Australian Law Reform Commission

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**ALRC December 2016 *Elder Abuse* Discussion Paper Proposals and Questions**

Please find following our response to the current discussion paper proposals and questions.

Part 1 of this response addresses a number of broad, general issues that are of relevance to the enquiry, while part 2 considers the specific proposals and questions posed in the discussion paper in greater detail.

The response reflects research and teaching over the past decade in relation to matters such as guardianship, trusts, the identification and support of vulnerable people, mandatory reporting and the supervision of service providers.

Please note that this response reflects the views of the authors, rather than the institutions with which they are affiliated. The response does not represent what would be reasonably construed as a substantive conflict of interest.

We are happy to discuss any part of this response with you further on the contact details provided at the end of the response.

**Part 1: General considerations**

The following comments are general in nature, and pertain to the discussion paper as a whole, and potentially the foundational basis of the enquiry.

**‘Elder’ abuse**

We note from the discussion paper that others have raised concerns about the definitions of ‘elder’ and ‘abuse’. To those entirely valid concerns, we wish to add another of a more existential nature: specifically, our concern about the emphasis of this enquiry on ‘elder’ abuse.

Both the authors of this response have done extensive legal research across the spectrum of vulnerability, encompassing vulnerability associated with age,[[1]](#footnote-1) race, disability, and gender. Although we agree with the basic premise that older people are vulnerable to abuse by others, we are not persuaded that the root cause of the abuse is necessarily old age *per se*. Vulnerability is often cumulative across the life course: pre-existing vulnerabilities, such as gender and learning disabilities, may be compounded in old age by the addition of new vulnerabilities, based on impaired physical, intellectual, mental, or social disability.

We are concerned that by emphasising age as the critical factor, a number of risks are created: firstly, that victims of abuse are categorised on the basis of age, and responses to the abuse are directed at that risk factor alone, rather than at what we would identify as the underlying risk factor, which may have been exacerbated by other risk factors associated with age, such as physical infirmity, rather than created by the person’s increasing age. In such situations the person’s ability to detect or respond to the abuse may change, thereby shifting the overall dynamic of the abuse, but the vulnerability at the basis of the abuse may have always been present. Examples of this are demonstrated in some of the case studies presented in the discussion paper. For instance, the transgender person forced to comply with gender expectations they are uncomfortable with (and that are inconsistent with recognition of that individual’s dignity as a person), or the Indigenous person whose residential accommodation fails to acknowledge their traditional practices, did not suddenly become transgender or Indigenous once they achieved old age: those vulnerabilities have been present for much of their lives. What has changed is their ability to respond to attacks on that vulnerability: with old age, other vulnerabilities, such as social isolation, or physical infirmity, or cognitive decline, may develop, making the individual more susceptible to the abuse. They are not being targeted for abuse *because* they are older; rather, they are being targeted for other vulnerabilities, and factors associated with old age, rather than old age itself, make them more susceptible to that abuse.

This distinction is important. Failure to appreciate the complexity of an individual’s circumstances including their vulnerabilities results in overly simplistic systematic responses, some of which are evident in the current proposals put forward by the Commission. Firstly, it potentially justifies a systemic denial of agency to all older people, *‘for their own* protection’. Treating all older people as potentially at risk of abuse because some older people may not be able to respond to it is a paternalistic denial of agency. Proponents of schemes of mandatory reporting of elder abuse frequently cite examples at the more extreme end of the abuse spectrum, such as the physical or sexual abuse of people with impaired capacity in institutional or isolated domestic settings. Its persuasiveness diminishes in situations where the ‘abuse’ is less tangible, or financial in nature, and occurring against ‘victims’ who have full capacity and are socially well-connected. Is it, for example, financial abuse if an elderly parent with full capacity gifts that person’s child with money to buy a car, perhaps in exchange for driving them to various medical appointments and social engagements? To implement a scheme of mandatory reporting of such transactions is to fundamentally undermine the autonomy of the donor, and to attribute motivations to the recipient which in many cases simply will not exist.

Secondly, and perhaps more concerningly, systematically characterising abuse of older people as ‘elder abuse’ risks creating a ‘special’ subclass of abuse, which is treated differently from other sources of abuse and that implicitly objectifies a very broad class of people merely on the basis of age (in itself an arbitrary chronological marker). We already have a well-established framework of criminal laws capable of addressing many forms of abuse perpetrated against older people, which do not specifically rely on characteristics of the victim, such as age, to have effect. Where the offending is particularly egregious, the courts often have the ability to impose sentences at the higher end of the spectrum, noting factors such as the vulnerability of the victim. They also have the ability to reduce sentences in circumstances where mitigating factors are present.

