

**Submission to the Australian Law Reform Commission**

**Response to the Protecting the Rights of Older Australians from Abuse Inquiry**

**(Elder Abuse Discussion Paper 83)**

**March 2017**

**Prepared by**

**COTA Australia**



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# **COTA Australia**

COTA Australia is the national consumer peak body for older Australians. Its members are the State and Territory COTAs (Councils on the Ageing) in each of the eight States and Territories of Australia. The State and Territory COTAs have around 30,000 individual members and more than 1,000 seniors’ organisation members, which jointly represent over 500,000 older Australians.

COTA Australia’s focus is on national policy issues from the perspective of older people as citizens and consumers and we seek to promote, improve and protect the circumstances and wellbeing of older people in Australia. Information about, and the views of, our constituents and members are gathered through a wide variety of consultative and engagement mechanisms and processes.

This contribution was prepared by COTA Australia with input from the State and Territory COTAs.

We also note that Senior’s Rights Victoria (SRV), an arm of COTA Victoria, will make separate submission to the Inquiry given its deep expertise as a service provider in the field of elder abuse prevention and response.

# **Introduction**

COTA welcomes the opportunity to comment on the Australian Law Reform Commission’s (ALRC) Elder Abuse Discussion Paper 83.  The Commission’s Inquiry into Protecting the Rights of Older Australians from Abuse is a critically important initiative.  We believe that the Inquiry will lay the ground for and give greater impetus to an overdue national response to law reform, service delivery and cultural change to protect older people from elder abuse.

COTA supports the intent of all the Proposals in the Discussion Paper. We acknowledge the comprehensive nature and scope of Proposals and the value of the supporting discussion and evidence. We strongly support the overall approach in the Discussion Paper to strengthening protections against elder abuse.

In our brief contribution below we:

* make comment on the crucial issue of defining elder abuse;
* identify Proposals we consider to be particularly important and urgent to implement;
* identify what we consider to be gaps in coverage of the Proposals; and
* offer additional comments on selected Proposals.

# Defining Elder Abuse

COTA recognises the complexity of defining elder abuse. Nonetheless, the definition is of critical importance in the context of the Discussion Paper as it underpins the parameters of the Proposals.

However, the Discussion Paper is not clear about the definition to be adopted; and especially whether it should require the relationship to include an "expectation of trust." It contains a discussion of the pros and cons of including this as an essential element and then goes on to make recommendations about elder abuse, but significantly it does not recommend the adoption of a specific definition.

The Discussion Paper considers that, to obtain a full picture of abuse of older persons, a broad description of elder abuse needs to be used, like the WHO definition. This can serve a range of purposes, including to gain a better understanding of the experiences of older Australians. The WHO definition from the Toronto Declaration on the Global Prevention of Elder Abuse (2002) is:

*“a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.”*

The Discussion Paper goes on to suggest that elder abuse may be broadly defined as causing harm to an older person, usually referring to deliberate harm (such as assaulting an older person or stealing their money) but it may also be harm caused by neglect (such as failing to feed or provide prescribed medications to an older person). The discussion acknowledges that elder abuse usually refers to abuse by family, friends, carers and other people the older person may trust, rather than abuse by strangers. Most elder abuse therefore has ‘similar features’ to other forms of family violence.

Restricting the definition as in the WHO description of course leaves out abuse which occurs outside the relationship of trust, of which the Discussion Paper contains examples.

COTA views the WHO definition as a reasonable starting point but would expect any prevalence study (and related research) and a National Plan on Elder Abuse to investigate definitions and parameters in greater depth through a consultative process.

# **Key Proposals**

COTA highlights the following set of Proposals as critical to implement as soon as possible. In our view these Proposals offer a solid legal and policy foundation within a comprehensive, nationally consistent, evidence-based framework to guide future elder abuse prevention, detection and response.

* **Proposal 2–1**

A National Plan to address elder abuse should be developed.

* **Proposal 2–2**

A national prevalence study of elder abuse should be commissioned.

* **Proposal 5–1**

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

* **Proposal 5–4**

Enduring documents should be witnessed by two independent witnesses, one of whom must be either a: (a) legal practitioner; (b) medical practitioner; (c) justice of the peace; (d) registrar of the Local/Magistrates Court; or (e) police officer holding the rank of sergeant or above.

Each witness should certify that: (a) the principal appeared to freely and voluntarily sign in their presence; (b) the principal appeared to understand the nature of the document; and (c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

* **Proposal 5–5**

State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person’s failure to comply with their obligations under the relevant Act.

