The Executive Director

Australian Law Reform Commission

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27 February 2017

Dear Executive Director,

**Submission Responding to Discussion Paper 83, Elder Abuse**

Thank you for the opportunity to provide a submission to the abovementioned Discussion Paper. We would like to commend the ALRC on undertaking this Inquiry.

We provide this submission in response to the proposals and questions contained in Discussion Paper 83 (December 2016). We make some general comments followed by specific submissions in response to the proposals and questions.

**About the Contributors**

Dr Kelly Purser is a senior lecturer in the Law School at the Queensland University of Technology and a member of the Australian Centre for Health Law Research. Dr Purser has published nationally and internationally on the challenges presented by capacity assessment and the ageing population. She has a forthcoming book about the relationship between legal and health professionals when assessing legal capacity and the need for national assessment guidelines, including a suggested paradigm for such guidelines.

Dr Bridget Lewis is senior lecturer in the Law School at the Queensland University of Technology and a member of the International Law and Global Governance Research Program. Dr Lewis has published widely on a range of human rights issues, particularly the application of international human rights law to contemporary issues such as climate change and natural disasters.

Kirsty Mackie is an elder law practitioner with a strong interest in elder abuse, advocacy and law reform. Ms Mackie is a guest lecturer to the Masters of Law program at the Queensland University of Technology on elder abuse.

Professor Karen Sullivan is a registered psychologist, and has held clinical appointments in major teaching hospitals. In 2007 Professor Sullivan became a Board accredited supervisor of psychologists. Professor Sullivan’s research in clinical neuropsychology includes applications in ageing, stroke, Alzheimer’s disease, mild traumatic brain injury and malingering.

1. **General Comments**

We agree that a national plan to address elder abuse should be established. Imperative in any response to elder abuse is the adoption of a human rights framework and the development of interdisciplinary national capacity assessment guidelines.

**1.1 Definitions**

We believe that there is utility in the ‘old’ and ‘old old’ distinction.[[1]](#footnote-2) Such a differentiation is useful given that the risk of neurodegenerative conditions such as Alzheimer’s disease is age dependent and often expressed for specific age cohorts (e.g., the risk for people over 80 years of age is substantially higher than it is for people over 60 years of age). Further, the risks of abuse may escalate with increased frailty and/or increasing dependence.

The definition of ‘elder abuse’ should not however include an element of ‘trust[[2]](#footnote-3)’ as this seems to narrow the definition of abuse unnecessarily. While the problem of abuse within existing relationships is of obvious concern, the prevalence of ageism and 'invisibility' of older persons in our community also leaves them vulnerable to abuse and exploitation from people with whom they do not have an existing relationship (for example in the form of finance scams).

**Submission**: the definition of ‘elder abuse’ should not include an element of ‘trust’ as this narrows the definition of abuse unnecessarily. If an element of ‘trust’ is included in the definition then it should be broadly interpreted to include pre-existing as well as new relationships.

**1.2 A human rights conceptual framework**

Absent a dedicated international convention, the rights of older persons are protected in a number of existing international human rights instruments, such as the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR), as DP 83 notes.[[3]](#footnote-4) Under these laws, Australia is obliged to ensure that the rights of older people are respected, protected and fulfilled. These laws and principles have implications for a number of key policy areas relating to older persons, including the assessment of capacity to make specific decisions. They represent important standards applying to issues such as driving, housing, estate planning, the provision of healthcare, end of life and palliative care, and financial management.

Elder abuse can represent a violation of a wide range of human rights, including the rights to security of the person (ICCPR art 9), to freedom from cruel or degrading treatment (ICCPR art 7), to freedom of movement, including freedom to choose one's place of residence (ICCPR art 12) and to an adequate standard of living (ICESCR art 11). Ageism more generally impinges upon older persons' rights to work (and particularly to gain a living by work of their choosing - ICESCR art 6); access to justice and equality before the law (ICCPR art 26); and the right to health (ICESCR art 12). Other rights that are pertinent in this respect include the right to social security, which obliges the government to provide adequate support for persons to enable them to live a life of dignity (ICESCR art 9) and the right to privacy (ICCPR art 17) which must be respected in any measures taken to protect older persons or address elder abuse.