Problematically and paradoxically, some of the proposals contained in the discussion paper appear to ‘privilege’ elder abuse, both by increasing sanctions and investigation powers in cases of suspected abuse in some proposals, and decreasing sanctions and investigation powers in others.

Legal exceptionalism of this type is contrary to the rule of law and to respect for elderly as people with inherent dignity, persons rather than entities. In this case exceptionalism is not warranted: similar situations affecting younger victims can also arise, and logically there is no reason to think that fraudulent exercise of financial powers by an appointed guardian is a more heinous offence when carried out against an older person with dementia, than against a younger person with intellectual disability, for example.

**Federalism and constitutionality of elder law**

We note that underlying the process of elder law reform in Australia is the vexed issue of jurisdictionality, which does not appear to be covered in as much depth as it should be in the discussion paper.

Elder law in Australia is currently incoherent and fragmented. This is in part due to the involvement of all eight jurisdictions (six states, two territories, and the Commonwealth) in legislating on aspects of elder law. Under Australia’s model of federation, the Commonwealth can legislate only on defined topics. The States and Territories can (with some exceptions)[[2]](#footnote-2) legislate on all topics not identified as subjects exclusive to Commonwealth legislation. Neither health or age are express exclusive Commonwealth powers, and there are no international agreements to which Australia is a signatory which would enable them to be treated as express Commonwealth powers under the external affairs power, for example.

The Commonwealth government does, however, provide funding for many of the medical and residential services required by older people, which makes Commonwealth laws on aspects of these services valid. Similarly, the States and Territories legislate on other aspects regulating provision of health, residential, and other activities relevant to older people. Unfortunately, however, the legislation adopted by the states and territories is often inconsistent across jurisdictions.

Although we whole-heartedly support greater uniformity of legislation across Australia, we note that such uniformity will have to rely on the goodwill of the states and territories, as it cannot simply be imposed by the Commonwealth. Particularly compelling areas for uniformity include the establishment of a uniform scheme for the creation and registration of documents such as enduring Powers of Attorney and guardianship appointments, and any scheme of registration, complaints investigation, or official visitors for aged care facilities.

Uniformity would have the benefit of providing protected people with greater certainty that their wishes and needs were being respected and met, and their families, and professionals supporting them, with greater efficiency in locating and utilising the relevant powers and information to better support vulnerable people.

We also note that there are many laudable instances of state and territory initiatives designed to protect the interests of vulnerable people. In particular, those initiatives that focus on support and education, rather than sanction, should be identified and retained under any move towards uniformity. A model for that assimilation of best practice at the non-Commonwealth level is provided by establishment of the Australian Consumer Law under complementary Commonwealth, state and territory enactments.

**Private vs institutional/professional carers**

Following on from the previous point, there needs to be greater distinction within the ALRC’s final report about the differences between institutional or professional, and personal, or domestic, arrangements.

Individuals who intentionally cause harm to an older person for whatever reason should be dealt with according to existing criminal laws, regardless of whether they are a professional care provider, or a family member or friend, or even a complete stranger.

We do however note that in situations where harm may have been caused by inadvertence or negligence, rather than by malice, there may be a need for greater differentiation in the treatment of harm-causers. For example, a nursing home which negligently injures a bed-ridden patient while turning that person should be subject to different reporting requirements and sanctions than a family member who causes the same injury while trying to care for the person in their own home, in accordance with the person’s wishes. The former is a professional care provider, receiving payment for services, while the latter is often untrained, and often acting altruistically rather than for profit. Furthermore, it is well-established that professional supports for in-home care, such as home visits and respite care, may be difficult to access for many people.

Similar points can be made about people, rather than institutions, who are appointed to exercise financial, welfare, or healthcare decision-making powers on behalf of another, either through mechanisms such as enduring powers of attorney, or by tribunal appointment. Many people performing these roles are doing so altruistically, or because they feel there simply is no other alternative, noting that options such as financial trustees, including the public trustee, may be perceived to be too expensive, or too far removed from the person.

Any reporting requirements or investigation of abuse of these powers should reflect the domestic or voluntary nature of many people exercising these powers, particularly when any wrong doing appears to be attributable to negligence or lack of knowledge rather than mal intention. Education and support, rather than punishment or overly onerous reporting requirements, should guide law reform endeavours in this area.

