RESPONSE TO DISCUSSION PAPER 82 – ELDER ABUSE [RODNEY LEWIS]

OVERARCHING PRINCIPLES

In submitting this response to the Discussion Paper 82 of the Australian Law Reform Commission, I am particularly mindful and enthusiastic about certain of the Terms of Reference. Those of particular interest to me are underlined:

> *In conducting this inquiry, the ALRC should specifically consider best practice laws, as well as legal frameworks including, but not limited to, the National Disability Insurance Scheme and the Aged Care framework, which:*
>
> - *promote and support older people's ability to participate equally in their community and access services and advice*
> - *protect against misuse or advantage taken of informal and formal supporter or representative roles, including:*
>   - *formal appointment of supporters or representatives*
>   - *informal appointment of support and representative roles (eg family members)*
>   - *prevention of abuse*
>   - *mitigation of abuse*
>   - *reporting of abuse*
>   - *remedies for abuse*
>   - *penalties for abuse, and*
> - *provide specific protections against elder abuse*

We as a community must properly and seriously address the injury to mind and body which are the outcome of elder abuse. Thus we have granted to government the right to impose penalties and punishment and to provide the means to acquire reparations, redress, and recovery of lost financial assets. So it should be in this area of our society.

The submission to criminalise elder abuse which this author has offered is also susceptible to statutory civil remedies designed – as the criminalisation proposal is designed, to afford access to justice to vulnerable elder Australians and their families wherever they live and whatever their financial circumstances. This is what is meant access to justice in my view.

We must create the circumstances for our vulnerable elders to participate in effective remedies, not as part of a cohort whose data sits somewhere in the bureaucratic digital virtual world, but as an individual Australian whose rights are presently assured in name only, but not in reality . That is the reality of the financial and convenience costs of the limited remedies presently available.

INVESTIGATION POWERS FOR PUBLIC ADVOCATES

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.

COMMENT

The power to investigate is a significant and welcome move forward in dealing with elder abuse, especially if it belongs to a select group who have a mandate for elder abuse. It is an approach similar to an adult protective service such as those found in the USA. However, taken alone it cannot represent an effective tool for addressing the outcomes of elder abuse, without more [see response to 3-4 below].

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.

COMMENT

The public advocates may –

a. Refer to service providers;
b. Assist a person to access the services;
c. Prepare a services support plan

What is clear is that there is no change in the status quo of available remedies save for those which the Commonwealth and its partners adopt as a result of the ALRC Report. In that regard at this stage of the process, there are still many gaps in remedies for financial elder abuse [contrary to the Commissions conclusion at para 4.20] which I

hope I can illustrate in this response. Given that, the power to investigate is clearly not enough to deal with the various adverse outcomes of abuse.

To achieve meaningful outcomes and a just solution for elders and those who care for them, there must be a coherent legal regime under which the power to investigate exists and there is no such regime proposed by DP82.

For example, in the case of a business financial guarantee or a loan given by a vulnerable parent to an aggressive or controlling adult child, although there needs to be a clear and accessible pathway to redress, none is offered by this recommendation, standing alone.

If however investigation is accompanied by the kind of recommendation which is found at ALRC Proposal 8-1 and extended to include other related and serious property deprivation issues suggested by the Seniors Legal & Support Service Hervey Bay [at p.156, DP 82] then real progress can be made.

The suggestion was :

There be established an easily accessible Tribunal which has the power to deal with all issues arising from the breakdown of family agreements, not just the issues relating to any real property in which the older person has an interest.

The reservation I have is that the administrative tribunals of the States and Territories be given the exclusive legal mandate. My experience with tribunals leads me to urge that at least the power not be granted exclusively to them. As with my proposal for criminalisation I prefer the Local Courts system for its accessibility to people living in rural and remote areas and the expertise in these areas of law can be found for staffing Local Courts as easily as it can be found for Tribunals.

Moreover, in many of these cases [which may involve traditional equitable remedies] evidence and its weight should be carefully analysed. Tribunals are unused to following the rules of evidence. There should therefore, be a choice either for the claimant, or for the ALRC to make in its recommendations to permit a choice, in my submission.

CHANGING 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.

COMMENT

It appears the ALRC has decided upon a passive approach to this aspect of elder abuse.

9.23 The ALRC considers that the emphasis of the proposed law reforms in this Inquiry should be on the role that lawyers can play in assisting older persons in their estate planning and the instruments to give effect to such plans; and the community education strategies that may be developed and enhanced through the National Plan discussed in Chapter

It is urged upon the Commission that the same venue for redress of accommodation disputes [Tribunals + Local Courts] be not only broadened to include all similar disputes [see above regarding proposal 8-1] but should also include wills disputes. Reference is again made in this respect to the Terms of Reference for this Report, calling for remedies, penalties and specific protections.

