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ALRC Discussion Paper 83: Elder Abuse

Thank you for the opportunity to provide our comments on this Discussion Paper. The issue of elder abuse is relevant to a number of areas across the ACT Human Rights Commission, and we have focused our comments on the proposals that relate to the Commission's functions.

The ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (ACT). The role of the Commission is to promote rights and resolve a range of complaints. The ACT Human Rights Commission includes:

- The President & Human Rights Commissioner
- The Public Advocate and Children & Young People Commissioner
- The Disability & Community Services Commissioner
- The Discrimination Commissioner
- The Health Services Commissioner
- The Victims of Crime Commissioner

Roles relating to Elder abuse

Elder abuse is a significant human rights issue, potentially breaching a range of human rights protected in the *Human Rights Act 2004* (ACT), including rights to equality, privacy and family life, liberty and security of person, freedom of association and freedom from torture and inhumane and degrading treatment. As noted in the Discussion Paper, such abuse can be perpetrated by family or friends of an older person, or may occur in the context of service provision including health services, services for older people or services for people with a disability.

Elder abuse falls within the scope of the policy and community education work of the President & Human Rights Commissioner and the Victims of Crime Commissioner; the advocacy role of the Public Advocate in relation to vulnerable people, and the range of complaints handled by the Disability and Community Services Commissioner, Discrimination Commissioner and Health Services Commissioner, who also has a complaint handling role in relation to services for older people. Victim Support ACT is also part of the Commission and provides a range of supports and services to victims of crime in the ACT.

The Commission supports a National Plan to respond to the serious issue of elder abuse, and has a particular interest in the proposals of the ALRC relating to the powers of investigation and referral, reportable conduct, and criminal justice responses to elder abuse. We also note the potential implications of the proposed ratification of the Optional Protocol to the Convention Against Torture (OPCAT) in relation to elder abuse in aged care facilities.

Powers of Investigation

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

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

It is proposed that the public advocate or public guardian should be able to exercise this power on receipt of a complaint or referral or on their own motion (proposal 3.1). The Discussion Paper also proposes that the public advocate or public guardian be given a range of investigative powers and options for response focused on referral and planning (proposal 3.3-3.4).

The Commission supports the range of investigative and referral powers proposed in the Discussion Paper to respond to the issue of elder abuse. However, we have concerns about the feasibility of a prescriptive approach seeking consistency in implementation across all jurisdictions. While it is appropriate to ensure that the same range of powers and functions is available to address elder abuse in each state and territory, in our view it would be preferable to allow flexibility for state and territory governments to determine how, and by which agency, those powers and functions should be exercised. To be effective in addressing elder abuse, powers must also be matched with necessary resources.

We note that currently there is wide variation in the functions and powers of public advocates and public guardians across different jurisdictions, and the powers proposed may also overlap with the functions of other oversight and complaint handling agencies.

In the ACT, the Public Advocate has a function of individual and systemic advocacy for vulnerable people, which may already extend to the investigation of cases of elder abuse. Under s 27B(1)(e) of the *Human Rights Commission Act*, the Public Advocate may investigate matters relevant to her functions, including her function in s 27B(1)(a)(iv) to promote the protection of people with a disability from abuse and exploitation. Disability is defined as a physical, mental, psychological or intellectual condition, or a condition that would make a person a forensic patient; where the condition gives rise to a need for protection from abuse, exploitation or neglect. However, the ability of the Public Advocate to conduct such investigations is constrained by available resources, and a range of competing statutory obligations.

The ACT Disability and Community Services Commissioner and Health Services Commissioner may also consider and investigate complaints relating to elder abuse in the provision of disability services, health services or services for older people, and has particular expertise and a range of powers to address misconduct by service providers. The ACT Public Trustee and Guardian also has specific expertise in relation to financial abuse, and has powers under s 19B of the *Public Trustee and Guardian Act 1985* to investigate complaints and allegations about the actions of a guardian or manager or a person acting or purporting to act under an enduring power of attorney.

The Public Trustee and Guardian also acts as a Guardian of Last Resort, where the ACT Civil and Administrative Tribunal considers that a person has impaired decision-making ability with regard to a matter relating to the person's health or welfare, but there is no other suitable person willing or able to fulfil this function. This role was undertaken by the Public Advocate until 1 April 2016. We note that the ACT Law Reform Advisory Council (LRAC) in its 2015 report on guardianship practices in the ACT recommended reforming existing guardianship legislation to better align with modern principles of supported decision making.¹ The ACT Human Rights Commissioner is a member of LRAC.