Failure to recognise the differences between professional or institutional actors, and domestic or personal ones, risks alienating many providers of voluntary care, forcing people into organised care who would prefer to be at home, or forcing people, particularly those with few assets, to rely on agencies such as public trustees for estate management, both of which will carry significant financial and resourcing implications for the state as well as the individuals concerned.

**Existing laws**

It is important to note that based on the discussion paper, and particularly on case studies and quotations contained within, there appears to be a significant question about whether the issue is a lack of relevant law, or whether it is one of whether some existing laws are being used effectively.

In particular, it appears to us from the discussion paper that many people are not aware of the law of capacity, for example, or are using instruments such as powers of attorney and enduring powers of attorney inappropriately.

One of the clearly stated proposals that should be included in the Commission’s final report is a recommendation that older people be better educated about their rights. A disturbing number of submissions and comments seemed to reflect older people being pressured into doing things they did not want to, because they *thought* others had the power to force them to do it, whether through exercise of a Power of Attorney, or a threat of a tribunal, or some other reason.

It is evident that better public awareness campaigns educating people about their decision-making powers, including the presumption of capacity, the effect of delegated decision-making instruments such as enduring powers of attorney, and the roles of guardianship tribunals are essential both to counter misrepresentation of those things to older people by others, and encourage people to be proactive in recording their wishes, and have confidence that those wishes will be respected.

**Part 2: Response to specific proposals and questions:**

***2. National Plan***

***Proposal 2–1*** *A National Plan to address elder abuse should be developed.*

***Proposal 2–2*** *A national prevalence study of elder abuse should be commissioned.*

We agree with both of these proposals, subject to a) concerns noted by other submissions about the need for a clear and consistent definition of both ‘elder’ and ‘abuse’; and b) our stated concern above about the risks of over-simplifying the causes of abuse.

***3. Powers of Investigation***

***Proposal 3–1*** *State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:*

*(a) has care and support needs;*

*(b) is, or is at risk of, being abused or neglected; and*

*(c) 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.*

We suggest that this proposal be rejected outright on the basis that it creates a conflict of interest which fundamentally distorts the role of the public guardian or advocate, and differentiates between older people lacking capacity who are under the care of public authorities, as opposed to private decision-makers appointed either by the person via an instrument such as an Enduring power of Attorney, or a tribunal.

Firstly, it should be expressly noted that any power to be exercised by a public guardian or advocate is to be restricted to matters related to the person’s identified lack of capacity. As mentioned earlier, capacity is context dependent: some people may be under the care of the public guardian for some matters but not others. If the suspected abuse falls outside the scope of matters for which the person has been found to be lacking in capacity, thereby necessitating the appointment of the guardian or advocate, the person retains the right to agree to further investigation or not, as they wish.

Secondly, and more critically, the role of the public guardian or advocate is to act in the person’s interests. They are not there to regulate to industry by investigating care providers. Vesting the advocate or guardian with any such investigative powers is likely to inhibit their relationship with care providers, and impair their ability to act in the best interests of the person whose interests they have been appointed to serve. Public guardians and advocates should not be exercising investigative powers: they are not a regulator or an industry watch dog, nor are they a quasi police force. At most they should be referring complaints or suspicions to a regulator or police force, and then return to the task of advocating on behalf of their client.

Thirdly, this creates a mechanism of oversight available only to those older people lacking capacity who are in a formal relationship with the public advocate, unless the public guardian or advocate is specifically empowered to investigate on behalf of all older people lacking capacity, rather than just those to whose care it has been appointed. Absent this broad empowering, a person whose welfare or healthcare decision-making is overseen by a family member or private individual would be unable to access this reporting and investigation mechanism for suspected abuse.

If this is a direction the Commission supports taking, we would urge it to consider creation of an independent ombudsman or other regulatory watch dog, rather than conflating an investigation role with that of the public advocate.

***Proposal 3–2*** *Public advocates or public guardians should be guided by the following principles:*

*(a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;*

*(b) 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*

*(c) the will, preferences and rights of the older person must be respected.*

This proposal appears to fundamentally misunderstand the law of capacity. If a public guardian or advocate has been appointed, it is because the person lacks the capacity to make their own decisions, including deciding to refuse support, assistance or protection. If a public guardian or advocate has been appointed, the older person does not generally retain the right to refuse support, assistance or protection if it falls within the scope of the guardian’s or advocate’s appointment.

Although advocates and guardians should be required to consider the will and preferences of the person, those wishes *must* be balanced against the best interests of the person, in accordance with the appointment of the guardian or advocate. As such, the advocate or guardian cannot be bound by them where they are inconsistent with the person’s health or welfare.