The jurisdiction should not be exclusive to the Tribunals and Local Courts and the present superior jurisdictions of the Supreme Courts of the States and Territories must remain, not only in original jurisdiction but an appellate function. However, the Tribunals and Local Courts are –

- firstly better placed for rural and regional Australians and secondly,
- there could be a financial limit on them in terms of the value of property in dispute.

The financial limit on claims, if adopted, should be applied to all other financial disputes arising in the elder abuse context – unless the parties agree upon jurisdiction. Emphasis should be placed on the means of parties to prosecute the litigation, not only an arbitrary value limit to assets involved in the dispute.

The proposal that these wills dispute issues should fall within an extended jurisdiction of Tribunals and/ or Local Courts assumes, of course, that there is a legal regime in place for jurisdiction to be defined. That place is suitable for an Elder Justice Law of the kind I have proposed. Even though it is submitted as a vehicle for criminalisation, it is also possible for it to serve the purpose of civil proceedings if breach can result in a civil claim. Once again, there would need to be a financial limits on claims so that the jurisdiction fo the superior courts is preserved.

DEATH BENEFIT NOMINATIONS

Proposal 9-2 suggests there should be 2 witnesses for these instruments.

My suggestion is that the existence of 2 witnesses to give evidence as to the circumstances of making the instrument will generally have the same outcome as taking evidence from witnesses in contested will making cases. Witnesses in my experience and research are most often asked to perform that function at the last moment, without any information or explanation of the circumstances let alone background on any issues of capacity or conflict. In cases involving wills, important witness evidence routinely comes from the solicitor who prepared it, the medical practitioners who have attended

the testator, the friends and relatives who have been in contact with the person before the signing of the document.

Accordingly it is suggested this recommendation is meaningless unless it is coupled with an opportunity for review and decision, as in the case of accommodation agreements for care [as the ALRC itself has suggested] as well as other related conflicts and disputes [as recommended by others [including this writer].

AGED CARE

The recommendations proposed by the ALRC all fail to take account of:

1. the need for, indeed the right to justice for elders when they suffer harm of injury as a result of being a resident in an aged care facility – which includes a final decision fairly arrived at, imposed upon both parties [provider and resident] by an independent decision maker;
2. the often futile search for a remedy by and for individuals who have suffered harm and injury in residential aged care;
3. the patent limitation on power available from the present complaints regime to provide redress and reparations to individual residents in the more serious cases.

The approach to these issues by the ALRC has been disappointing, insofar as it concerns the ordinary aged care resident with a serious complaint is concerned.

Bearing in mind the Commission's TOR which I have sought to address in particular, it is disappointing to find that the ALRC takes a view on residential aged care issues where complaints arise expressed in the following way:

> *11.86 The ALRC notes the concern of the Seniors Rights Service that the Complaints Commissioner is a 'toothless tiger', but suggests that there is greater potential for systemic reform through the proposed approach. It has been said that a truly remedial institution may not be best served by 'teeth'... an order, grudgingly accepted and implemented can only change one result. A recommendation, if it is persuasive and compelling, can change a mindset.*
>
> *11.87 The dual functions of complaint resolution and independent oversight and monitoring of internal complaint handling offers many benefits. It builds on the existing expertise of the Complaints Commissioner in relation to aged care; utilises and builds upon the existing complaints function; enables information captured across both functions to be utilised to develop an intelligence profile of approved providers and aged care staff and thus informs more comprehensive risk assessment and management of staff members and providers.*

To rely upon 'complaint resolution', and 'intelligence profiles of approved providers' information capture' is commendable when managing an aged care system of significant size and complexity. However, to rely only upon those measures and the very limited 'bottom line' remedies which the Aged Care Commissioner and the Secretary of the Department have available to them, is patently inadequate. The facts are these:

The Aged Care Commissioner relevantly [and in summary] has power to

- require information,
- direct action to be taken by a Provider [but with no follow-up consequences]
- conciliate the parties
- mediate between the parties
- refer the Provider to the Department Secretary.

The Secretary of the Department has power to

- Appoint an adviser to the Provider;
- Appoint an administrator to the Provider.
- Remove / cancel the accreditation of the Provider.

None of these actions have any impact upon the resident who may have suffered harm or injury. The bottom line of a binding decision by an independent party fairly arrived at is missing, and one can only imagine this is not an omission by government but a matter of government policy.