Human rights provide a useful way of understanding the range of impacts and vulnerabilities that are experienced by older persons, and offers a language for describing the harm inherent in elder abuse. Following a human rights-based approach to elder abuse, it is clear that at all times the basic dignity and autonomy of individuals must be respected, and an older person's freedom to make decisions for himself or herself must be supported. It should be noted however that, while human rights principles provide a useful and appropriate normative framework for conceptualising the problem of elder abuse, human rights are not currently well-protected in Australian domestic law. This means that there is limited potential for individuals to enforce their rights in this area, particularly through legal action. We would argue that to be truly effective and meaningful, a rights-based approach to elder abuse and supporting older persons ought to encompass the legal protection of human rights within Australian law, and not just the use of human rights norms as guiding principles. This would ensure that where a violation of human rights occurs there is a remedy available to the injured individual.

Australia has participated in, and is signatory to, a number of “soft law” instruments relating to the rights of older persons which can provide important guidance in developing domestic law which is consistent with human rights principles. These instruments include the *Vienna International Plan of Action and Ageing*,[[4]](#footnote-5) the *United Nations Principles for Older Persons*[[5]](#footnote-6) and the *Madrid International Plan of Action on Ageing*.[[6]](#footnote-7) However, these documents are not legally binding on States. Consequently, the important principles contained in these documents have remained unfulfilled. The Secretary-General in his 2009 report to the General Assembly argued for stronger protection of the rights of older persons, stating that these rights were not sufficiently addressed in the existing human rights instruments. The report recommended that Member States:

1. Ensure that older persons have better access to information about their rights;
2. Develop their capacity for monitoring and enforcing the rights of older persons;
3. Strengthen the gender perspective in all policy actions on ageing;
4. Address key issues such as neglect, abuse and violence against older persons; and
5. Consider how best to improve international norms and standards relating to older persons.[[7]](#footnote-8)

Australia has taken steps to provide some legislative protection for its elderly citizens in the areas of health, nutrition, long term care, social security and welfare programs. However, it is suggested that this protection is relatively one-dimensional and a welfare based rather than a rights based approach. Whilst it is important to ensure the older population is taken care of from an economic and social perspective, it is also important to recognise that the elderly have the same inalienable right as the rest of the population to enjoy a life of dignity, security, and independence.

**Submission**: that Australia move away from a welfare-based approach to a rights-based framework in drafting legislation for its older citizens.

**1.3 Elder abuse as a subset of family violence**[[8]](#footnote-9)

While it is crucial to recognise the problem of inter-personal elder abuse, and the particular dimensions and subtleties this entails, elder abuse occurs in a wider range of settings which must also be addressed. While it might be practically convenient to tap into the public awareness of family violence, there is a concern that doing so would overlook and further marginalise those older persons who are suffering abuse in other contexts for example, where it is a singular incident or episodic, involving strangers, or linked more to institutionalised ageism. Further, elder abuse perpetrators do not come solely from within familial units. Therefore, elder abuse as a subset of family violence may lose its identity and not be recognised as the significant issue that it is.

**Submission**: Elder abuse should not be subsumed as a category within family violence.

**1.4 Capacity[[9]](#footnote-10)**

With respect, we do not see any utility in moving away from the presumption of capacity. Indeed, from a human rights perspective, respect for dignity and autonomy dictates that capacity ought to be presumed until it can be established otherwise. In a human rights-based approach, capacity should not be viewed in binary terms of either having/not having capacity but instead, and in line with the *Convention on the Rights of Persons with Disabilities*, looking for ways to support decision-making to facilitate enjoyment of the right to make decisions for oneself.

The literature has demonstrated that the best test is probably a functional test, although some status-based assessment can be optimal in certain contexts. For example, if a person is in a coma, it is the person’s status which can more easily determine their level of capacity.

What is required is the rigorous, transparent and accurate assessment of capacity which is currently not occurring in Australia. Instead, capacity assessment is undertaken on an ad hoc basis, dependent upon the experience and knowledge of the individual practitioner, be they legal or health. The lack of a satisfactory assessment process only serves to heighten the risk of abuse to already vulnerable individuals.