***Proposal 3–3*** *Public advocates or public guardians should have the power to require that a person, other than the older person:*

*(a) furnish information;*

*(b) produce documents; or*

*(c) participate in an interview*

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

We fundamentally disagree with this proposal, which is more consistent with anti-terrorism powers given to ASIO or the police, than investigation of *suspected* abuse, very loosely defined in proposal 3-1 (a) – (b).

Any such powers requiring provision of evidence should be exercised in accordance with established legal principle, by police or the courts, and restricted to circumstances those entities would typically regard as warranting the exercise of those powers, ie serious and intentional injury, for example, noting that other legal requirements regarding rights against self-incrimination and the rules of evidence should also be applied.

Furthermore, any exercise of draconian measures of this type should be restricted to institutional or professional carers, noting that in the event of serious harms perpetrated by individuals, rather than institutions, the matter should be investigated by police in accordance with existing criminal procedure regarding assault, as noted in Part 1 above. A corollary is that the police forces should recognise such investigation as a priority and receive appropriate resourcing.

***Proposal 3–4*** *In responding to the suspected abuse or neglect of an older person, public advocates or public guardians may:*

*(a) refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;*

*(b) assist the older person or perpetrator in obtaining those services;*

*(c) prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or*

*(d) decide to take no further action.*

Public advocates and guardians who have been appointed to fulfil duties regarding the health and welfare of individuals are required to do more than merely refer people to services. At a minimum, they should be facilitating contact between the individual and the service, and following up on outcomes, noting that they are legally obliged to do so as part of their appointment. Indeed, much of this proposal as it relates to an older person simply reiterates the legal obligations of the public guardian or advocate.

More problematic are the provisions relating to the ‘perpetrator’ of the ‘suspected abuse’. Firstly, the term perpetrator implies that the abuse was not only proven, but so too was the identity of the abuser, determinations which we would argue are more appropriately left to the courts and the criminal justice system to make. Notwithstanding the wording issues, it is a further conflict of interest for the public guardian or advocate to be making decisions about taking further action that is inconsistent with their duties to the protected person whose interests they have been appointed to protect, for the same reason it is inappropriate for them to be carrying out the investigation. An appointed decision-maker such as a guardian stands in the shoes of the person found to be lacking capacity, but is bound to act in the protection of that person’s interests in a way the person themselves is not. In this context, empowering the public advocate or guardian to investigate suspected abuse renders them victim, witness, police force, prosecutor and judge.

It is also inherently problematic that the public advocate or guardian should be empowered to refer ‘perpetrators’ to other services: characterisation of a person as a ‘perpetrator’ is outside the scope of the advocate’s role, and providing such support and assistance potentially puts them in directly conflict with meeting the requirements of the suspected victim.

***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:*

*(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.*

This proposal should be consistent with mandatory reporting rules in existence under the Australian Health Practitioners Regulatory Agency reporting framework; it could also be noted that standards of professional conduct would require reporting.

***5. Enduring Powers of Attorney and Enduring Guardianship***

***Proposal 5–1*** *A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.*

We agree absolutely; further expansion should subsequently include registration of advanced health directives, organ donation wishes, and, ultimately, wills.

***Proposal 5–2*** *The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.*

Yes, although there needs to be some emergency registration mechanism in place, whereby an enduring document could be deemed to take effect from the time of execution rather than formal registration – possibly through a mechanism such as an ex tempore order by a duty judge – in circumstances such as for example an emergency medical procedure.

***Proposal 5–3*** *The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents can be registered and that unregistered enduring documents remain valid for a prescribed period.*

Yes. Implementation should also be accompanied by a public education campaign designed to encourage people to make or update, and register, enduring documents. Such a campaign should not be undertaken in the manner employed for the personally controlled E-health records.

***Question 5–1*** *Who should be permitted to search the national online register without restriction?*

Unrestricted access should be restricted, potentially to professionals governed by adequate professional safeguards for dealings with misuse of confidential information, such as legal practitioners and some others. Institutional actors such as banks and superannuation providers who require access should be required to register for it, and sign undertakings regarding misuse of the information, and acknowledging penalties for misuse, including potentially criminal penalties. All access should be via appropriate information security safeguards, such as passwords and encryption consistent with best practice in Australian privacy law and international useability standards.