* **Proposal 7–1**

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

* **Proposal 7–2**

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

* **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.

* **Proposal 10–1**

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

* **Proposal 11–5**

A national database should be established to record the outcome and status of employment clearances

* **Proposal 11–6**

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

# **Gaps in Proposal coverage**

COTA congratulates the ALRC for the comprehensiveness of the Discussion Paper. We make comment though in regard to a small number of gaps in coverage.

1. In earlier submissions and statements on elder abuse COTA has called for a package of measures to support prevention and response services nationally, including:
* A small national secretariat to facilitate communications between elder abuse services, enhance their capacity and service network activities;
* A national Elder Abuse Awareness Campaign;
* A national Hotline with a single phone number, through which older persons can access advice and obtain professional support and assistance on their own behalf or others;
* A National Elder Abuse Prevalence Study; and
* Data collection on elder abuse, including the development and implementation of a national systematised data collection tool that would create a minimum data set.

Unfortunately, a prevalence study is the only item from this list that has been included in the Proposals.

Although we recognise that this review is being conducted by a legal body and reporting to the Attorney-General, and therefore it will have a legal and policy focus and bias, we view the national package of service and information supports as essential to underpin any legal advances in this area. Therefore:

***COTA recommends that the Final Report of the Inquiry include proposals for:***

* ***a package of national support measures for elder abuse prevention and response services; and***
* ***a national system of supported, ongoing data collection and analysis.***
1. The ALRC discussion paper acknowledges that elder abuse is invisible in the laws and legal frameworks pertaining to Social Security. The proposed DHS elder abuse strategy (Proposal 10‑1), while commendable, does not address this specific concern. It is important that the National Plan (Proposal 2-1) includes strategies to specifically examine how Social Security laws and legal frameworks can be amended to specifically identify and address elder abuse.

More broadly than Human Services and Social Security, there is also an opportunity for Commonwealth policy departments to increase awareness of staff about elder abuse, review policies and programs for implications regarding elder abuse and ensure that future policy development seeks to recognise and minimise the opportunities for elder abuse.

***COTA recommends that the National Plan include strategies to examine and amend laws and legal frameworks pertaining to Social Security to recognise and respond to elder abuse.***

# **Comments on Selected Proposals**

In the following table we make additional comments on particular Proposals.

| **Proposal** | **Comment** |
| --- | --- |
| **Proposal 2–1****A National Plan to address elder abuse should be developed.** **(Supported)** | COTA considers the development of a National Plan fundamental to ensuring a coordinated, consistent response across Commonwealth, state/territory and non-government organisations to elder abuse. Some key issues to be taken into account in the development of a National Plan include:* a recognition of, exploration of and response to pervasive ageism as a causal factor in elder abuse;
* the need to develop a National Plan
	+ under the auspices of COAG processes to give it appropriate weight and standing
	+ with the full involvement of all parties including civil society groups, consumer representatives and service providers
	+ recognising the full diversity of experience, needs and culture present among older people including in regard to gender, sexual orientation, disability, cultural and linguistic background, geographic location, health status, economic status and different stages of older life
	+ giving attention to the specific issues and needs facing Aboriginal and Torres Strait Islander peoples
	+ that is more than a high level statement of intent, but rather is a comprehensive plan of action with accountability
	+ that is funded to succeed;
* so much of the relevant legislation is State/Territory-based and therefore it will be a challenging task to gain alignment and harmonisation. Nonetheless the stakes are very high for older people, each of whom should have an equal right to the protection of the law and fit-for-purpose policy responses on elder abuse no matter what jurisdiction they live in;
* some jurisdictions have higher standards in place in some of the key functions, such as Powers of Attorney, and a National Plan should establish current best practice as a benchmark from which to go forward and avoid lowest common denominator policy settings;
* a potential for appraisal of State/Territory protections and processes to support each jurisdiction in pursuing best practice;
* given the complexity and impact of the issue, it is especially crucial that best practice policy and program design and evaluation is employed, particularly identifying and avoiding the significant potential for unintended consequences that increase the risk of all forms of elder abuse or neglect, or further disempower older Australians.
 |
| **Proposal 2–2****A national prevalence study of elder abuse to be commissioned.** **(Supported)** | COTA welcomes this Proposal. Some key issues that need to be taken into account in implementing it are the need to:* take account of the familial nature of much elder abuse that then leads to under reporting, and find and fund innovative ways to conduct a study of prevalence that safeguard older people;
* take a comprehensive approach that captures data on perpetrators and context as well as the victim;
* design research to take full account of population and cultural diversity;
* base the research on the WHO description of elder abuse, but build into the study a strong learning and testing component around the definition of elder abuse as a key research outcome;
* ensure that an ongoing regime for supported data collection continues as an integrated part the Prevalence Study, rather than undertaking a one-off baseline study.
 |
| **Proposal 5–4 (Abridged here)****Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:**1. **legal practitioner**
2. **medical practitioner**
3. **justice of the peace**
4. **registrar of the Local/Magistrates Court or**
5. **police officer holding the rank of sergeant or above.**