In this respect the interests of the resident defer to those of the Aged Care Provider. This is one of the very few Australian communities of which it may be said that their rights are deferred to the more powerful counterparty to the contract as a matter of policy. If ever there was a need for legal reform, this is it.

The policy must however change, and the ALRC has both the opportunity and the mandate to make that change [see TOR – "specific protections'].

A good practical illustration of the difference between the systemic approach and the individual approach [they are not of course mutually exclusive] is the discovery after several days that a resident has fallen [a known fact to the staff] and broken her hip - discovered only by someone who had cared to look at the person after days of expressing pain and being fed analgesics. The response by way of the systemic approach? Give the staff training in recognising pain and the signs of a broken hip. But the system denies to the resident and her family the pathway to find some reparations, not necessarily money but rather specially designed and delivered rehabilitation and restorative specialised treatment. Treatment such as specialist care and ongoing resident focussed physiotherapy might be ordered but will not be, because there is no access to an independent decision maker who has the power to order such health care measures.

Where there are individual cases of harm and injury, generally our society has not contented itself only with systemic remedies and means of managing the system. We have laws which provide for redress and penalties. Why are our most vulnerable denied the simple right to access an independent decision maker who can [after all the other mechanisms have been followed] make a binding decision?

In two other submissions to the ALRC [Submission for Review of the Australian Consumer Law – Better access for Elder Abuse, and A Proposal for Compulsory arbitration in residential aged care and home care contracts] I have tried to point the

way for two possible approaches to this problem but there are no doubt many variations to the main theme.

RESTRICTIVE PRACTICES

It is difficult to minimise, in my mind the importance of this subject. All Australians should value their freedoms. Among those freedoms is the right to come and go as we please, subject to the right of others. It can be characterised as freedom of movement although even that expression does not adequately cover the importance of the right.

Put even more starkly the issue of restrictive practice decides who is free and who is not. At law we call it by several names including false imprisonment, unlawful detention, trespass to the person, possibly a battery. Our common law courts have treated the subject with clear and concise boundaries. Indeed the very powerful writ of habeas corpus was designed to overcome this breach of law regardless of who may have been an alleged offender, including of course the State itself.

Yet our health system has devised a term which is designed to cover these issues under the rubric "restrictive practices". Even by any name however, these so called "practices' also fall under the law and those who are in breach are answerable to it. Punitive damages may also be awarded.

In practice the restraint of aged care residents takes place in very many places every day around the country. What differentiates the lawful from the unlawful [except in cases or urgent necessity for which the law allows some latitude] is consent.

Consent may be granted by a person in advance when they have capacity to do so, in circumstances which may be foreseeable and which have arisen. Consent may also be granted by a person's appointed guardian if they have the authority under the orders, or the instrument by which they were appointed.

So it is concerning when it is suggested in proposal 11-7 by the ALRC that :

> *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.*

The issue singularly absent in the context of aged care is consent.

Moreover, to propose that the use of these practices be regulated under the Aged Care Act 1997 suggests that the Commonwealth has the constitutional power to legislate on what are common law rights. It is respectfully suggested there is no such power. However that is not to say that the States and Territories may not agree to legislate in a cooperative scheme.

OFFICIAL VISITORS

This is a commendable reform and would help greatly to discover the low performing aged care homes and practices. However the Visitors must be able to enter and inspect and to inquire, interview and to call for documents to be produced.

Finally the Visitor scheme as proposed, like the public advocates proposal, exists in a legal vacuum unless there is not only reporting but the capacity to initiate proceedings which will result in a final mandatory determination of the issues after hearing from both sides. To simply be satisfied with reports which have no real outcome for individuals affected or harmed by the aged care service, is meaningless to the individual resident.

THE PROPOSAL FOR CRIMINALISATION – REPRISED

To be clear about the proposal and how it may be constructively assessed and applied, here is a summary which as already suggested above, can be a vehicle accommodating the possibility of civil action occurring under it.

[See attachment "A"]

RODNEY LEWIS

27 FEBRUARY 2017

THIS IS ATTACHMENT "A" TO THE RESPONSE BY RODNEY LEWIS TO dp82

SUMMARY OF PROPOSED OFFENCES UNDER AN ELDER JUSTICE ACT TO ADDRESS A RANGE OF ELDER ABUSE.