Individuals should be able to search for references to themselves, in order to check whether they have been nominated as a decision-maker in an instrument, or to check their own instruments, which is consistent with the privacy laws, and also the requirement that appointees should be informed of their potential appointment prior to execution of the instrument. Such access could potentially require a search to be carried out by an official, or a registered legal practitioner, rather than in person, and be underpinned by a statutory declaration against abuse of the information.

***Question 5–2*** *Should public advocates and public guardians have the power to conduct random checks of enduring attorneys’ management of principals’ financial affairs?*

No. This might be appropriate for institutional financial managers, such as the public trustee, but there are typically other compliance safeguards in place for those entities. In the context of a private or domestic financial manager, such as a spouse or child, this represents an enormous administrative burden which would dissuade many from undertaking the duty.

***Proposal 5–4*** *Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:*

*(a) legal practitioner;*

*(b) medical practitioner;*

*(c) justice of the peace;*

*(d) registrar of the Local/Magistrates Court; or*

*(e) police officer holding the rank of sergeant or above.*

*Each witness should certify that:*

*(a) the principal appeared to freely and voluntarily sign in their presence;*

*(b) the principal appeared to understand the nature of the document; and*

*(c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.*

Yes, noting that this is consistent with the execution requirements for other legal documentation. It should also be noted that this is not a full test of capacity, instead reaching a lower threshold of ‘apparent’ capacity and volition. Part (b) should be expanded, to require that the witness actually witnesses the signatory explain in their own words what the document is and what it does, rather than merely signs on the line after having merely skimmed it.

***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.*

Such measures should be a last resort, utilised only in situations of intentionally rather than carelessly caused loss. In the first instance, orders requiring the person to receive education and perhaps supervision would be more appropriate.

***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:*

*(a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or*

*(b) a tribunal has authorised the transaction before it is entered into.*

Yes, noting that in domestic situations a tribunal might need to consider situations that hadn’t been expressly authorised, eg home repairs, or a need to provide a car for transport, or similar in the event the person is living at home.

***Proposal 5–7*** *A person should be ineligible to be an enduring attorney if the person:*

*(a) is an undischarged bankrupt;*

*(b) is prohibited from acting as a director under the Corporations Act 2001 (Cth);*

*(c) has been convicted of an offence involving fraud or dishonesty; or*

*(d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.*

Once again, (d) needs to better articulate a distinction between domestic and professional carers, for example a child who is a nurse and cares for his/her mother should still be able to be a power of attorney.

***Proposal 5–8*** *Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:*

*(a) making or revoking the principal’s will;*

*(b) making or revoking an enduring document on behalf of the principal;*

*(c) voting in elections on behalf of the principal;*

*(d) consenting to adoption of a child by the principal;*

*(e) consenting to marriage or divorce of the principal; or*

*(f)  consenting to the principal entering into a sexual relationship.*

Yes, noting that alternatives need to be available for some of these activities, ie divorce consent, and maintaining oversight of some of these activities by a tribunal may provide an appropriate safeguard, such as in (f), where consent may not be able to be validly provided by anyone.

‘Consenting to euthanasia’ (unless expressly included in the protected person’s advances health directives or other anticipatory declarations) might also be added to the list, in anticipation of future legislative reform.

***Proposal 5–9*** *Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.*

Yes.

***Proposal 5–10*** *State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.*

Yes

***Proposal 5–11*** *The term ‘representatives’ should be used for the substitute decision makers referred to in proposal 5–10 and the enduring instruments under which these arrangements are made should be called ‘Representatives Agreements’.*

This needs clarification. Although we agree the proliferation of nomenclature across jurisdictions is confusing, ‘Representatives’ lacks detail; if adopted, there needs to be extensive education about the broad and differing ranges of powers ‘representatives’ can exercise.

It also needs to be clear when a ‘Representatives Agreement’ takes effect, noting that in some submissions, it appears that the protected person believes that they cede all decision-making powers on execution of the instrument, rather than on loss of capacity.

***Proposal 5–12*** *A model Representatives Agreement should be developed to facilitate the making of these arrangements.*

Yes.

***Proposal 5–13*** *Representatives should be required to support and represent the will, preferences and rights of the principal.*

Yes, balanced against, and often limited by, their obligations to act in the best interests of the protected person.

***6. Guardianship and Financial Administration Orders***

***Proposal 6–1*** *Newly-appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations.*

Yes - but ‘should’ needs to be replaced by ‘must’.

***Question 6–1*** *Should information for newly-appointed guardians and financial administrators be provided in the form of:*

*(a) compulsory training;*

*(b) training ordered at the discretion of the tribunal;*

*(c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or*

*(d) other ways?*

All of the above - in addition, these should be supplemented by a broader public education campaign, designed to provide all Australians with some familiarity with these matters.