¹ ACT Law Reform Advisory Council, *Review of Guardianship and Management of Property Act 1991*, 29 April 2015, available at: http://cdn.justice.act.gov.au/resources/uploads/JACS/Reviews/submissions/Guardianship_review/Guardianship_Report-Final.pdf.

We consider that prescribing a particular approach which focuses solely on expanding the functions of the Public Advocate, or the Public Trustee and Guardian, to investigate and respond to all cases of elder abuse, may have the effect of increasing regulatory burden in adding a layer of complexity where there are existing complaint handling and investigative mechanisms that could be expanded to take on these functions. If the ACT Public Advocate were to be given expanded functions of investigating and responding to elder abuse as proposed, this would require significant additional resourcing and would result in some overlap of jurisdictions with other statutory office holders, which would need to be carefully considered.

Reportable conduct in aged care

The Discussion Paper also proposes establishing a reportable incidents scheme in relation to incidents of elder abuse in aged care (proposal 11-1) to be overseen by the Aged Care Commissioner.

While we support a reportable incident scheme, we consider that it is important that such a scheme closely integrate with existing reportable conduct schemes and background checking regimes in states and territories rather than creating a stand-alone scheme, as this would allow greater information sharing and detection of patterns of abusive conduct by employees in services for vulnerable people.

The ACT has recently established a reportable conduct scheme overseen by the ACT Ombudsman (under the *Reportable Conduct and Information Sharing Legislation Amendment Act 2016*), in relation to reportable conduct by employees of designated entities providing services for children and young people. New South Wales also has a reportable conduct scheme overseen by the NSW Ombudsman, which has recently been extended to include reportable conduct in disability services. It is foreseeable that the ACT will eventually extend its reportable conduct scheme following the NSW model.

We note that the ACT also has a Working with Vulnerable People Background checking scheme established under the *Working with Vulnerable People (Background Checking) Act 2011* which provides for background checking and registration of people employed in a broad range of services for vulnerable people (although this currently excludes people employed in federally funded aged care facilities).

Given the mobility of staff between aged care and other services for vulnerable people, it would be useful to consider whether a single reportable conduct scheme and registration process would more effectively reduce the risk of harm to vulnerable people, including elder abuse; or if

robust information sharing mechanisms could be established between state/territory and commonwealth reportable incident and registration schemes to ensure consistency in approach.

Implications of Ratification of OPCAT

We note that the Federal government has now indicated an intention to ratify the Optional Protocol to the Convention Against Torture (OPCAT) by the end of 2017 and that this is likely to have implications for the oversight of aged care.

The UN Subcommittee for the Prevention of Torture (the body that visits and provides authoritative guidance on the OPCAT) has recently considered the scope of Article 4 of the OPCAT regarding the definition of a place of detention. It concluded that any place where people may not be free to leave, that is subject to the regulation or oversight of the state, could fall within this scope – including aged care facilities.

Countries including Germany and Austria currently monitor aged care facilities and the New Zealand Human Rights Commission recently expressed the need for the New Zealand National Preventive Mechanism's mandate to be expanded to include aged care facilities, noting concerns that current auditing process tends to focus on compliance rather than improved outcomes, and also noting the particular vulnerabilities of persons in aged care facilities.²

While aged care is overseen by the federal Aged Care Commissioner, it would be important to consider how this jurisdiction would need to be expanded or complemented to fulfil the function of a preventive mechanism under the OPCAT.

Criminal Offences

The Commission agrees with the view in the Discussion Paper that it is unnecessary to create new offences in circumstances where the same conduct is already criminalised through other offences; that offences limited to abuse against 'elders' have the potential to be paternalistic and discriminatory; and that the broad range of activity captured within the definition of elder abuse is difficult to criminalise due to the need for specificity and the high thresholds that apply in the criminal justice system. However, the Commission notes that there are legal provisions in some jurisdictions which provide additional avenues to address elder abuse, and jurisdictions which do not currently have such provisions could consider adopting these. These include neglect offences and provisions which allow age, disability and other vulnerabilities to be taken into account in sentencing.

² <https://www.hrc.co.nz/files/9314/7251/4226/He_Ara_Tika_Report_2016.pdf>

We would be happy to discuss our submission with you if you have any queries. The contact officer for this matter is Ms Gabrielle McKinnon, ph 02 6205 2222.

Yours sincerely,



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