The critical issue is how a legal professional reaches the conclusion that an individual has lost legal capacity. Appropriate definitions, including of legal capacity, are imperative and the legal standards need to be clearly identified. This is fundamental for not only elucidating the level of understanding required on the part of the individual in question, but also so that the legal and health professionals appreciate what is required of them in satisfactorily conducting assessments. Thought must be given to the clinical models available for assessment and the benefits and disadvantages of each, for example, the limitations of the Mini Mental Status Examination.[[10]](#footnote-11) It is also necessary to consider the triggers raising legal capacity as an issue, for example: cognitive, emotional, or behavioural signals; emotional distress; delusions; hallucinations; very poor hygiene; or displaying inappropriate behaviour.[[11]](#footnote-12) Such triggers can also heighten an individual’s vulnerability to abuse. Consideration must be given to who should conduct the assessment and how, including when an interdisciplinary approach is necessary. It is important to appreciate that not all health professionals are familiar with capacity assessments, especially given the differences between clinical and legal capacity. Consent from the individual is needed before the assessment can occur which can also further exacerbate issues of abuse. With legal capacity assessment growing in complexity, it is possible that issues surrounding practitioner liability and the assessment process itself will increase. The development of national capacity guidelines may help address issues of practitioner liability.

**Submission**: national interdisciplinary capacity assessment guidelines should be developed.

**1.5 Support for family-based care-givers**

A human rights-based approach would also need to acknowledge the rights of those involved in care-giving, who are often women. This would recognise the opportunity costs for people who take on a care-giving role, including potential future economic consequences of being out of the workforce. It is recognised that elder abuse can occur or be exacerbated by the strains placed on families in care-giving situations, so acknowledging the rights/interests of care-givers is not only appropriate under a human rights-based approach, it may also contribute to lowering incidences of abuse.

**Submission**: recognition of the interests of care-givers is appropriate under a human rights based approach.

**2. Specific proposals and questions**

We make the following submissions in response to the specific proposals and questions set out in DP 83:

* 1. **National Plan**

2.1.1 Proposal 2-1

We agree that a national plan to address elder abuse should be developed.

This submission supports the proposal to introduce a national plan to combat elder abuse and the conceptualisation of elder abuse as a human rights issue but advocates that any such plan must also address the pervasive issue of ageism.

**Ageism** is the stereotyping of and discrimination against individuals or groups based on their age. These negative attitudes are present within the health and aged care settings where older adults are at their most vulnerable.[[12]](#footnote-13) By taking no active steps to combat ageism, the promotion of stereotypes of older people as being incompetent, slow and an economic burden becomes a self-fulfilling prophecy. In that regard, the national plan to combat elder abuse must also seek to **educate** the general community on the multiple benefits of older people in our society.

**Submission**: a national plan to address elder abuse should be developed which addresses issues of ageism. Education about these issues and the plan is vital.

* + 1. Proposal 2-2

We agree that a national prevalence study of elder abuse should be commissioned. This should specifically take into account the following:

1. gender specific issues facing older women; and
2. differentiating between the ‘old’ and ‘old-old’ categories identified.

Demographic figures have long indicated that female life expectancy is greater than male life expectancy and that the majority of the elderly are women. This therefore places older women in an especially vulnerable position because of their reliance on, for example, family for financial and other support. Neglect, abuse and violence against older women often goes undetected. A 2013 report, *Neglect, Abuse and Violence against Older Women*,[[13]](#footnote-14) presents the different risk factors and forms of abuse suffered by older women. There is however a lack of comprehensive data on older women’s experiences of neglect, violence and abuse. Such data is essential for the development of comprehensive evidence-based policies and for measuring the effectiveness of legislation or a national plan targeting elder abuse. The Secretary-General in his 2014 report to the United Nations General Assembly stated that most studies on violence against women survey only women under the age of 50 years, thereby omitting older women altogether.[[14]](#footnote-15) The Secretary-General suggests that this situation reflects the lack of an agreed definition of what is **violence against older women**. The report concludes by recommending that Member States ‘consider developing an explicit reference and policy framework for addressing neglect, violence and abuse against older women’.[[15]](#footnote-16)

**Submission**: A prevalence study should be undertaken developing a more harmonised and uniform approach to the prevention of abuse of older Australians, in particular violence against older women. A definition of what constitutes violence against older women should be agreed upon and included in the prevalence study.