 **(Supported)** | COTA’s main comment in regard to this Proposal relates to access. It is possible that the list of classes of witness referred to in Proposal 5-4 is too narrow and should be expanded. There will be many places in Australia where the witnesses referred to in the Proposal will simply not be available, or where people will not feel comfortable having such a document witnessed by, say, a local police officer, even if one were available.COTA suggests that more investigation goes into this Proposal including considering expanding the remit of already existing authorised witnesses in some jurisdictions who play this role in other contexts, for example registration of sale of land documents in the ACT. |
| **Proposal 7–1****The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.** **(Supported)** | COTA sees this Proposal and others relating to banking and superannuation as especially important. The issue of 3rd party nominees is essential to address. Effective responses must take account of a context of * generally low levels of financial literacy amongst older people, and particularly older women;
* growing complexity in the operation of banking;
* accelerating change of banking business practices and product offerings;
* a shift to online transactions;
* a reduction in physical bank branch offices and numbers of staff available to assist older customers in person or on the telephone.

Banks must take a holistic approach to supporting older consumers to feel confident in the conduct of their own business. This could make a significant contribution to reducing the vulnerability of some people to elder financial abuse. Staff training and the alignment of on-the-ground performance measures and business practices with the intentions set out in the Code will be essential. |
| **Proposal 8-1****State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an “assets for care” arrangement.** **(Supported)** | COTA views ‘assets for care’ arrangements as both a very important option for older people to choose for their own wellbeing and a major risk environment for elder abuse. Tribunals having jurisdiction to resolve disputes would be a major step forward, but COTA also believes that much more attention must be given to the prevention of disputes in the first place through more widespread use of formalised, written agreements. This is a complex and fraught area that will require cultural change, education of older people and appropriate policy incentives. One possible example of an incentive is the idea we moot for investigation below (Proposal 10.1) regarding a mandatory Family Agreement associated with Centrelink assessment of Granny Flat Interest.Alongside this legalistic approach, COTA argues that there needs to be a stronger focus on family mediation to maintain relationships or negotiate solutions within complex family situations. COTA reiterates our often-repeated view in this context and others that the definition of family must be broad and inclusive and can include friends or neighbours in an informal support role. |

| **Proposal** | **Comment** |
| --- | --- |
| **Proposal 10-1****Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.** **(Supported)** | Centrelink is ideally placed to detect and respond to possible cases of elder abuse for people participating in the Social Security system. This strategy will raise awareness of the issue of elder abuse within the Department of Human Services and can provide a useful overarching framework to guide the implementation of initiatives to prevent, detect and respond to elder abuse.A DHS strategy to reduce elder abuse will need to include the implementation of:* processes which make it harder for a person to take advantage of an older person, either inadvertently through lack of knowledge or deliberately
	+ an example of this might be the possible introduction of a mandatory requirement for a formal, written Family Agreement prepared with legal advice, as part of the assessment process for a Granny Flat Interest case;
* clear procedures for staff to report and respond to a suspected case of elder abuse, including guidance on appropriate responses to be taken by management and frontline staff;
* a process for ongoing monitoring or review of reported cases of suspected abuse;
* data protocols, tools collection and reporting on the incidence of suspected elder abuse.

We also highlight the challenges for Centrelink staff to be able to detect indicators of suspected elder abuse in a service delivery system that is increasingly reliant on online interactions.As part of the DHS Elder Abuse Strategy, consideration needs to be given to:* protections for older people who have experienced financial abuse to ensure that, as far as practical, they are not further financially ‘penalised’ as a result of that abuse; and
* conducting a review of the effectiveness of the current level of compliance checks undertaken by Centrelink with regards to requests for records from payment nominees.
 |
| **Proposal 10 – 2****Centrelink policies and practices should require that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangement with others that concern social security payment.** **(Supported)** | COTA supports this proposal as it will assist Centrelink staff to identify any indicators of suspected elder abuse. However, consideration will need to be given to:* the process for this interaction, as existing methods of communication with Centrelink are problematic for many vulnerable older people;
* Centrelink staff also speaking directly with payment nominees to ensure they understand their obligations and identify any areas of concern, which may indicate risk of for elder abuse.