***Proposal 6–2*** *Newly-appointed guardians and financial administrators should be required to sign an undertaking to comply with their responsibilities and obligations.*

Presumably this is already incorporated into the evidence they provide to a tribunal, underpinning the orders made by the tribunal appointing them. It is not clear how signing an undertaking would further entrench the formality of the tribunal orders.

***Question 6–2*** *In what circumstances, if any, should financial administrators be required to purchase surety bonds?*

Only in the event that the administrator is a professional or institutional administrator; even then, there may be other mechanisms such as insurance which are better suited to this task. To impose it on domestic administrators is to impose a further obligation on an altruistic, or voluntary, actor, who may not have the resources to undertake it.

***Question 6–3*** *What is the best way to ensure that a person who is subject to a guardianship or financial administration application is included in this process?*

People subject to these orders should be included in the process by comprehensive education about them prior to the need for the orders arising ie mainstream public education.

After the appointment, people should be consulted, and their wishes considered to the extent they are a) capable of consulting, and b) that those wishes are consistent with their best interests.

**7. Banks and superannuation**

***Proposal 7–1*** *The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.*

***Proposal 7–2*** *The Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.*

***Question 7–1*** *Should the Superannuation Industry (Supervision) Act 1993 (Cth) be amended to:*

*(a) require that all self-managed superannuation funds have a corporate trustee;*

*(b) prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;*

*(c) impose additional compliance obligations on trustees and directors when they are not a member of the fund; and*

*(d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds*?

***Question 7–2*** *Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?*

Beyond endorsing (b) to the extent that there needs to be some planning for possible loss of capacity when a self-managed superannuation fund is established by an individual, these authors are not in a position to comment meaningfully on this proposal.

***8. Family Agreements***

***Proposal 8–1*** *State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.*

***Question 8–1*** *How should ‘family’ be defined for the purposes ‘assets for care’ matters?*

We agree that state and territory tribunals should have jurisdiction to resolve these matters, with the proviso that all states and territories and the Commonwealth ideally should be bound by uniform laws that are consistent in their definition and treatment of governing assets for care. For example, similar definitions should apply for dealings with aged care at state and federal level, the Australian taxation Office, and Centrelink, to minimise the burden of family members undertaking dealings with these agencies on behalf of others on a non-professional basis. Similarly, ‘family’ needs a consistent definition throughout the legislation governing dealings relating to aged care.

***9. Wills***

***Proposal 9–1*** *The Law Council of Australia, together with state and territory law societies, should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:*

*(a) common risk factors associated with undue influence;*

*(b) the importance of taking detailed instructions from the person alone;*

*(c) the importance of ensuring that the person understands the nature of the document and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and*

*(d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents.*

We agree. Such materials should be included regularly as part of legal practitioners continuing professional development requirements. We would note, however, that this should not be restricted to legal practitioners alone. Professionally we have encountered many health practitioners whose understanding of the law of capacity is flawed, and should not be relied on. Common errors are conflating common diagnostic tests for cognitive impairment with the test for legal capacity, and failure to recognise the context-dependent nature of legal capacity: being able to count back from one hundred, and successfully name the past eight prime ministers does not mean you understand the nature and effect of a Deed gifting all your assets to the Martian appreciation society, for example.

***Proposal 9–2*** *The witnessing requirements for binding death benefit nominations in the Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 1994 (Cth) should be equivalent to those for wills.*

We agree. This consistency should extend to witnessing requirements for enduring powers of attorney and other anticipatory directives.

***Proposal 9–3*** *The Superannuation Industry (Supervision) Act 1993 (Cth) and Superannuation Industry (Supervision) Regulations 1994 (Cth) should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.*

We agree. This should be added to the list of actions a power of attorney or guardian is not authorised to undertake.

***10. Social Security***

***Proposal 10–1*** *The Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.*

We agree, noting that such a strategy should be consistent with those developed by other relevant agencies, and should emphasise education and prevention, and referral of suspected abuse to others, rather than development of in-house investigative powers, or punishment.

***Proposal 10–2*** *Centrelink policies and practices should require that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.*

No. This is inappropriate in the event that a tribunal or a principal has legitimately appointed another person to act on behalf of the person in the event of loss of capacity. Although we generally agree with the principle that an elderly person (and indeed anyone) who has dealings with Centrelink should be able to speak directly with a staff member, rather than be forced to navigate a website or automated phone system, both of which present equity barriers particularly for older people, we do not believe that direct contact with Centrelink staff would necessarily enable staff to detect elder abuse, nor to establish whether the older person has experienced a loss of capacity justifying communication with a guardian on the person’s behalf. This proposal is unlikely to offer meaningful protection against elder abuse to people at risk of being victimised beyond that provided by other, less directed education campaigns.