[for further details see submission to the Australian Law Reform Commission – 'A PROPOSAL FOR AN ELDER JUSTICE ACT TO ADDRESS VARIOUS FORMS OF ELDER ABUSE' August 2016 ; Rodney Lewis}

Proposed offence	Elements of the offence	Existing laws - legal actions – other issues
Definition:The offence must have been committed against a 'vulnerable elder'	A person might be said to be a "vulnerable elder" if they have a physical, mental, psychological or psychiatric disability to the extent that the person is wholly or partially unable to : • Defend themselves against physical, mental, emotional or psychological abuse; • Defend themselves against exploitation; • Understand the nature and effect of their decisions; • Make decisions freely and voluntarily; • Communicate decisions; • Report abuse; • Be reasonably mobile in their freedom of personal movement; Or otherwise be frail in body or mind or have a shortened life expectancy For the purpose of clarity in applying the law it is suggested that an age of 65 years be adopted for defining an 'elder'	*A "disability" may include –* • *Impaired cognitive capacity;* • *Dependence upon the offender or an associate of the offender including emotional, financial and psychological dependence;* • *A position of power or authority over the victim by the offender* • *Social isolation;* • *Any other matter the Court considers which contributes to the vulnerability of the victim/ elder*
Aggravated undue influence	• Aggravated Undue influence involves the offender acting in a way which is to the financial advantage of the offender or another person (often another family member such as an adult child) and • in circumstances where the elder is aware and appears willing to give effect to the transaction but • in fact is acting not with their own will but is under overbearing will of the other person and either • because of a special relationship which exists between them • or because of a disability or disadvantage falling within the definition of 'vulnerable elder ' and 'disability.	*The offence is called 'aggravated' because* *firstly there has never been a criminal offence of 'undue influence' and it is only in the circumstances described that the offence is proposed and therefore needs to be distinguished from the equitable remedy.* *Secondly, the offence is aggravated because of the presence of cognitive impairment or other disability known or which ought to have been known to the offender (whether by prior knowledge and history of the relationship, or by reason of the nature of the dealings with the elder and the elder's responses to those dealings).* *THIS OFFENCE CAN FILL THE GAP IN ACCESSIBLE LEGAL REMEDIES FOR THOSE UNABLE TO AFFORD LITIGATION IN SUPERIOR COURTS AND THOSE IN RURAL AND REGIONAL AREAS - COVERING UNDUE INFLUENCE [EXAMPLES LOANS, GUARANTEES, PROPERTY TRANSFER WITHOUT ADEQUATE VALUE AND WILLS MADE UNDER PRESSURE]*
Aggravated breach of fiduciary duty	The elements of the offence would be : • Appointment of the offender as an attorney under an Enduring Power of Attorney; • Knowingly breaching the fiduciary duty of the attorney resulting in a financial advantage to the attorney or his/her family or associates and/or a financial loss for the principal; • The offence occurs at a time when the principal is under a disability including cognitive impairment and the attorney knew or ought to have known of the disability;	*When and if the donor's/ principal's mental capacity becomes impaired, and the attorney deals with the donor's property for his/her own financial advantage, that is a breach of law which often goes unpunished, especially if the attorney is a family member.* *THIS IS A MORE ACCESSIBLE REMEDY TO A CLAIM OF BREACH OF FIDUCIARY DUTY WHICH IS NORMALLY BROUGHT IN SUPERIOR COURTS*
Aggravated unlawful restraint of a vulnerable elder	The offence would consist of : • Unlawful restraint by any means where proper consent was not sought or given; • Of an elder – where the victim is a person apparently over the age of 65 years; • The victim has a disability or cognitive impairment which renders them vulnerable to accept or acquiesce in the restraint or is otherwise for reasons of disability unable to protect themselves from the offender.	• *Unlawful restraint under the common law is known as trespass to the person* • *restraint [whether physical, environmental, chemical] is an alarming feature when it occurs in institutional elder abuse, and it may occur when a person is restrained without lawful excuse, or proper consent whether from the person themselves or if the person is not*