**2.2 Powers of Investigation**

* + 1. Proposal 3-1

We agree that powers of investigation should exist. However, we submit that as framed such an investigation is still predominantly be reliant upon a complaint or referral being made. We note that the proposal states that the powers of investigation can be exercised by the public advocates or public guardians of their own volition. Nevertheless, the question arises as to how they will become aware that there is an issue that needs to be investigated.

**Submission**: there should be a **system of mandatory financial reporting** whereby financial attorneys have to provide annual reports in accordance with a prescribed form that must be lodged. These can then be randomly audited for any discrepancies.

* + 1. Proposal 3-2

We agree with these principles.

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| **Submission**: In addition we would suggest that the following principles should also be included:   1. respect for basic human rights, including the right to be free from ageist stereotypes and discrimination; 2. freedom of decision, that is, the morality of a particular decision as judged by other people should not determine its validity; 3. promotion of self-reliance; 4. encouragement of the community to know and apply the principles; 5. encouragement of the individual to participate in their community as a valued member of society; 6. respect for cultural and linguistic differences; 7. maintenance of the individual’s environment and values; and 8. respect for privacy and confidentiality.[[16]](#footnote-17)   In the development of any set of guiding principles a balance must be achieved between respect for personal autonomy, self-sufficiency and privacy on the one hand, and protection and security on the other. Careful attention is required to ensure that an appropriate balance is achieved in any given context. While the physical security and well-being of each individual must be protected, such protective measures must respect individual autonomy, liberty and dignity. An infringement of these basic rights would only be acceptable in exceptional circumstances, such as when it is necessary to protect the individual from serious harm or to protect the rights of others, and only to the extent justified by those circumstances. |

* + 1. Proposal 3-3

**Submission**: the preparation and provision of such information should be mandatory on an annual basis as per our response to Proposal 3-1.

* + 1. Proposal 3-4

Consideration in this proposal needs to be had for the difficulties faced by older people who reside in regional, rural and remote areas. Access to ‘quality’ health care, legal services and justice can be restricted. Therefore, while theoretically an ideal to aim for, practical considerations do need to be taken into account.

* 1. **Enduring Powers of Attorney and Enduring Guardianship** 
     1. Proposal 5-2

While we support an online register, subject to accessibility issues, we question the need for it to be compulsory. Predicating the validity of the making or revoking of an enduring document on registration adds an extra hurdle to encouraging uptake of enduring documents when the execution of these documents is already low. The point of an EPA is to facilitate decision-making at the time when people are most vulnerable, so a compulsory registration system would create a risk that an individual’s vulnerability is actually exacerbated. Additionally, a system of mandatory registration adds extra **cost**, even if kept as minimal as possible, to the making of enduring documents. Many people already view these documents as extraneous to their lives and are reluctant to obtain them even without the requirement for registration.

If a legal professional is not retained then the added requirement of compulsory registration may be missed, with the result that an otherwise valid enduring document may be rendered invalid. This would clearly run counter to the aim of encouraging uptake and prolonging decision-making capacity by enabling an individual to appoint someone they trust to make legally recognised decisions on their behalf if they no longer have that ability.

From a human rights perspective, the argument in favour of enduring documents is that they enable an individual to make a free choice as to how their decision-making power is to be delegated in times when they lack capacity to act themselves. They are therefore an important means of respecting individual autonomy, as well as facilitating important action to be taken on issues of healthcare, finances, housing etc - all things which are protected by human rights law. While there are positive benefits of registration, such as transparency and accountability, they ought not to come at the expense of people creating an enduring document in the first place or risk invalidating their freely-made decision.

As noted in DP 83 there is a **risk with privacy and accessibility if compulsory registration is enforced**. This may also have the undesired effect of exposing older people to abuse if, for example, family members become aware that the older person has an enduring power of attorney which appoints a different attorney. The family member may then pressure the older individual to appoint them. Further, the right to privacy under art 17 of ICCPR would apply here - privacy should be respected unless there is a legitimate reason to make info public.

**Submission**: introducing compulsory registration as a condition of validity (with the exception of dealing with land, where registration is appropriate) arguably would lead to an even lower uptake of enduring documents. It is worth considering a scheme whereby a person could choose what kind of visibility they would like if they their EPA is registered.

* + 1. Proposal 5-3

If compulsory registration is enforced there is a real risk that, even with a transitional process in place, people in the community may not realise that they need to register their existing enduring documents to ensure that they remain valid.

