

ALRC inquiry into elder abuse: response to discussion paper

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Lauren Adamson
Manager & Principal Lawyer
Justice Connect Seniors Law

Tel 03 8636 4408

Fax 03 8636 4455

lauren.adamson@justiceconnect.org.au

Faith Hawthorne
Lawyer
Justice Connect Seniors Law

Tel 03 8636 4416

Fax 03 8636 4455

faith.hawthorne@justiceconnect.org.au

Lauren Gordon
Lawyer
Justice Connect Seniors Law

Tel 03 8636 4443

Fax 03 8636 4455

lauren.gordon@justiceconnect.org.au



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Introduction

Justice Connect Seniors Law (**Seniors Law**) welcomes the opportunity to respond to the Australian Law Reform Commission's (ALRC) Elder Abuse Discussion Paper 83 (**the Discussion Paper**)¹.

Seniors Law commends the ALRC for undertaking a comprehensive consultative approach to this inquiry and for developing a comprehensive Discussion Paper. This submission will respond to many of the proposals and questions. The submission adopts the same chapter, proposal and question numbers used in the Discussion Paper.

This current submission is subsequent to our two submissions to the ALRC Elder Abuse Inquiry Issues Paper: the Seniors Law [submission](#) to the issues paper and our [joint submission](#) with cohealth in relation to two of the questions concerning health services.

¹ Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016)

Recommendations

National Plan

Proposal 2-1

Seniors Law supports the development of a national plan to prevent and respond to elder abuse. Seniors Law also recommends the establishment of a national body to develop the national plan.

Proposal 2-2

While Seniors Law supports a prevalence study, we recommend an immediate investment in developing the evidence base to promote more robust identification and responses to elder abuse. This will, ultimately, improve the accuracy of a prevalence study.

Powers of Investigation

Proposal 3-3

Seniors Law recommends that the ALRC consider:

- mechanisms to enforce powers requiring third party participation in investigations
- the addition of a power of entry

Enduring Powers of Attorney and Enduring Guardianship

Proposal 5-1

Seniors Law strongly supports the establishment of an online register of enduring documents.

Proposal 5-2

Seniors Law supports a framework where registration is encouraged at the time that the document is executed, but required before the instrument is activated. VCAT should be granted the power to hear challenges to the registration of an instrument and to validate appointments made under unregistered instruments that have been validly executed.

Proposal 5-3

Seniors Law supports the proposal that the making and registering of a subsequent enduring document should automatically revoke the previous document of the same type, and that the implementation of the national online register should include transitional arrangement to ensure that existing enduring documents remain valid for a prescribed period.

Question 5-1

Seniors Law supports a tiered approach to access to the national online register, enabling people to access the amount of information they need in order for them to conduct their dealings with a person with impaired decision-making ability.

We recommend that an electronic record be generated whenever a user accesses a record, and that it be an offence to access a part of the register without a legitimate interest.

Question 5-2

Seniors Law supports the introduction of random checks of enduring attorneys' management of principals' financial affairs.

Proposal 5-4

Seniors Law supports stringent witnessing requirements as an important means of reducing the incidence of elder abuse.

Proposal 5-5

Seniors Law supports the proposal that state and territory tribunals should be vested with the power to order that enduring attorneys and 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.

We support the proposal that all state and territory tribunals should be vested with similar powers, and the proposal that the power also extends to tribunal appointed guardians and financial administrators.

Proposal 5-7

Seniors Law supports any proposals that seek to ensure that only appropriately qualified people are appointed to the important role of attorney.

However we note that there may be cases where the only person that the older person wishes to appoint to the role has a relevant conviction or finding of guilt in their history. The requirement for disclosure may strike the appropriate balance between protection of the older person and the older person's right to appoint whoever they wish to the role.

Proposal 5-8

Seniors Law supports the proposal that legislation governing enduring documents should explicitly list

transactions that cannot be completed by an enduring attorney or enduring guardian.

Proposal 5–9

Seniors Law supports the proposal that enduring attorneys and enduring guardians should be required to keep records, and that enduring attorneys should keep their own property separate from the property of the principal.

Proposal 5–10

Seniors Law broadly supports greater consistency between state and territory governments, however, the process of national harmonisation should not diminish the important safeguards established in states that have more robust regulation of substitute decision-makers.

Proposal 5–13

Seniors Law strongly supports the proposal that representatives should be required to support and represent the will, preferences and rights of the principal.