		capable of giving consent, then by their guardian or other person with proper authority, in advance . *Available defences should include:* • *urgent necessity including imminent harm to the person or to others;* • *informed consent including by the legal guardian or other person nominated and authorized by Guardianship Law.*
Aggravated battery of an elder	Elements of the offence • the offender is in a position of authority such as a health professional, carer; • the offender administers or causes a prescription drug to be administered apparently without prior consent; • the victim is disabled including having a cognitive impairment;	*defences will include:* *a) urgent necessity in the interests of the health of the patient or resident;* *b) the act is done in the best interests of the person to avoid imminent harm to self or others;* *c) notes must be made and kept;* *d) the person whose consent is legally required is informed in circumstances as in (a) or (b) above, as soon as reasonably practicable thereafter.*
Aggravated Assault of an elder	Elements of the offence may include • victim aged 65 or over; • offender in a position of dominance (domestic or family situation); • victim in a position of dependence (domestic or family situation) • offender has a duty of care towards the victim; • the victim suffers assault, battery, harassment or intimidation; • the victim has a reasonable apprehension of all or any of assault, battery, harassment or intimidation. • In the special case of an offender who resides in the same aged care establishment as the victim without any barriers preventing occurrence or re-occurrence and where re-occurrence is likely by reason of cognitive impairment coupled with a tendency to aggression.	*One of the most obnoxious kinds of elder abuse is assault. In cases where the elderly are assaulted by –* • *Members of their own family;* • *Carers;* • *Staff in residential aged care homes,* • *Other residents in an aged care setting* *the assault may be concealed, other excuses given and in cases where there is the relationship of dependence coupled with latent intimidation that may result in difficulty or reluctance in bringing the case to attention.* *Residents assaulting residents is a difficult circumstance and the power of the Court to make special orders such as removal or permanent separation [by the aged care Provider who has authority over accommodation of the offender] of the offender from others who are vulnerable should be a useful legal remedy* *The offender may be subjected to an appropriate isolation regime [under the delegated supervision of an appropriately qualified person – for example a person attached to the Office of Public Guardian] or other protective measures designed for the interests of the particular residential community of aged persons*
Aggravated neglect of an elder	Elements of the offence- (i) Assumption by an adult of the care of an elder (whether or not related by blood or marriage) whether voluntarily or for some advantage or reward; (ii) The care required may be general care or for some particular health or disability; (iii) The duty of care has been wilfully and deliberately or recklessly or negligently without caring about the consequences, under performed; (iv) The person in care has suffered pain or injury as a result of the lack of care or failure to provide sufficient care;	*Defences may include reasonable excuse, lack of awareness of the health or disability which has been neglected, reasonable attempt to deliver care.* *Defences may include reasonable excuse, lack of awareness of the health or disability which has been neglected, reasonable attempt to deliver care.*
Aggravated elder abuse	The elements of the offence could include: • Repeated or persistent emotional, verbal psychological or physical abuse • by a carer or other person upon whom the vulnerable elder is dependent and • whose conduct is causing or may potentially cause serious harm, and	• *Defence could include 'reasonable excuse' an example of which might be harassment or aggressive conduct by the elder,or* • *That the elder has reasonably available means to avoid or terminate the harm themselves and the court would need to balance the needs of the victim against the potential penalties for the offender [for example requiring the offender to*

	• where the perpetrator knows or ought to know of the harm suffered by the elder;	*leave the home; requiring an offender to undertake to not approach the victim]*
Court procedure to recognise and accommodate the vulnerable elder	• Similar provisions to those found in Chapter 6 Part 6 of the Criminal Procedure Act 1986 [NSW] should apply to vulnerable elders • Vulnerable person includes a person with a cognitive impairment	
Sentencing arrangements to be similar to those contained in the Criminal Procedure Act 1986 [NSW] with restorative justice and VICTIM FOCUSSED remedial outcomes as an objective of the proceedings	• intervention programs sentencing options [chapter 7, part 4] should be applied with appropriate programs supported by State government, community and other purpose specific organisations and professionals enlisted in aid of providing solutions to the people [victims and offenders] involved in cases brought before the court under the proposed Act • special emphasis upon s 347[2](c) encouraging and facilitating the provision by offenders of appropriate forms of remedial actions to victims and the community with remedies including • adjournments for conciliation and mediation conferences • applying sentencing options such as deferral and conditional and default penalties • making orders for reparations, restitution and rehabilitation in the case of harm and injury and importantly, in appropriate cases, reconciliation between victim and offender	*Sentencing options should be applied in association with appropriate programs supported by State government, community and other purpose specific organisations and community, health and legal professionals enlisted in aid of providing solutions to the people [victims and offenders] involved in cases brought before the court*
Access to justice through rural and remote areas and a lower cost regime	• jurisdiction to the Local Courts system throughout Australia • social and community resources can be made accessible through the Local Courts	*The Elder Justice Law is intended to make legal remedies more accessible through the well distributed Local Courts system not only to rural and remote communities but also to make the proceedings more affordable where access to superior courts is often unaffordable*
Proposed investigative service attached to the Public Guardian	• the ALRC proposed investigation service may not only report to the Public Guardian but [IT IS SUBMITTED] should also have the right and obligation in certain cases to initiate proceedings in the Local Court under the proposed Elder Justice Law	