PROTECTING THE RIGHTS OF OLDER AUSTRALIANS FROM ABUSE

Submission to the Australian Law Reform Commission Discussion Paper

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1. Introduction

Legal Aid ACT welcomes the opportunity to make further submissions to the ALRC regarding Elder Abuse. In particular, Legal Aid ACT will respond to the following proposals and questions in the Second Consultation Discussion Paper:

1. National Plan

Proposal 2-1

1. Powers of Investigation

Proposal 3-1

Proposal 3-2

Proposal 3-3

Proposal 3-4

Proposal 3-5

1. Enduring Powers of Attorney and Enduring Guardianship

Proposal 5-5

Proposal 5-6

Proposal 5-7

1. Guardianship and Financial Administration Orders

Proposal 6-1

Question 6-1

1. Family Agreements

Proposal 8-1

Question 8-1

1. National Plan

2.1. Should there be a National Plan?

Legal Aid ACT supports the ALRC’s proposal to develop and implement a national plan. An integrated framework is key to addressing elder abuse in a consistent and efficient manner.

1. Powers of Investigation

3.1 Extension of powers

**Proposal 3-1**

State and Territory public advocates or public guardians should be given the power to investigate elder abuse where they have reasonable cause to suspect that an older person:

1. has care and support needs;
2. is, or is at risk of, being abused or neglected; and
3. is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

Public advocates or public guardians should be able to exercise this power on receipt of a complaint or referral or on their own motion

**Question 4**: Current evidence and research gaps about elder abuse.

Legal Aid ACT submits that the powers of the Public Trustee and Guardian Office be extended in line with Proposal 3-1 to include investigative powers, both where a complaint or referral regarding elder abuse has been received, or on the advocate or guardians own volition.[[1]](#footnote-1)

As both Legal Aid ACT and the ALRC have identified, there is a significant risk that older Australians may be reluctant to report instances of abuse due to fear of reprisal, feelings of shame, or a desire not to jeopardise familial relationships. Older Australians may also not be aware of the nature of the abuse, or that services and legal remedies exist to prevent and respond to these matters. Legal Aid ACT agrees with the ALRC that education and community awareness campaigns are the preferable mode through which these issues should be addressed for older Australians *able* to seek help.[[2]](#footnote-2) The existence of a ‘comprehensive model of protection and support’,[[3]](#footnote-3) with its broad powers to investigate any older persons ‘at risk’, would expand the powers of public guardians and advocates too far.

Refining the scope of the investigatory powers is necessary to preserve the autonomy and dignity of older Australians. Legal Aid ACT submits that parts (a)-(c) in Proposal 3-1 are, for the most part, sufficient limitations. In relation to ‘care and support needs’ Legal Aid ACT agrees with the submission by the Office of the Public Advocate (OPA) that the definition of ‘care and support needs’ does not need to include situations of physical restraint, for the reasons outlined by the OPA.[[4]](#footnote-4) In relation to part (c), Legal Aid ACT submits that the phrase ‘because of care and support needs’ be removed. There are many reasons older Australians may be unable to protect themselves from abuse. Geographic location, lack of access to appropriate facilities (such a lock on the door), and general frailty (that does not constitute a physical impairment for the purposes of ‘care and support’) are a few examples. Part (c) is an unnecessary restriction for older Australians whose care and support needs have already been established.

Proposal 3-1 should also be implemented subject to the guiding principles outlined in Proposal 3-2 and specifically to the restriction that the older person has the right to request termination of the investigation at any time, and have that request unreservedly complied with by the investigating body. This is particularly important for older Australians in diverse communities, or in complex inter-familial and dependant relationships where there is an ongoing need to maintain the relationship.[[5]](#footnote-5) Legal Aid ACT acknowledges that in some instances, older persons may lack capacity to request termination of the investigation. Legal Aid submits that in these cases where the older person has an Enduring Power of Attorney (EPOA), the EPOA should be consulted, informed of the right to terminate, and have the ability to terminate the investigation on the older person’s behalf. Where there is no EPOA, or the EPOA is suspected of perpetrating or being complicit in the abuse, the investigatory body should not be required to obtain the older person’s or the EPOA’s consent and should proceed with the investigation, subject to the restriction that they operate with regard to the best interests of the older person at all times.