Guardianship and Financial Administration Orders

Question 6–1

Safeguards protecting represented persons should be applied on a case-by-case basis, depending on the complexity of their affairs, and in a timely manner.

Question 6–3

The process for appointing formal representatives should seek to balance an older person's right to autonomy and safety, explore least-restrictive alternatives and be informed by the wishes and preferences of the older person, irrespective of their capacity.

Banks and Superannuation

Proposal 7–1

Seniors Law supports the proposal that the Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers.

Proposal 7–2

Seniors Law strongly supports the proposal that the Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts.

Family Agreements

Proposal 8–1

Seniors Law supports a proposal offering older people a timely and accessible forum to resolve issues arising from an 'assets for care' arrangement. However, this forum should be able to resolve disputes arising from arrangements where the 'assets' provided are residential property or a monetary equivalent; and 'care' is provided by a trusted person, including a non-family member.

The utility of this forum will depend on people having a greater awareness of 'assets for care' arrangements. We would, therefore, recommend a broader campaign educating older people about the legal, financial and social risks associated with these arrangements and encouraging people to seek professional assistance as early as possible.

Question 8–1

Seniors Law does not support a restriction on the jurisdiction to resolve issues arising from 'assets for care' arrangements to those involving 'family' members. We recommend, in the alternative, using key concepts and definitions arising from frameworks regulating substitute decision-makers and care relationships, thereby ensuring the relevant jurisdiction was available to older people who had entered into, or had expected to enter into, caring relationships with non-family members. However, this jurisdiction should be limited to resolving disputes between parties where there is an element of trust – it should not extend to arms-length arrangements with professional carers.

Social Security

We recommend that consideration is given to amending social security laws to include elder abuse as a special circumstance which justifies the cancellation of an assurance of support, or that the older person is entitled to another form of income support in circumstances where elder abuse has been alleged.

Proposal 10–1

Seniors Law supports the proposal that the Department of Human Services (Cth) develop an elder abuse strategy. The strategy should include a requirement that Centrelink staff undergo professional development to ensure that cases of suspected abuse are identified and that staff have the skills and confidence to respond to a disclosure of abuse in accordance with the strategy.

The strategy should also require staff to look behind the relevant transaction when allegations of elder abuse arise, before stopping payments.

Proposal 10–2

Seniors Law supports the proposal that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

Seniors Law supports the proposal that staff be trained to identify and respond to elder abuse.

Aged Care

Proposal 11–7

Seniors Law supports the proposal to regulate the use of restrictive practices in the Aged Care Act

1997 (Cth). Regulation should ensure that restrictive practises in aged care facilities be used only in circumstances of last resort.

In addition, Seniors Law recommends the introduction of a regime of oversight and scrutiny of the admission of any person into an Aged Care facility.

Proposal 11–8

Seniors Law supports the proposal that 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.

2. National Plan

Proposal 2–1 A national plan to address elder abuse should be developed.

Seniors Law supports the development of a national approach to elder abuse. Elder abuse is a complex social problem that touches on law and policy at state and Commonwealth levels of government. It is vital that state systems are coordinated – for example the state based powers of attorney and guardianship regimes – and that initiatives to combat ageism and raise awareness of elder abuse are approached a national level.

The development of a national plan would play an

important role in ensuring a national approach to the prevention of, and response to elder abuse.

Seniors Law also recommends the establishment of a national body tasked to develop the national plan, facilitate the sharing of information and resources and promote best practice.

The establishment of a national body would ensure that the national plan is informed by the experience and expertise of those working in this area and the older people that they work alongside.

Proposal 2–2 A national prevalence study of elder abuse should be commissioned.

Seniors Law supports a prevalence study that would lead to a better understanding of the rates and types of abuse as well as the characteristics of those who experience and perpetrate abuse. However, an accurate prevalence study relies on people's ability to identify elder abuse.

An investment in developing an evidence base for: (a) elder abuse risk assessment factors; and (b) best practice service response is also required. This investment would not only inform the development of best practice interventions, but would also enhance the accuracy of a prevalence study. The current lack of comprehensive data regarding the risk factors of abuse, and the effectiveness of prevention and response initiatives is emerging as a key issue in the prevention of and response to elder abuse.