***Proposal 10–3*** *Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments.*

We agree. Furthermore, Centrelink communications to this effect should be drafted clearly and concisely, preferably in a way that is understandable by people with limited literacy and who may have visual disabilities, may not have English as their primary language and may not have broadband access. Such communications should also clearly state what it is the recipient of the communication is required to do, or, if the communication is purely for the purpose of providing reporting, should clearly indicate if the recipient is not required to do anything at all.

***Proposal 10–4*** *Centrelink staff should be trained further to identify and respond to elder abuse.*

Centrelink staff should be trained in the provision of education and support in the case of elder abuse. However if Centrelink staff suspect fraud, it should be referred to fraud investigation services within the agency, or police, and responded to in the same way as any other instance of suspected fraud or wrongdoing. Treating elder abuse as ‘different’ from other kinds of abuse is unlikely to be beneficial to older people, for reasons noted above in Part one of our response.

***11. Aged care***

***Proposal 11–1*** *Aged care legislation should establish a reportable incidents scheme. The scheme should require approved providers to notify reportable incidents to the Aged Care Complaints Commissioner, who will oversee the approved provider’s investigation of and response to those incidents.*

We agree in principle, noting that the Aged Care Complaints Commissioner, or even a truly independent Ombudsman or industry regulator, are more appropriate mechanisms for investigating suspected abuse than the Public Advocate or guardian, discussed in an earlier proposal.

***Proposal 11–2*** *The term ‘reportable assault’ in the Aged Care Act 1997 (Cth) should be replaced with ‘reportable incident’.*

*With respect to residential care, ‘reportable incident’ should mean:*

*(a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient;*

*(b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or*

*(c) an incident resulting in an unexplained serious injury to a care recipient.*

*With respect to home care or flexible care, ‘reportable incident’ should mean a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient.*

A participant in sexual activity who lacks capacity cannot give valid consent, and as such any sexual activity involving a person who cannot give legally valid consent due to lack of capacity is technically a sexual assault, regardless of whether it is an isolated incident, or a pattern of behaviour.

***Proposal 11–3*** *The exemption to reporting provided by s 53 of the Accountability Principles 2014 (Cth), regarding alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment  on another care recipient, should be removed.*

This exemption should be removed. In the event that a patient with a pre-diagnosed cognitive impairment is free to assault other care recipients, the incident should be reported to ensure that appropriate steps are taken at the institutional level to prevent recurrence.

***Proposal 11–4*** *There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of:*

*(a) a person’s national criminal history;*

*(b) relevant reportable incidents under the proposed reportable incidents scheme; and*

*(c) relevant disciplinary proceedings or complaints.*

***Proposal 11–5*** *A national database should be established to record the outcome and status of employment clearances.*

***Question 11–1*** *Where a person is the subject of an adverse finding in respect of a reportable incident, what sort of incident should automatically exclude the person from working in aged care?*

***Question 11–2*** *How long should an employment clearance remain valid?*

***Question 11–3*** *Are there further offences which should preclude a person from employment in aged care?*

***Proposal 11–6*** *Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.*

Proposals 11-4 to 11-6, and Questions 11-1 to 11-3 raise a more fundamental question: why aren’t professional aged care providers subject to the National Health Practitioners Regulatory Scheme, as are the majority of healthcare professions? This scheme governs registration and accreditation, background checks, notification of reportable incidents, and professional conduct matters.

Given the significant overlap at both a conceptual and individual employee level of providers of health care and aged are services, extension of the scheme to encompass aged care appears to be a logical next step.

***Proposal 11–7*** *The Aged Care Act 1997 (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:*

*(a) when necessary to prevent physical harm;*

*(b) to the extent necessary to prevent the harm;*

*(c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and*

*(d) as prescribed in a person’s behaviour management plan.*

This proposal needs to consider a number of factors, including the person’s mental health (is the use of restrictive practices permitted under the Mental Health Laws, for example?); their capacity to refuse or accept treatment, or make decisions and choices about their care (which encompasses their ability to recognise that they may be a source of harm to themselves or others); and also the potential for first instances to arise prior to the development of any behaviour management plan related to that person.