Older Australian’s (and where applicable, their EPOA’s) should be made aware through the investigative process that discrete assistance services are available, and be given the means to pursue action if desired. A time frame for the investigate process should also be specified to prevent delay and its associated impacts, including ongoing stress, financial cost, accelerated relationship breakdown and incapacity to seek help due to cognitive decline.

3.2 Guiding Principles

**Proposal 3-2**

Public advocates or public guardians should be guided by the following principles:

1. older people experiencing abuse or neglect have the right to refuse support, assistance or protection;
2. the need to protect someone from abuse or neglect must be balanced with respect for the person’s right to make their own decisions about their care; and
3. the will, preferences and rights of the older person must be respected.

Legal Aid ACT endorses the Guiding Principles outlined in Proposal 3-2, recognising the need to respect the autonomy and dignity of older persons.

3.3 Other powers

**Proposal 3-3**

Public advocates or public guardians should have the power to require that a person, other than the older person:

1. furnish information;
2. produce documents; or
3. participate in an interview

relating to an investigation of the abuse or neglect of an older person.

Legal Aid ACT recognises that the power to compel interview participation or to disclose documents and information would be a useful investigative tool for public advocates or public guardians, and would likely facilitate a more effective and expedient investigative process. However, this must be balanced with the need to respect the privacy and independence of older Australians. Concurrent with our submission that a purported victim of elder abuse (or where they lack capacity, their EPOA) be endowed with the power to request immediate termination of an investigation, Legal Aid ACT submits that the consent of the older person (or again, their EPOA) must first be obtained before persons, other than the older person, can be approached to furnish documentation, produce documents, or participate in an interview. This includes healthcare providers, family, friends, etc. The exception to this would be situations in which the older person lacks capacity and either does not have an EPOA, or it is not appropriate to approach an EPOA due to a reasonable suspicion of EPOA abuse. Legal Aid ACT submits that in those limited cases, the investigatory body may proceed with the investigation without obtaining either the older persons’ or the EPOA’s consent.

Legal Aid ACT agrees with the ALRC that powers of entry and inspection without consent be restricted to police agencies. Unauthorised entry is inconsistent with an investigative process committed to respecting the integrity and autonomy of older persons, particularly if an older person has the right to terminate the investigation at any time. Legal Aid ACT submits that in situations where an investigative body, as a result of evidence obtained in the investigative process, has real concerns as to the personal safety of an older person, they immediately alert police. Police may then progress the matter, applying for a warrant or taking other action.

Legal Aid ACT submits that complaints received by the investigatory body regarding its conduct during elder abuse investigations be subject to review. Internal review processes should be transparent and conducted in a timely manner. Serious complaints requiring external review should be handled by a recognised and respected body, for example the State or Territory Ombudsmen. Any expansion of investigative powers should be accompanied by a clear, publicly accessible investigation and review policy.

**Proposal 3-4**

In responding to the suspected abuse or neglect of an older person, public advocates or public guardians may:

1. refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;
2. assist the older person or perpetrator obtaining those services;
3. prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or
4. decide to take no further action.

**Proposal 3-5**

Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:

1. liable, civilly, criminally, or under an administrative process;
2. found to have departed from standards of professional conduct;
3. dismissed or threatened in the course of their employment; or
4. discriminated against with respect to employment or membership in a profession or trade union.

Appropriate action in response to suspected or confirmed instances of elder abuse is vital to ensuring victim safety and the expedient resolution of the abuse. Referrals, consultation, and assistance with obtaining services are appropriate steps for public guardians or public advocates to take. These kinds of action respect the agency of the older person and keep confrontation to a minimum. Less confrontation means there is less risk of aggravating familial stress, accelerating relationship breakdown, or encouraging increased or alternate instances of elder abuse, for example financial abuse escalating into both financial and physical abuse due to caregivers feeling the strain of an investigation and blaming the victim for the additional stress.

Decisions to take no further action should be made only in circumstances where it is clear that no abuse has occurred, or is occurring. Investigative procedures, including the adoption of a risk and safety matrix should be developed by public guardians or public advocates to guarantee, as far as possible, that cases of elder abuse do not slip through the cracks.