For example, the Royal Commission into Family Violence (RCFV) recommended that the Victorian Government review and revise the Family Violence Risk Assessment and Risk Management Framework (known as the CRAF). The review was intended to deliver a comprehensive framework that sets minimum standards and roles and responsibilities for screening, risk assessment, risk management, information sharing and referral throughout Victorian agencies. In particular, the RCFV recommended the revised CRAF should “reflect the needs of the diverse range of family violence

victims and perpetrators, among them older people...”²

In its subsequent review of the CRAF, Monash University concluded there was limited evidence regarding the risk factors of elder abuse and best practice models to address it:

“Currently there is no strong evidence base for family violence risk assessment factors beyond heterosexual intimate partner violence...In order to address this significant gap in identifying, assessing and managing the risks posed by different forms of family violence in diverse communities the redevelopment of the CRAF should: include research to develop or build an evidence base on risks factors specific to diverse populations including...older people...”³

“Available academic literature and policy guidance offer limited discussion of relevant models and/or best practice relating to family violence beyond intimate partner violence. This gap includes elder abuse...”⁴

With this in mind, Seniors Law recommends an immediate investment in developing the evidence base to promote more robust identification and responses to abuse. This will, ultimately, improve the accuracy of a prevalence study.

² Victoria, Royal Commission into Family Violence: *Report and Recommendations* (2016) 45.

³ Jude McCulloch et al, ‘Review of the Family Violence Risk Assessment and Risk Management Framework

(CRAF): Final Report’ (Report, Monash University, 2016) 21.

⁴ Ibid 25.

3. Powers of Investigation

Scope and Enforcement of Powers

Proposal 3–3: Public advocates or public guardians should have the power to require that a person, other than the older person:

- (a) furnish information;
- (b) produce documents; or
- (c) participate in an interview

relating to an investigation of the abuse or neglect of an older person.

Seniors Law supports the ALRC’s proposal to expand the investigatory powers of public advocates or guardians to allow investigation of suspected cases of elder abuse.

Scope of Investigatory Powers

The ALRC has proposed that the scope of the investigations allow public advocates to require that third parties:

- (a) furnish information;
- (b) produce documents; or
- (c) participate in an interview

relating to the investigation of abuse and neglect of an older person.

Engagement with the Older Person

Any proposed framework must seek to empower the older person, to promote the older person’s right to choose interventions, if any and to respect those choices. The appropriate balance between autonomy and protection is difficult but important to strike. For these reasons, we support the proposal that any powers of investigation would only be available in circumstances where the person’s care and support needs as defined in the Discussion Paper prevent the older person from protecting themselves from abuse.

With this in mind, Seniors Law and a number of the health professionals we work with agree that any investigation into a suspected case of elder abuse should seek at first instance to establish the position of the older person.

Whilst the proposed powers do not envisage legislation requiring the older person take part in an interview, it is important that an investigator make every attempt to engage with the older person as a starting point. This goes also to the interests of the safety of the person, enabling the investigator to establish the older person’s fears in terms of any likely response by the alleged perpetrator.

Finally, we note and support the ALRC’s finding that it will be imperative to ensure that the relevant public guardians and public advocates are appropriately resourced to carry out any additional responsibilities.

Enforcement of Investigatory Powers

Powers of Entry

A number of the health professionals that we work with have indicated the importance of being able to visit a person at their home to establish the existence or extent of abuse.

There are existing provisions in Victoria that enable certain professionals to access, or attempt to access an older person.

For example, section 26 of the *Guardianship and Administration Act 1986* (Vic) allows for emergency enforcement of a guardianship order where a represented person does not comply with that order. In circumstances where a person is deemed to be at risk, as an option of last resort an application can be made to the Victorian Civil and Administrative Tribunal (**VCAT**) to enforce an existing order, to allow entry to a premises, and removal of a person, or access to services. This order must be reviewed within 42 days.⁵ However, this provision

⁵ Office of the Public Advocate, *Good Guardianship: A guide for guardians appointed under the Guardianship*

and Administration Act (February 2011), 13 <http://www.publicadvocate.vic.gov.au>.

only applies to an older person who is the subject of a guardianship order.

Similarly, as part of an Aged Care Assessment Services (ACAS) assessment, an assessor will attend at a person's property and knock on their door with the intention of visiting and assessing the circumstances at home. There is no power for the assessor to be able to enter the home if entry is denied by the older person or a third party.