**Submission**: compulsory registration will have the opposite effect to that intended in that people who currently have valid enduring documents will find themselves without valid documents.

* + 1. Question 5-1

The question of who ought to be given access to registered documents raises similar arguments to those against compulsory registration, as people may not want their documents to be visible and such a policy may (inadvertently) act as a deterrent.

There are concerns about the risk of abuse or negative treatment from family members if they become aware that an enduring document has been entered into which gives authority to someone else. Some variability in terms of access to the register of instruments may therefore be appropriate. Giving family members access to the information as to whether a document exists but not to the actual content of the document may help mitigate this risk. For example, an elderly mother could say to an overbearing child that she has an enduring document, but would not be required to disclose who has been named as her attorney in the instrument.

There are good arguments for registration, and people may choose to register as a means of strengthening protection, but not everyone is in the same circumstances.

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| **Submission**: we suggest that a more versatile scheme would be more beneficial whereby individuals are encouraged to register, but registration does not determine validity, and the donor can choose who will have access. The barriers to usage must be minimised and confidence in the security of any such system must be high. Education is vital. People who may have access might include:   1. Legal professionals – to see whether clients have valid enduring documents. 2. Health professionals – may need to know the identity of a health attorney if one has been appointed. This would be increasingly the case if there is an increase in the role of health professionals in encouraging the uptake of future planning documents. 3. Staff in financial institutions (for example banks) – although this access would need to be restricted and only to give effect to Proposal 7-1. |

2.3.4 Question 5-2

Yes. This ties in with the idea of compulsory financial reporting. The fear of being caught can be a powerful incentive to do the right thing.

* + 1. Proposal 5-4

We agree with the proposal that there should be two independent witnesses for enduring documents.

The inclusion of legal and health professionals is particularly useful, especially given the issues of capacity which underpin this whole area. Health professionals in particular are more ‘front line’ and may be in a better position to assess changes in a patient’s capacity. Further, there is often an element of **trust** that exists between patients and their health professionals which is not always present in a lawyer-client relationship, given that people may have only dealt with lawyers in negative or stressful circumstances.

However, the problem is that many legal and health professionals do not have the **ability to identify capacity issues** **and/or to accurately assess capacity**. This again highlights the importance of national guidelines, including a strong system of education for all practitioners, but also referrals where a practitioner themselves lacks the expertise necessary. Identifying issues of capacity earlier rather than later can also serve to avoid litigation at a later date by ensuring, for example, that the document is executed at a time when there is no issue as to capacity.

With respect to the other suggested witnesses, while a wide ranging list may mean an increase in the uptake of enduring documents, there are issues as to ensuring that witnesses are able to accurately identify issues around capacity. As noted above, legal and health practitioners cannot always assess capacity correctly (especially around the necessary level of understanding of the enduring document being signed) so we suggest that the ability of the others mentioned in (c) – (e) would be even more questionable. A human rights-based approach strongly supports the presumption of capacity in the absence of appropriate evidence.

The connected **issue of cost** is raised. Who is going to pay for an assessment if capacity is an issue? There is **no Medicare claim number for witnessing documents or for providing capacity assessments**. How then are health professionals to charge? Similarly with legal professionals, people will have to pay for the witnessing.

**Submission**: people witnessing must be appropriately trained/qualified to spot a potential lack of capacity and to *know* how to make an assessment. National capacity assessment guidelines building on an interdisciplinary approach must be developed. Cost is critical to effective witnessing provisions and may prove to be a barrier if not addressed.

* + 1. Proposal 5-7

**Submission**: we agree with this proposal and would further add another category of ineligible person, being someone who has committed an offence against the principal.

* + 1. Proposal 5-8

As a peripheral issue, capacity to consent to **marriage** is generally lower than that required to make a will. So, while a person may not be capable at law of making a will, they can enter into a marriage, the effect of which is to revoke previous wills unless the will was made in contemplation of marriage (see for example *Succession Act 1981* (Qld) s 14).

* + 1. Proposal 5-9

**Submission**: we support this proposal and would further add the requirement that attorneys report yearly.

**2.4 Guardianship and Financial Administration Orders**

* + 1. Proposal 6-1

**Submission**: we support this proposal but question who would be given the responsibility for providing such information. This is something which requires further consideration.