Actions available to the investigative body upon conclusion of the investigation should be limited to referrals, consultation, assistance with obtaining services, and the provision of a final report to ACAT for use in its deliberations. Other actions, such as pressing criminal charges or imposing civil penalties would abrogate the autonomy of the elder person and should not be undertaken. This aligns with Legal Aid ACT’s earlier submissions that adult protection legislation focused on the ‘best interests’ of the adult should not be introduced[[6]](#footnote-6) nor should the jurisdiction of the ACT Civil and Administrative Tribunal (ACAT) be expanded to allow for broader orders for at-risk adults.[[7]](#footnote-7)

Legal Aid ACT submits that reporting schemes in relation to any suspected elder abuse should occur with the consent of the person or, if they lack capacity and have an appointed EPOA, the consent of the EPOA. This is particularly so for healthcare providers, for reasons outlined in our original submission.[[8]](#footnote-8) However, in situations where there is no capacity and no EPOA, or where the EPOA is suspected of perpetrating or being complicit in the abuse, the investigatory body may obtain reports from persons without the older person’s or the EPOA’s consent. Legal Aid ACT submits that in these cases only, Proposal 3-5 be adopted to protect individuals and service providers (the provision of consent otherwise removing the need for limited liability). Confusion and uncertainty as to the extent of obligations, and reticence to report when requested due to fear of consequences, may otherwise undermine the efficacy of the scheme.

1. Enduring Powers of Attorney and Enduring Guardianship

4.1 Orders for compensation

**Proposal 5-5**

State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person’s failure to comply with their obligations under the relevant Act.

As noted at sections 4.3 and 4.5 of our original submission, Legal Aid ACT strongly supports the expansion of ACT Civil and Administrative Tribunal’s (ACAT) jurisdiction to allow compensation and penalty orders to be made against enduring attorneys, guardians, and financial administrators with unlimited jurisdiction.[[9]](#footnote-9)

ACAT currently does not have the legislative power to make these orders under the *Powers of Attorney Act 2006* (ACT). Where a finding that an attorney has breached their obligations has been made, ACAT may refer the matter to the ACT Supreme Court (pursuant to section 63 of the *Guardianship and Management of Property Act 1991*); alternatively the principal may make an application to the ACT Supreme Court pursuant to section 50 of the *Power of Attorneys Act 2006* (ACT).

The cost and complexity of making applications to the ACT Supreme Court in these matters constitutes a significant barrier for older vulnerable persons within the ACT community. Legal Aid ACT and other Community Legal Centres are severely restricted in providing representation due to funding constraints, and private practitioners may be similarly deterred.[[10]](#footnote-10)

Expanding ACAT’s jurisdiction, in line with the existing Victorian model,[[11]](#footnote-11) would greatly increase the ability of elder Australians to seek appropriate legal redress, and would allow Legal Aid ACT to provide more cost effective advice and assistance in these matters, thereby improving access to justice for elderly Australians.

4.2 Conflicts and enduring powers

**Proposal 5-6**

Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney’s duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney), unless:

1. the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
2. a tribunal has authorised the transaction before it is entered into.

It is vital to implement laws regulating transactions where there is, or may be, conflict of attorney/principal interests. Laws of this kind provide additional protections against financial abuses perpetrated by enduring power of attorneys (EPOA), ensuring that the interests of vulnerable older Australians retain primacy. While there may be some concern that these regulations could be unduly restrictive, and could affect individuals’ willingness to be appointed as attorney, the protections afforded are substantial and Legal Aid ACT submits they outweigh any potential negative consequences. The regulations also align with existing enduring power of attorney duties and principles, and more broadly with principles embedded in equitable doctrines[[12]](#footnote-12) and with statutory obligations that bind trustees.[[13]](#footnote-13)

Successful implementation of laws in line with Proposal 5-6 may require adopting Legal Aid ACT’s submission that principals obtain mandatory legal advice on enduring powers of attorney arrangements before signing.[[14]](#footnote-14) This could reduce the number of applications made to ACAT to authorise relevant transactions, as well as the number of future disputes required to be adjudicated by ACAT. Legal Aid ACT would be well positioned to provide the necessary community legal education and advice to interested members of the community.

* 1. Ineligibility for enduring powers

**Proposal 5-7**

A person should be ineligible to be an enduring attorney if the person:

1. is an undischarged bankrupt;
2. is prohibited from acting as a director under the *Corporations Act 2001* (Cth);
3. has been convicted of an offence involving fraud or dishonesty; or
4. is, or has been, a care worker, a health provider or an accommodation provider for the principal.

Legal Aid ACT supports restricting the class of persons eligible to act as an EPOA. In particular, preventing individuals with a documented history of dealing poorly, dishonestly, or fraudulently with assets and income from acting as an EPOA should increase the likelihood that the principal’s affairs will be managed in their best interests.