Our health partners have relayed experiences where a need for assessment has been clearly identified and planned for by workers but the patient has unexpectedly discharged from hospital. Concerns have arisen where patient follow up is needed, but the patient is uncontactable because they or a third party refuse entry to the older person's home.

For these reasons, we recommend that the proposed investigatory powers are coupled with a power of entry. Without such a power of entry, arguably the proposed investigatory powers do not add anything to the existing powers or role of those completing an ACAS assessment - or in indeed those of any interested member of the public - when assessing the risk to a person whose safety is of concern.

It may be that police presence is required as part of a power of entry, particularly where there is likely to be aggressive behaviour from any party. Alternatively, a clear power of entry may also persuade otherwise uncooperative parties to comply in the absence of police presence.

A power of entry conferred on the investigator, either by way of a VCAT order, or as a mandated part of the investigatory process, would play an important part of an investigation where an investigator was unable to otherwise speak to the older person themselves.

In order to identify potential dangers, and to facilitate service provision, Seniors Law submits that the ALRC should consider whether an investigator should be armed with an additional power of entry.

Where Third Parties Refuse to Cooperate

In order for this investigatory power to properly function, there must be some method by which to enforce the proposed powers. It is conceivable that where there is family conflict and abuse, that a third party might be reticent to cooperate with an investigator. Where a third party is told to provide information or participate in an interview, but refuses to do so, how then does an investigation proceed?

Seniors Law submits that there must be some method of enforcement where a third party refuses to cooperate.

Seniors Law recommends that the ALRC contemplate how powers will be enforced where third parties refuse to cooperate, thus hindering or preventing an effective investigation.

5. Enduring Powers of Attorney and Enduring Guardianship

Seniors Law broadly supports greater consistency between state and territory governments, however, the process of national harmonisation should not

diminish the important safeguards established in states that have more robust regulation of substitute decision-makers.

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 5–2 The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.

Proposal 5–3 The implementation of the national online register should include transitional arrangements to ensure that existing enduring documents remain valid for a prescribed period.

Seniors Law has long advocated for the establishment of an online register of enduring documents.⁶ As per our submission to the Issues Paper, we strongly support the establishment of an online register of enduring documents on the basis that:

- a register is a necessary foundation for the implementation of a suite of safeguards that together would work to decrease the incidence of elder abuse, including random audits;
- registration could prevent people from purporting to rely on powers that have subsequently been revoked; and
- an easily searchable register of powers of attorney may make it less likely that institutions rely on their own third party documents which in most cases have less robust witnessing requirements and protections.

In accordance with our previous submissions, in our view, registration should be encouraged at the time that the document is executed, but be required before the instrument is activated. VCAT should be granted the power to hear challenges to the registration of an instrument and to validate appointments made under unregistered instruments that have been validly executed.⁷

We support the proposal that the making and registering of a subsequent enduring document should automatically revoke the previous document of the same type, and that the implementation of the national online register should include transitional arrangement to ensure that existing enduring documents remain valid for a prescribed period.

⁶ See for example: Seniors Rights Victoria, Submission No 71 to the Victorian Law Reform Commission *Guardianship Consultation Paper 10*, 3 June 2011.

⁷ Ibid 13.
http://www.lawreform.vic.gov.au/sites/default/files/Submission_CP_71_Seniors_Rights_Victoria_03-06-11.pdf

Question 5–1 Who should be permitted to search the national online register without restriction?

Seniors Law, in a joint submission with Seniors Rights Victoria to the Victorian Law Reform Commission (VLRC) Guardianship Inquiry, proposed a tiered approach to the VLRC Guardianship Review (the VLRC review). A tiered approach was recommended in the VLRC’s Guardianship Final Report⁸. The report noted that “people should be given access to the amount of information they need to know in order for them to conduct their dealings with a person with impaired decision-making ability.”

Furthermore, the VLRC recommended that an electronic record be generated whenever a user accesses a record, and that it be an offence to access a part of the register without a legitimate interest.

Seniors Law endorses the recommendations made in the Final Report, that only authorised people and organisations should have access to the register and to only those parts of the register they are permitted to view at any one time.⁹

Question 5–2 Should public advocates and public guardians have the power to conduct random checks of enduring attorneys’ management of principals’ financial affairs?

Seniors Law has advocated for and supports the introduction of random checks of enduring attorneys’ management of principals’ financial affairs. As noted in the Discussion Paper, the introduction of a national register could form the foundation of a suite of measures to reduce abuse.

