Submission To THE ALRC Elder AbusE Inquiry

Submission To
the Australian Law Reform CommissioN (ALRC) INTO

Elder Abuse

The following document provides input to both the Issues paper (IP 47) and the Discussion paper (DP83) on Protecting the Rights of Older Australians from Abuse

WE ARE HAPPY FOR THIS DOCUMENT TO BE PUBLISHED WITH OTHER SUBMISSIONS ON THE WEBSITE

**PUBLIC
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**27th February 2017**

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# Overview

The following section provides an overview of our proposal regarding the requirements for a system that governs the rights of elderly people within the context of the need for Powers of Attorney (POA) and guardianship.

## Introduction to a nightmare

Abuse of the elderly has been, and continues to be a scandal that dwarfs others, resulting from deficient government oversight and system design. When governments build freeways they design them to minimise bad events, reduce costs and optimise safe and efficient driving by the entire community. The governance of the affairs of elderly and vulnerable people is a ‘system of governance’ with many moving parts that needs to be structured correctly to prevent elderly abuse (EA) by any of the many threat vectors.

It is tragic, that, at the very end of their lives, when elderly people become very vulnerable, and they should be able to relax and enjoy life in safety, security, fun and enjoyment that instead, hundreds of thousands are living in fear of ‘abuse’. This ancient challenge now needs to be resolved, once and for all, for us all to hold our heads high – and for the well-being of so many vulnerable people and their carers. Not to mention the massive costs to society from a growing epidemic of elderly abuse.

We propose the following system to prevent elderly abuse. It is based on the idea that deterring would-be abusers is much more efficient than trying to clean up the mess they create. The key to the system is the rights granted under POA process and how those rights are enacted and enforced throughout the elderly care system (ECS). The declining capacity of an elderly person creates a vacuum of governance in their life. Vacuum’s are abhorred in nature and as a result many vectors (forces such as people, institutions, employees of institutions etc) then seek to enter the vacuum of control.

## Threat Vectors

Elderly people are at risk from a long list of potential threats (threat vectors). The ALRC process should systematically identify these threat vectors and the manner of the threats posed from original, on-ground research. We call them threat vectors because the manner in which the threat mechanism evolves, manifests and acts is as important as the threat itself if we wish to firstly deter, then prevent, then act and protect elderly people. The key aim is that all actions by all parties should be to ensure the rights of the elderly to have a ‘good life’ as described in numerous documents. Our list is based on our experience and the many observations of other distressed carers for elderly people. For example:

1. **Family members and acquaintances**: are heavily involved but they are also used as a ‘convenient whipping post’ and ‘pawns’ for other threats to hide behind (see below). Neighbours and other community members who spot an opportunity.
2. **Professional service providers:** to elderly people from auctioneers representatives wheedling their way into the favour of a elderly person for a share of the estate, lawyers, doctors, carers and on and on and on.
3. **Nursing staff, medical staff, hospital administrators, other staff**: of all kinds who use their position to exploit elderly people in the hospital/nursing home workplace by for example forcing outcomes to satisfy perceived directives to ‘clear beds’ and ‘cut costs’, staff who are unidentified bullies and abusers who take out their workplace pathologies on elderly patients and their families, staff who deliberately seek to start-up family disputes in order to meet aforementioned management objectives to ‘clear beds’ or who just enjoy ‘causing trouble’;
4. **Staff of administrative agencies and courts**: who such as the Public Advocates Offices who get very close to, say one party or the other, and start acting in the interests of one party and not in the interest of the represented person. This includes benign neglect where inexperienced staff, with old loyalties (to say their previous employer like an AHA,), ‘believe’ the authority without properly interviewing and documenting (on video) their interactions with various parties. Inadequate management and supervision is responsible for such benign neglect particularly when workloads are high;
5. **Courts**: themselves are systemic threat to elderly people. Judiciary, for a variety of reasons seek to make sense of the cases in front of them. Benign neglect such as, otherwise capable judges, having ‘snap’ 15 minute interviews with vulnerable elderly people to ascertain their ‘real’ interests. Any anthropologist would suggest that elderly people are more likely to be wary of such powerful people and may not be fully clear in their explanations in such an approach. This also includes court staff such as interpreters who are unable, mix up or mis-understand the translation of language to each party including the judge. Courts are party to abuse when they give more weight to the evidence from a witness because they are employed by government, (eg a witness represents an AHA) rather than assessing the witness on their integrity, relevance and proper evidentiary standards. Courts that fail to adjust their judgement by allowing for and discounting institutional self-interest on the part of witnesses who are government employees or any other witnesses. This gives AHA unmitigated and unaccountable power to then ‘terrorise’ families into submission because without expensive legal help there is no legal remedy. Legal representatives who work in the system should be interviewed, as it is likely that many find the system of decision-making around elderly people fraught with injustice and failure.
6. **The hospital system**: as a whole is a systemic threat to elderly people beyond the miscreant behaviour of some individuals and groups. The system favours low cost outcomes and elderly people can be expensive threat to hospital budgets. The net result is that the care of elderly people is ‘triaged’ to save the budget ‘because they are old and going to die anyway’ and they ‘don’t know what is going on’. When budgets are under pressure the system pressures staff to ‘deal’ with problem old people (ie. get them to a nursing home and off our books’). The result is that all the rules in the world won’t stop a determined bureaucrat trying to protect their job by sacrificing elderly patients to the nursing home and running roughshod over families. Hospitals are medically focussed. This turns old age into a medical condition, where only medical solutions are permitted. The hospital system is also deeply risk averse and seeks to move people to nursing homes as an act of risk aversion. That is if the elderly person goes home and dies the hospital is responsible. If the elderly person goes to a nursing home and dies it’s the nursing homes problem.
7. **Nursing homes**: are a systemic threat to elderly people. This has been documented in so many ways that it almost goes without saying. Please refer to this reference for some details. (telegraph.co.uk/culture/books/11139446/Can-life-in-a-nursing-home-be-made-uplifting-and-purposeful.html) and (<http://atulgawande.com/book/being-mortal/>). In short nursing home costs are the main institutional KPI. Quiet malleable patients who schedules don’t waste time are cheaper. These institutional goals are deeply incompatible with the elderly having a ‘good’ life. Thus elderly are ‘assaulted’ every day in nursing homes by the system and their rights, lives and loved ones are trampled in the name of cost and efficiency. We would venture to say that 99% of the population have no effective means of countering the onslaught from the nursing home machine.
8. **Abuse of the privacy legislation**: to cloak and hide inappropriate actions;
9. **Other**: to be determined in a thorough inquiry.