Difficulty, however, may arise with ineligible applicants under part (d). A broad interpretation of ‘care worker’ or ‘… accommodation provider’ may result in family members providing lodging, or care and assistance to elderly persons being rendered ineligible to act as their EPOA. Whilst it is true that the perpetrator of elder abuse is most often a close family member of the victim[[15]](#footnote-15) it is important to remember that the vast majority of family members do not engage in elder abuse. Indeed family members play an essential role in the provision of unpaid care to elderly relatives. There are multiple benefits to appointing a family member as an EPOA, the most obvious of which is that principals are relieved from having to engage and pay the fees of a private entity or the Public Trustee. Other benefits include the comfort and security derived from having a close, trusted family member, who understand the principal’s needs, fill the role.

Part (d) would nonetheless be effective in preventing obvious conflicts of interests between paid service providers and principals. Legal Aid ACT submits that definitions be provided in any implemented legislation that make it clear that part (d) is restricted to paid, institutional care workers, health providers, and accommodation providers for the principal.

1. Guardianship and Financial Administration Orders

5.1 Reducing the risk

**Proposal 6-1**

Newly-appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations.

As noted in Legal Aid ACT’s original submission, not all instances of elder abuse are malicious, or indeed intentional.[[16]](#footnote-16) Many are the result, or are comprised of, inadvertent neglect. Educating newly-appointed non-profession guardians and financial administrators could help reduce instances of elder abuse.

For those who unintentionally engage in abusive practices, providing clear information on the scope, duties, and responsibilities of the role may prevent accidental breaches of their obligations. For those that might be inclined to intentionally perpetrate elder abuse, it would make clear the costs and legal penalties of doing so, providing a significant legal and social deterrent.

**Question 6-1**

Should information for newly-appointed guardians and financial administrators be provided in the form of:

1. compulsory training;
2. training ordered at the discretion of the tribunal;
3. information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or
4. other ways?

Whilst training for newly-appointed guardians and financial administrators is certainly ideal, compulsory training would be difficult, costly and burdensome. Training ordered at the discretion of ACAT would be effective in some cases (i.e. those already before the Tribunal that meet certain criteria) but would fail to more broadly educate all newly-appointed individuals.

Legal Aid ACT has previously submitted that a compulsory registration scheme for powers of attorneys be implemented.[[17]](#footnote-17) Such a scheme could be expanded to include registration of newly-appointed guardians and financial administrators. Comprehensive information resources, provided upon receipt of registration documentation could help educate newly-appointed guardians and financial administrators about their obligations and the potential penalties for non-compliance. Supplementary to this, Legal Aid ACT is open to providing ACAT with free optional training sessions for interested members of the community in conjunction with other relevant organisations such as the Public Trustee and Guardian office. These training sessions would help clarify any issues or concerns that newly-appointed guardians and financial administrators might have.

The design and implementation of a new registration system, possible training sessions, and information resource would inevitably place an increased resource burden on Legal Aid ACT and any other relevant agencies. Legal Aid ACT is willing to collaborate with other relevant agencies to help ease the pressure of this additional work, particularly in respect of providing training and the drafting of a comprehensive information resource in the context of a new compulsory registration scheme.

1. Family Agreements

6.1 Jurisdictional issues

**Proposal 8-1**

State and Territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.

Older people face significant difficulty protecting their interests when family arrangements break down. This is particularly so when the arrangement is ‘informal’ and not documented in writing. The older person will need to assert their equitable, contractual, or proprietary rights in the ACT Supreme Court; an action that is costly, time intensive, and fractious. The current system is restrictive, posing a significant access to justice barrier and placing older persons in a vulnerable and weakened position when family arrangements breakdown.

Legal Aid ACT submits that ACAT’s jurisdiction should be expanded in a manner similar to current VCAT jurisdiction. This includes being vested with the ability to hear disputes in its Joint Property List about co-owned land and goods, the power to award compensation having regard to the contributions of parties made under the ‘assets for care’ arrangement, and the power to order the sale of property, among other things. ACAT’s jurisdiction should be unlimited in relation to these matters. Resolving these disputes without the necessity of recourse to the ACT Supreme Court will increase access to justice for older Australians. ACAT’s less formal, less time and less cost intensive processes render it a highly preferable forum for the expedient and just resolution of these disputes.