We believe that the risk of an audit strikes the right balance between ensuring a level of oversight of the conduct of the attorney without being so onerous as to deter people from assuming this important role.

However, public advocates and public guardians would need further resources if granted additional powers.

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.

Seniors Law supports stringent witnessing requirements as an important means of reducing the incidence of elder abuse.

⁸ Victorian Law Reform Commission, *Guardianship: Final Report*, Report No 24 (2012) 364-371 recommendations [259]-[274].

⁹ *Ibid* 372, recommendation [275].

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.

Seniors Law supports this proposal. Section 77 of the new *Powers of Attorney Act 2014 (Vic)* grants VCAT with the power to order compensation. The provision makes it far less onerous for older people to seek to recover funds that have been misappropriated by an attorney, provided that the attorney has any assets to recover.

We support the proposal that all State and territory tribunals should be vested with similar powers, and the proposal that the power also extends to tribunal appointed guardians and financial administrators. Older people should have the same avenue for recourse regardless of whether the substitute decision maker was personally appointed or appointed by a Tribunal.

Proposal 5–7 A person should be ineligible to be an enduring attorney if the person:

- (a) is an undischarged bankrupt
- (b) is prohibited from acting as a director under the *Corporations Act 2001 (Cth)*;
- (c) has been convicted of an offence involving fraud or dishonesty; or
- (d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

Seniors Law supports any proposals that seek to ensure that only appropriately qualified people are appointed to the important role of attorney.

However, we note that the *Powers of Attorney Act 2014 (Vic)* provides that a person is eligible to be an attorney for financial matters if the individual has not been convicted or found guilty of an offence involving dishonesty; or if the person has been convicted or found guilty of an offence involving dishonesty, has disclosed the conviction or finding

of guilt to the principal and the disclosure of the conviction or finding of guilt has been recorded in the enduring power of attorney¹⁰.

There may be cases where the only person that the older person wishes to appoint to the role has a relevant conviction or finding of guilt in their history. The requirement for disclosure may strike the appropriate balance between protection of the older person and the older person’s right to appoint whoever they wish to the role.

Proposal 5–8 Legislation governing enduring documents should explicitly list transactions that cannot be completed by an enduring attorney or enduring guardian including:

- (a) making or revoking the principal’s will;
- (b) making or revoking an enduring document on behalf of the principal;
- (c) voting in elections on behalf of the principal
- (d) consenting to adoption of a child by the principal
- (e) consenting to marriage or divorce of the principal; or
- (f) consenting to the principal entering into a sexual relationship

Seniors Law supports this proposal.

¹⁰ *Powers of Attorney Act 2014 (Vic)* s 28.

Proposal 5–9 Enduring attorneys and enduring guardians should be required to keep records. Enduring attorneys should keep their own property separate from the property of the principal.

Seniors Law supports this proposal.

Proposal 5–10 State and territory governments should introduce nationally consistent laws governing enduring powers of attorney (including financial, medical and personal), enduring guardianship and other substitute decision makers.

Cross-jurisdictional recognition of appointments will aid the resolution of disputes arising from appointments between parties who are located in

different jurisdictions. Maya's story illustrates the resources that are sometimes required to help older people resolve these types of disputes:

Maya settled in Australia to be closer to her daughter, Gabby. As she speaks minimal English, has impaired hearing, and no formal education, she has become increasingly reliant on Gabby, who lived with her.

Gabby asked Maya for money to buy a car. Maya obliged. Later that week, Gabby picked Maya up with her new purchase and asked her if she wanted to go for a spin. They did – Maya was driven to an aged care facility and left on a bench outside. Maya hasn't seen Gabby since.

While at the facility Maya became subject to an order appointing an independent financial manager and guardian.

Maya has a sister, Veda, who only recently found out about Maya's situation. They subsequently agreed Maya would relocate interstate to a facility in Victoria where Veda lives. Veda, a pensioner herself, met the costs of moving Maya and providing daily essentials. The financial manager and guardian were unresponsive to Maya's requests for ongoing assistance.

Veda approached a lawyer at Seniors Law seeking help for Maya. Within days, the lawyer had arranged to meet with Maya at her aged care facility. The first meeting was difficult: the manager initially refused the lawyer entry, an onsite interpreter was not available, and Maya found it difficult to speak to an interpreter over the phone because of her hearing difficulties and unique dialect. Different arrangements would need to be made.

