departments is inadequate given the paucity of verifiable statistical information.[[2]](#footnote-2) Annual reports from some statutory bodies such as the WA Mental Health Commission, are closer to political statements than accurate reflections of what happens in practice.

The WA government and the opposition have little interest in Human Rights legislation. The Sydney-based Australian Human Rights Commission appears to have very limited impact in WA, despite evidence of serious concerns with the incarceration of persons lacking capacity.[[3]](#footnote-3)

1. Prevalence

Studies of the prevalence of abuse must be independent of governments and establish verifiable criteria by which performance between States can be compared. Ascertaining the extent of use of mental health detention in WA through publicly available information is impossible without recourse to FOI procedures.[[4]](#footnote-4) No Commonwealth records are available indicating which aged care facilities are locked at all times, ensuring that patients can only leave with staff assistance.

1. Powers of investigation

State resourcing of public advocates and public guardians should be audited and compared in terms of budgets, population serviced and numbers under care etc. Otherwise governments will

avoid meeting national benchmarks. In my thesis, I have mentioned that although the number of persons in aged care facilities in WA was 16,350, the Public Advocate is guardian of last resort for only 1,383 persons, many of whom are not in aged care.[[5]](#footnote-5) This suggests a substantial shortfall met by ‘informal’ arrangements. The extent of informal decision-making arrangements vs legal oversight has been mentioned as a concern in several studies. While no doubt most these decisions are well intentioned, the potential for harm and loss of autonomy is clearly present.

1. Family agreements

Strict reviews should take place where aged care admission results at any time after an ‘assets for care’ arrangement is found to have broken down.

1. Aged care

Important as it is to address abuses *within* aged care facilities, greater attention needs to be given to consent and capacity, *prior to* aged care admission. Once a person has been admitted or placed in aged care, it becomes very difficult to reverse the process, and harm may have already occurred in the initial period. Aged Care Assessment Teams are not subjected to independent legal checks and balances in making placement decisions, particularly where capacity and consent may be impaired. Administrative pressures to shift patients out of hospitals, and failure of States to meet their obligations to provide services at home, can contribute to risk of abuse. As a psychiatrist who has held ACAT membership, I am acutely aware of this concern. The fact that abuses such as sexual and physical assaults can arise in all forms of aged care signals that admission into residential care carries a range of risks, some of which can be extreme. This strengthens the case for assertive and vigilant oversight of the entire process, and the need to balance risks entailed in both action and inaction, while supporting autonomy.

1. Community visitors scheme.

I strongly support this proposal, and that it must have legislative authority like that which applies to mental health care.[[6]](#footnote-6) As a model of this type of approach the aged care ombudsman service in the USA, established under the Older Americans Act may be worth consideration. This program includes both paid and volunteer staff.[[7]](#footnote-7)

1. Guardianship and Administration Orders

Where a person who is being made the subject of a Guardianship or Administration order lacks mental capacity, independent legal representation should be provided in the same way that mental health representation is made available, despite obvious limitations in WA resourcing.

1. Family Agreements

The use of mediation services should be supported and formally required as part of the resolution process in settling family disputes. Greater use of mediation could reduce coercion in a range of decision-making situations, including those in mental health care and aged care residential placement.

 Neville F Hills, FRANZCP., MRCPsych. DPM, LLM.

WA 6010

**Abstract**

This thesis addresses matters affecting the liberty, rights and welfare of older people in Western Australia (WA). Restriction of personal liberty to choose where to live, and who to associate with, is usually only permitted under criminal law, following legal processes. Mental health legislation also permits restraints on freedom of individuals, subject to legal oversight of the process.

Admission into an aged care facility may restrict a person’s liberty, if placed in a locked area which they cannot leave without staff assistance. Laws regulating these procedures should be fair, open to scrutiny, and meeting international standards of law and good practice.

In 2015 there were 16,350 Commonwealth funded aged care beds in 263 facilities in WA. Records indicating which of these facilities are locked always are not kept, although accreditation standards require attention to security and safety of residents. Over 50% of residents have dementia or related conditions, potentially affecting their decision-making capacity. The WA Public Guardian has sole decision-making responsibility for 1,383 individuals, not all of whom are in aged care, suggesting the majority are placed under informal arrangements. These informal admissions are not routinely monitored by any form of legal safeguarding or oversight. Some elderly people informally admitted to mental health facilities also have no protection under mental health legislation, and no access to official advocates.

Informal detention in aged care, has received substantial examination overseas and in other states of Australia. In WA, authorities up to now have shown limited interest in the ethical and human rights aspects. The ‘Bournewood’ case in England provoked substantial attention and litigation, but the lessons derived have not received attention in WA. Unlike the UK, there is no Human Rights Act in WA, nor any right of independent appeal to an international court. The fact that mental health care and legislation is a state responsibility, while aged care is under Commonwealth government control, creates a gap in ownership of this problem.

Laws regulating admission to psychiatric hospitals in WA, owe their origins to historical developments in English law and procedures, handed down in the colonial era. These have been modified in each jurisdiction with the passage of time and local influences. The extent of this divergence is examined in this thesis by two methods; a table of comparisons set out in chapter 3, and an opinion survey of psychiatrists in chapter 4, with further chapters discussing legal and practical issues.

Current views on capacity and consent are discussed, followed by consideration of risks with non-consenting detention in aged care, including elder abuse and potential harm. The thesis examined the position up to November 30, 1915 while the *Mental Health Act 1996* (WA) was in operation. There are comments in chapter 8 on the *Mental Health Act 2014* (WA) and its ability to address some of these matters. English reports indicate serious problems with the costly and burdensome legislation adopted in that country. The thesis concludes with suggested measures which may assist in remedying some of the reported defects in current law and practice, while avoiding unduly complex and ineffective legislation.

1. Hills NF, UWA Thesis: Does mental health and guardianship legislation in Western Australia (WA) protect elderly persons from human rights abuse, and ensure procedural and substantive justice? [↑](#footnote-ref-1)
2. Thesis **9.11**, 349. [↑](#footnote-ref-2)
3. Marlon Noble, an indigenous man detained under the *Criminal law (Mentally Impaired Defendants) Act 1996* (WA), who was detained in prison for ten years. [↑](#footnote-ref-3)
4. Thesis **Chapter 7** at par 7.19.1. [↑](#footnote-ref-4)
5. Abstract attached, ii. [↑](#footnote-ref-5)
6. My thesis illustrated that in WA mental health practice, only around 12% of patients were legally represented at Tribunals. This has been increased recently but is only 16%. [↑](#footnote-ref-6)
7. <http://www.wvseniorservices.gov/StayingSafe/LongTermCareOmbudsmanProgram/tabid/81/Default.aspx> [↑](#footnote-ref-7)