6.2 Definition of family

**Question 8-1**

How should ‘family’ be defined for the purposes ‘assets for care’ matters?

The new *Family Violence Bill 2016* (ACT) amends the definition of a relative to include people with whom the aggrieved person has a ‘family-like’ relationship.[[18]](#footnote-18) This could potentially encompass carers, including paid carers where there is a level of dependency that takes on family-like characteristics. This may also encompass older people that are living in non-traditional family settings where the relationship has developed some family like characteristics.

Legal Aid ACT submits that the definition of ‘family’ for the purposes of ‘assets for care’ matters should be similarly broad. ‘Assets for care’ arrangements occur between older persons and a wide variety of individuals, who may or may not be of blood or immediate relation to the older person but with whom key relationship characteristics, including dependency and support, exist. A broad definition of ‘family’ recognises and reflects the highly varied and culturally diverse notion of family in Australia today, and provides protection in the full range of cases in which it may be required.

1. Conclusion

Structural reform and the development of integrated legal frameworks, including a national plan, is necessary to effectively address elder abuse in Australian Society.

The expansion of relevant State and Territory tribunal jurisdiction will help improve access to justice for elder Australians, particularly for older people seeking appropriate compensation. Older persons will be able to seek legal recourse in an effective, timely, and cost effective manner.

Training programs for newly-appointed guardians and financial managers, coupled with eligibility restrictions on EPOA’s will assist in preventing instances of elder abuse. Training programs will also help educate the community about the manner in which legal support may be provided to older Australians.

The powers of public advocates and public guardians should be expanded to include investigatory powers. These powers will help bridge the gap between mandatory reporting schemes and abuse sufferers with a fear of coming forward, however they should be exercised with caution, and subject to limitations. Any proposed measures should be careful not to impede the autonomy of older Australians, and policy makers should steer clear of a prescriptive approach.

1. Legal Aid ACT, Submission to the Australian Law Reform Commission, *Inquiry into Protecting the Rights of Older Australians from Abuse: Issues Paper* *47,* 1 June 2016, 34. [↑](#footnote-ref-1)
2. With ‘able’ referring to the physical and mental capacity to seek assistance, in line with the ALRC’s definition of care and support needs: ALRC, 2016, *Elder Abuse Discussion Paper 83*, 69. [↑](#footnote-ref-2)
3. ALRC, 2016, *Elder Abuse Discussion Paper 83*, 69. [↑](#footnote-ref-3)
4. Office of the Public Advocate, Submission to the Australian Law Reform Commission, *Submission to the Australian Law Reform Commission in Response to the Elder Abuse Discussion Paper 83,* February 2017, 4 [↑](#footnote-ref-4)
5. Legal Aid ACT, above n 1, 22-25. [↑](#footnote-ref-5)
6. Ibid 34-35. [↑](#footnote-ref-6)
7. Ibid 37; 43. [↑](#footnote-ref-7)
8. Ibid 35-36. [↑](#footnote-ref-8)
9. Ibid 31-39. [↑](#footnote-ref-9)
10. Ibid 36; 38. [↑](#footnote-ref-10)
11. Under s 77 of the *Powers of Attorney Act 2014* (VIC) VCAT has the power to order compensation for loss caused by an enduring attorney contravening the act, even where the principal has died, if the power of attorney is invalid or has been revoked, at the time of the contravention or otherwise. [↑](#footnote-ref-11)
12. For example, fiduciaries must act in the best interest of their beneficiaries, and are precluded from undertaking action that might conflict with those interests: *Chan v Zacharia* (1984) 154 CLR 178; *Grimaldi v Chameleon Mining (2012) 200 FCR 296; Howard v FCT (2014) 253 CLR 83.* [↑](#footnote-ref-12)
13. See for example *Trustee Act 1925* (ACT) s 14B. [↑](#footnote-ref-13)
14. Legal Aid ACT, above n 1, 32. [↑](#footnote-ref-14)
15. Sarah Ellison et al, *Access to Justice and Legal Needs: The legal needs of older people in NSW* (Law and Justice Foundation
of NSW, 2004), 269. [↑](#footnote-ref-15)
16. Legal Aid ACT, above n 1, 16. [↑](#footnote-ref-16)
17. Ibid 33. [↑](#footnote-ref-17)
18. *Family Violence Bill 2016* (ACT) s 11(1)(c)(iv). [↑](#footnote-ref-18)