Each of these vectors needs to be more fully elaborated. The hospital and nursing home components are shorter than the court segment. This is because teasing out the lines of abuse in these secretive and bureaucratic institutions is a bit like teasing out the abuses relating to children in the churches. Its complex and difficult and hidden. The best solution is the bright light of transparency and accountability.

In summary every person who comes in contact with an elderly person should be regarded as a potential ‘threat’. All too often the complex ecosystem sees family members and health staff, for example, forming ‘unholy alliances’ to achieve goals that effectively override the rights and wishes of the represented person. The list of threat vectors above summarises the danger that elderly people face today as they approach these most valuable days in their life. The ‘elderly care system’ is massively broken if it is supposed to support the rights to choose of elderly people.

# An approach to fixing the Elderly Care System

We need a threat vector analysis in order to understand where the problems are coming from to develop a systemic, cohesive response. Simple design principles include the presumption that deterrence is better and cheaper on a total social cost basis than after the fact enforcement. On that basis whilst the suggestions may appear fiscally expensive this needs to be weighed against the otherwise massive costs incurred throughout society and government if miscreant behaviour is not deterred at the outset. Any solutions should place elderly people’s rights (all of them) at the centre of any action on their behalf. Rights enforcement must be overseen and reviewed at arms-length by appropriate checks and balances in the system. Everyone is held accountable and radical transparency is the order of the day. All the insitutions and all the people in the system are flawed and the ‘system’ aims to provide guidance that self-corrects the tendency to flawed outcomes.

## Broad Proposals

The key is to ensure that the rights of each elderly person are actively pursued by the ECS at all levels in every granular detail. This is a big task given that the elderly themselves, as well as virtually all participants in the system do not know what elderly persons rights are, may not have the will to enforce them for a multitude of reasons and will probably also lack the wherewithal to do so.

### We propose:

| **Principle** | **Details** |
| --- | --- |
| Elderly Persons Representative (EPR)1. Each elderly person, at the moment when they seek to have a POA, register with the ECS.
 | Each person seeking to appoint a POA or each person who is found to need a POA is entitled to the services of an Elderly Persons Representative (EPR). Any party can call in the EPR. The EPR can intervene under their own authority, subject to reporting to a court. Employed by the Court system, in the same manner as the Family Court has lawyers to represent the best interest of children, the representative is available at any time to ensure that all participants put the elderly persons interests and rights at the heart of the system. |
| Seniors court1. This issue should be removed from THE adminstrative tribunal and placed in the hands of a ‘Seniors Court’.
 | Perhaps as an arm of the Family Court. If divorcing couples and children have a ‘proper’ court like the family court then elderly people, whose lives are being dismantled, also deserve equal treatment, probably through the Family Court. The EPR will represent the rights of the elderly person reviewing the actions of all people involved and will answer to the judges of the Seniors court. All parties who wish to participate in this will be required to attend this court and be subject to its jurisdiction. The Seniors court will administer the POA’s signed by elderly people, subject to review by an EPR in every instance, with recourse to the Seniors Court as required. The presence of a Court will remind everyone of their responsibilities to the elderly person and reassure elderly people that someone is exclusively in their corner at this vulnerable time. The EPR like the children’s lawyers will be talking to everyone as an absolute requirement of their role, helping the court to understand the rights of the represented person in the family’s complex ecosystem embedded in the complex bureaucracy of the health and nursing home systems. |
| Signing a POA1. The signing of a POA must be elevated as a serious decision to be reviewed by all interested parties.
 | The signing of a POA must be elevated as a serious decision to be reviewed by specified interested parties. All interested parties should be notified and requested to read, sign off and otherwise comment on the arrangements. Any person can return to the EPR to add more input or seek change if the elderly person lacks capacity. Lawyers and other professionals relevant to the elderly person should also be identified with input as required. Anyone who disagrees is able to schedule an open hearing with a judge where all the usual legal rules apply.  |
| The POA system1. The POA system, supervised by EPR’s with excellent official records and reporting
 | The POA system, supervised by EPR’s with excellent official records and reporting ensures, like the property registration system, that the key facts and wishes (perhaps even including wills hence saving Supreme Court costs here as well) are documented, preferably whilst the elderly persons can make their wishes known to reliably disinterested parties. (For example we have seen an AHA attempt to discredit the will of an elderly person from ten years previously on the basis lack of capacity through a review of old records.) |
| Ability to review decisions1. The elderly person or anyone else can call the EPR to intervene
 | If the elderly person enters any institution the person can call the EPR or anyone who has concerns can call the EPR to intervene. This would also make it possible for families to monitor nursing homes and hospitals on behalf of other people who they see being abused. The families and anyone (including staff) can anonymously report bad events using the elderly persons name or even just their location. The EPR would provide much needed discipline to health systems that presently operate unchecked. |