COTA also supports consideration of third party nominees having payments made into a trust account rather than their own personal account.  |
| **Proposal 10-3****Centrelink communications should make clear roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments.** **(Supported)** | Information on roles and responsibilities is critical and Centrelink will need to ensure that they use a number of different methods to communicate this message, in addition to proposed changes to Centrelink forms. Special consideration needs to be given to appropriate methods of communication for people from culturally and linguistically diverse backgrounds and Aboriginal and Torres Strait Islander people. |
| **Proposal 10-4****Centrelink staff should be trained further to identify and respond to elder abuse.** **(Supported)** | The importance of training cannot be overstated. It will need to be supported with clear policy, procedures, tools and systems for staff to identify, report on and respond to suspected elder abuse.  |

| **Proposal** | **Comment** |
| --- | --- |
| **Proposal 11-1** **Aged care legislation should establish a reportable incidents scheme. The scheme should require approved providers to notify reportable incidents to the Aged Care Complaints Commissioner, who will oversee the approved provider’s investigation of and response to those incidents.** **(Supported** **with caveat)** | COTA supports the intention of this proposal to establish a reportable incidents scheme. However **COTA does not support the scheme notifying the Aged Care Complaints Commissioner**. The appropriate notification for such a scheme is the Department of Health, rather than the independent Commission. To impose such functions on the Commission could lead to confusion about its independence within the sector.In addition, consideration should be given to ensuring that a reportable incidents scheme applies to all Commonwealth Funded Aged Care Programs, including those not currently listed under the Act, such as the Commonwealth Home Support Program.  |
| **Proposal 11-2 (Abridged here)****The term ‘reportable assault’ in the *Aged Care Act 1997* (Cth) should be replaced with ‘reportable incident’.** **(Supported)** | As with Proposal 11 -1, consideration should be given to ensuring similar provisions are included in all Commonwealth Funded Aged Care Programs, including those not currently listed under the Act, such as the Commonwealth Home Support Program to ensure a consistent approach across the entire aged care sector. |
| **Proposal 11–4 (Abridged here)** **There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of ….****AND****Proposal 11–5** **A national database should be established to record the outcome and status of employment clearances.**  **(Supported)** | In Proposals 11-4 and 11-5, COTA strongly supports the introduction of a Working with Vulnerable People Card rather than a national employment screening process. This would provide the same outcome, however it would be applicable beyond Aged Care into working with children, people with a disability and potentially people with mental health issues. See comment on 11.4 |
| **Proposal 11-7 (Abridged here)****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….**  **(Supported)** | While COTA supports this Proposal we note it may be more appropriate for such regulation to be contained in subordinate legislation, such as the Quality of Care Principles, to ensure efficient monitoring.  |
| **Proposal 11–8**          **Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.** **(Supported)** | COTA supports the intention of this Proposal to ensure older Australians have the choice of whether they appoint a decision maker to act on their behalf should they become incapacitated. We are concerned however that in the context of residential aged care, where higher levels of incapacity are reported than experienced in the community, the choice to not appoint a decision maker must be an informed one. Accordingly, we propose any adoption of this Proposal include an additional requirement that providers must also inform care recipients of what the consequences may be if there is no one appointed and they become incapacitated in regard to decision making. This Proposal should also clarify that it is referring solely to Residential Aged Care. COTA is not aware of Home Care or Home Support agreements requiring this information. |
| **Proposal 11-9 (Abridged here)****The Department of Health (Cth) should develop national guidelines for the community visitors scheme that….** **(Supported)** | COTA supports this Proposal, however we propose an amendment to Clause C to state “require NATIONALLY CONSISTENT training”. |
| **Proposal 11-10 (Abridged here)****The *Aged Care Act 1997* (Cth) should provide for an ‘official visitors’ scheme for residential aged care. Official visitors’ functions should be to inquire into and report on….** **(Supported)****AND****Proposal 11-11 (Abridged here)****Official visitors should be empowered to….** **(Supported)** | COTA considers that the scope of Proposals 11-10 & 11-11 should be broadened to include multi-purpose facilities and transition care facilities, not just residential care facilities. |

**Ends**