* + 1. Question 6-1

Our concern in relation to option (a) would be that people may not agree to undertake the role of attorney or guardian if it required compulsory training, even those who would perform the role appropriately.

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| **Submission**: we suggest that training should be voluntary, and should to be part of an integrated framework that includes compulsory financial reporting and spot checks, on the basis that people will be more motivated to undertake voluntary training if they know that they will be required to report on the performance of their duties, and that consequences may arise if they do not comply with the relevant guidelines. We support options (b), (c). Other ways could include online information and hard-copy resources (for those who do not have access to the internet). |

* 1. **Banks and Superannuation**

2.5.1 Proposal 7-2

Problems again arise here with respect to capacity. How are the witnesses going to attest to the fact that the customer had capacity unless it is very clear?

**Submission**: Training and education will be key if this comes to fruition, highlighting the need for national assessment guidelines.

* 1. **Family Agreements**

2.6.1 Proposal 8-1

It is our submission that any discussion about family agreements should include consideration of establishing elder mediation services in all State Tribunals.

**Elder mediation** is a preventative process because its focus on self-determination may interrupt the passivity and dependency that are often the pre-conditions of abuse, neglect and self-neglect.[[17]](#footnote-18) Dispute resolution for older people is a service that is complementary to other forms of intervention such as advocacy and legal, medical, psychiatric, and social work assistance. Elder mediation should be a discrete process that distinctively focusses on promoting the autonomy, independence and control of the parties in the situation of making decisions that affect their lives. Without effective management, dysfunctional family dynamics can escalate and lead to abuse. Elder mediation is an alternative dispute mechanism for resolving such conflicts without recourse to formal legal proceedings.[[18]](#footnote-19)

**Submission**: any discussion about family agreements should include consideration of establishing elder mediation services in all State Tribunals.

* 1. **Wills**

2.7.1 Proposal 9-1

The use of national guidelines is strongly supported. Law societies and other government and professional organisations frequently produce various sets of guidelines with respect to the matters identified in Proposal 9-1(a)-(d). The problem is that each of these sets of guidelines is being produced independently of the others. As such, they all cover similar ground but differences exist which can cause confusion and undermine attempts at establishing best practice. Guidelines, such as those with respect to assessing capacity (Proposal 9-1(c)) have recently been updated in, for example, New South Wales and Queensland and yet they differ markedly from one another.

On the issue of capacity assessment, health organisations, including insurers, are also producing their own guidelines. Consequently, when the legal and health professions intersect there is confusion about what is required to be assessed, how the assessment should be conducted and what format any such assessment should take.[[19]](#footnote-20) This is concerning because it not only impacts the individual in question but potentially also the practitioners, both legal and health, as questions around professional liability grow in this context.

An interdisciplinary approach through the inclusion of health professionals in the preparation of guidelines will expose the process to wider scrutiny. Such external investigation will strengthen the development and application of any guidelines, especially when proposing that the health professionals have a greater role in the context of testamentary and enduring documents as a way to combat elder abuse. This is especially pertinent to Proposal 9-1(c) which is fundamentally assessing the individual’s capacity.

Building upon this would then be the inclusion of other relevant stakeholder groups including financial organisations, medical and legal insurers, but also groups representing people who have had their capacity assessed to ensure that superior assessment processes taking into account the lived experiences of the people who will be the subject of such guidelines.

**Submission**: **national interdisciplinary guidelines** should be developed drawing not only upon the Law Council of Australia and the various state and territory law societies but also upon the representative bodies of relevant health professionals. Interdisciplinary guidelines have been produced in the United States of America by the American Psychological Association and the American Bar Association,[[20]](#footnote-21) and in the United Kingdom by the British Medical Society and the Law Society[[21]](#footnote-22) which act as excellent **exemplars** of professional organisations working together.

* + 1. Proposal 9-2

We support this proposal, especially in light of the concerns regarding capacity noted above.

**2.8 Aged** **Care**

* + 1. Proposal 11-10

While we support this proposal in general, it does present some issues with respect to privacy. Also, in 11-10(a) one of the key questions for inspectors is to ensure that rights are being upheld, but that assumes we have a clear statement of what the rights are.