It is difficult to see why these practices need to be regulated under the Aged Care Act, noting that there are other statutory provisions which, presumably, would also be triggered by circumstances warranting use of restrictive practices, such as the mental health laws or laws regarding loss of capacity (Guardianship and Powers of Attorney laws, for example). It is recommended, however, that the laws regulating restrictive practices should be made uniform across Australian jurisdictions.

***Proposal 11–8*** *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.*

We disagree: ensuring that a person has made and registered these instruments provides the approved provider with certainty in the event that a person in the care suffers a loss of decision-making capacity, and enables them to focus their efforts on supporting the care recipient, rather than establishing who is entitled to make which decisions regarding the recipient’s care.

In the event that providers cannot require recipients to appoint decision makers, the care provider should clearly outline to the applicant its processes for seeking appointment of a decision maker through the relevant tribunal, thereby ensuring that the applicant is aware of the significance of making their wishes known.

***Proposal 11–9*** *The Department of Health (Cth) should develop national guidelines for the community visitors scheme that:*

*(a) provide policies and procedures for community visitors to follow if they have concerns about abuse or neglect of care recipients;*

*(b) provide policies and procedures for community visitors to refer care recipients to advocacy services or complaints mechanisms where this may assist them; and*

*(c) require training of community visitors in these policies and procedures.*

We agree in principle, noting that reporting and investigation of such matters should be undertaken by an independent Aged Care Regulator or Ombudsman, rather than Public Guardian or Advocate.

***Proposal 11–10*** *The Aged Care Act 1997 (Cth) should provide for an ‘official visitors’ scheme for residential aged care. Official visitors’ functions should be to inquire into and report on:*

*(a) whether the rights of care recipients are being upheld;*

*(b) the adequacy of information provided to care recipients about their rights, including the availability of advocacy services and complaints mechanisms; and*

*(c) concerns relating to abuse and neglect of care recipients.*

We agree in principle, noting that reporting and investigation of such matters should be undertaken by an independent Aged Care Regulator or Ombudsman, rather than Public Guardian or Advocate.

***Proposal 11–11*** *Official visitors should be empowered to:*

*(a) enter and inspect a residential aged care service;*

*(b) confer alone with residents and staff of a residential aged care service; and*

*(c) make complaints or reports about suspected abuse or neglect of care recipients to appropriate persons or entities.*

We agree in principle, noting that reporting and investigation of such matters should be undertaken by an independent Aged Care Regulator or Ombudsman, rather than Public Guardian or Advocate.

In conclusion, we believe that while many of the proposals regarding investigation and regulation have some merit, in their current form powers are vested in the wrong entities. There is a need for an independent regulator and/or ombudsman type agency which have the power to regulate aged care providers, investigate complaints or suspicions of abuse for referral to police or the courts in extreme instances, provide education, and potentially govern employee conduct and screening modelled on the AHPRA system, in the event aged care workers are not ultimately included in the National Health Care Regulatory Scheme. Such a regulator or ombudsman is necessary to ensure its independence, and eliminate conflicts of interest such as those arising by vesting those powers in the Public Advocate or Guardian.

We would be happy to discuss any aspects of this response further with the Commission if clarification or expansion is required.

Yours sincerely

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1. We note that there are distinct differences between childhood and old age, which underpin the differing levels of acceptance of paternalism against children, as opposed to older people. Specifically, children are presumed to uniformly lack legal capacity at birth. As the child matures, that presumption can be displaced in certain contexts through demonstration of *Gillick* competence, for example, through statutory modification, until they reach the age of full legal recognition of personhood (18 years of age in Australia). The converse does not apply at the other end of the life spectrum: all adults are entitled to a legal presumption of capacity, which must be displaced before their ability to make their own decisions, and have those decisions recognised, is denied. Capacity is also context-dependent. Not all older people experience diminution of legal capacity, nor do those that do lose capacity do so in a uniform way. There is no uniform or arbitrary denial of capacity linked to old age: statute does not, for example, bar people over the age of 75 from voting. As a legal concept, capacity in adults is a highly individualised test, and denial of recognition of capacity in older people is essentially a denial of previously recognised legal personhood. For this reason, arbitrary or uniform mechanisms such as mandatory reporting which may be appropriate in the context of children who are presumed to lack the capacity to exercise their legal rights are an affront to the dignity and human rights of older individuals who have capacity. [↑](#footnote-ref-1)
2. One topic of relevance to elder law is euthanasia: while not expressly identified as a topic in the Constitution, the territories are nonetheless barred from legislating on it by the Commonwealth exercising its territories power. [↑](#footnote-ref-2)