**Submission**: we would propose that any system of inspection include clear guidelines and standards for visitors to apply.

* + 1. Proposal 11-11

**Submission**: in line with the comments above for Proposal 11-10, any powers given to visitors to inspect an aged care facility or confer with residents should ensure respect for privacy and autonomy of individuals. Similarly, powers to investigate and report should be exercised in a way which ensure natural justice and due process for any person suspected of wrongdoing.

1. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83, (2016) 22. [↑](#footnote-ref-2)
2. Ibid 17. [↑](#footnote-ref-3)
3. Ibid 34-7. [↑](#footnote-ref-4)
4. *The Vienna International Plan of Action on Ageing,* December 1982, <https://www.un.org/development/desa/ageing/resources/vienna-international-plan-of-action.html> (Accessed 16.01.2017) [↑](#footnote-ref-5)
5. *The United Nations Principles for Older Persons,* United Nations General Assembly Resolution 46/91, December 1991, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx> (Accessed 16.01.2017). [↑](#footnote-ref-6)
6. *The Madrid International Plan of Action on Ageing*, UN General Assembly Resolution 46/91, April 2002, <https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html> (Accessed 16.01.2017). [↑](#footnote-ref-7)
7. Follow up to the Second World Assembly on Ageing: Report of the Secretary General, Submitted to the United Nations General Assembly, A/64/127, July 2009. [↑](#footnote-ref-8)
8. Australian Law Reform Commission, *Elder Abuse*, Discussion Paper 83, (2016) 33. [↑](#footnote-ref-9)
9. Ibid 43. [↑](#footnote-ref-10)
10. American Bar Association Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) 21. [↑](#footnote-ref-11)
11. Ibid 15–6. [↑](#footnote-ref-12)
12. World Report on Ageing and Health 2015, World Health Organisation. <http://www.who.int/ageing/events/world-report-2015-launch/en/> [↑](#footnote-ref-13)
13. *Neglect, Abuse and Violence against Older Women,* United Nations Division for Social Policy and Development of the Department of Economic and Social Affairs, 2013, ST/ESA/351. <http://www.un.org/esa/socdev/documents/ageing/neglect-abuse-violence-older-women.pdf> (accessed 16.01.2017). [↑](#footnote-ref-14)
14. *Follow up to the Second World Assembly on Ageing: Report of the Secretary General*, Submitted to the United Nations General Assembly, A/69/180, 24 July 2014, 11. [↑](#footnote-ref-15)
15. Ibid. [↑](#footnote-ref-16)
16. On this see further: American Bar Association Commission on Law and Aging, American Psychological Association Assessment of Capacity in Older Adults Project Working Group, above n 10, 13. [↑](#footnote-ref-17)
17. R Ammerman & M Herson, *Case studies in family violence* (Plennum Press, 1991) as cited by Craig MA Yvonne, ‘Elder Mediation’ (1994) 6(1) *Journal of Elder Abuse & Neglect* 86-7. [↑](#footnote-ref-18)
18. Report A/HRC/33/44, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, United Nations General Assembly, Human Rights Council, Thirty Third Session, 8 July 2016, 9. [↑](#footnote-ref-19)
19. See for example: Kelly Purser, ‘[Assessing testamentary capacity in the 21st Century: Is Banks v Goodfellow still relevant?](http://eprints.qut.edu.au/87003)’ (2015) *University of New South Wales Law Journal,* 854; Kelly Purser and Tuly Rosenfeld, ‘[Evaluation of legal capacity by doctors and lawyers: the need for collaborative assessment](http://eprints.qut.edu.au/77882)’ (2014) *Medical Journal of Australia*, 483; Kelly Purser & Tuly Rosenfeld, ‘[Too ill to will? Deathbed wills: assessing testamentary capacity near the end of life’ (2016) 45(3)](http://eprints.qut.edu.au/94420/)*Age and Ageing* 334. [↑](#footnote-ref-20)
20. American Bar Association Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005); American Bar Association Commission on Law and Aging/American Psychological Association Assessment of Capacity in Older Adults Project Working Group, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008). American Bar Association Commission on Law and Aging, American Psychological Association and National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* (2006). [↑](#footnote-ref-21)
21. British Medical Association and the Law Society, *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* (Law Society Publishing, 4th ed, 2015). [↑](#footnote-ref-22)