Instead, Maya met with the lawyer and an onsite interpreter at cohealth, a nearby community health service where the lawyer was based. Veda picked Maya up from her aged care facility. At the meeting, Maya said she wanted to have Veda manage her affairs. This required an application to a tribunal interstate – it could not be resolved in Victoria. Using Justice Connect's network of pro bono lawyers, Maya was referred to lawyers interstate. The pro bono lawyers communicated with Maya by telephone. Seniors Law assisted by arranging onsite Spanish interpreters and rooms at cohealth for Maya to communicate with her lawyers.

The pro bono lawyers assisted by preparing the application and appearing on Maya's behalf at various hearings interstate before the tribunal, while she attended by telephone. After many hearings, Veda was finally appointed Maya's financial manager.

While Maya was able to overcome barriers through our network of pro bono lawyers, partnerships with health services, access to interpreters and supportive family members, some services would

not be in a position to address all of these barriers. For example, many community legal services can only help a client if they reside in the state. One of the difficulties in this case was that we had to find

Maya lawyers in a different state and support her in engaging them. Her matter would have been resolved in a timely and more cost-effective manner if her matter could have been heard in Victoria.

Therefore, better recognition of guardianship and administration orders between states and territories should allow people to resolve these issues in their preferred jurisdiction.

Proposal 5–13 Representatives should be required to support and represent the will, preferences and rights of the principal.

Seniors Law strongly supports this proposal.

6. Guardianship and Financial Administration Orders

Safeguards protecting represented persons should be applied on a case-by-case basis, depending on the complexity of their affairs, and in a timely manner.

The process for appointing formal representatives should seek to balance an older person's right to autonomy and safety, explore least-restrictive alternatives and be informed by the wishes and preferences of the older person, irrespective of their capacity.

Question 6–1 Should information for newly-appointed guardians and financial administrators be provided in the form of:

- (a) compulsory training;
- (b) training ordered at the discretion of the tribunal;
- (c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or
- (d) other ways?

While Seniors Law supports robust oversight of the conduct of guardians and administrators, safeguards should be applied on a case-by-case basis. There should be a range of mechanisms available and imposed according to the complexity of the represented person's affairs. A balanced

approach will help guard against misuse of appointments, without deterring trusted people who are otherwise capable of fulfilling these important roles. Bill's story illustrates the situation where these oversight mechanisms may be unduly burdensome.

Bill, 70, had a stroke and was admitted to hospital for three months. Following admission, his sister was appointed as his administrator. She was initially reluctant to be appointed because she had her own health issues and could not deal with too much paperwork. However, Bill's finances were relatively straightforward: his only income was the age pension and he lived in public housing. Every pension day he would withdraw enough cash to pay his bills and buy food and whatever was leftover he kept as cash. He had been very successful in managing his money this way, having saved \$15,000 over the last 10 years, by virtue of a direct debit into a savings account.

His sister managed Bill's finances in the same manner: she paid for expenses in cash and whatever was left over she gave directly to Bill. Even though Bill's sister paid all his expenses while he was in hospital, she did not keep all the receipts. When Bill was discharged from hospital, his sister gave him his bank card and he resumed responsibility for managing his affairs. They did not arrange for the administration order to be reassessed. Many months later, Bill's sister was asked to provide a statement to VCAT of how she managed his money. She was having some problems with her own health, and didn't have time to get all the paperwork together, so Bill and his worker tried to provide evidence that she had managed Bill's finances while he was in hospital. This evidence was insufficient and VCAT proceeded to have an independent administrator appointed for Bill, even though he had regained capacity, pending the provision of satisfactory evidence from his sister.

Bill was referred to Seniors Law, who connected him with one of our pro bono lawyers. We helped Bill successfully apply for a revocation of the administration order – he could manage his own affairs now and the appointment of an independent administrator was not necessary. VCAT also exempted Bill's sister from having to provide a statement of account, as the evidence provided satisfied VCAT that she had managed his affairs appropriately.

In Bill's case, it is clear his sister was an appropriate appointment, as she could successfully manage his finances in the same way he had. Evidence of this – such as rental statements – should have been sufficient to discharge her reporting obligations, even if she was unable to comply with the formal reporting requirements.

Safeguards should also be timely in their application. Our service frequently sees evidence of representatives misappropriating the older person's finances – sometimes their only financial safety net, the age pension. Clients, who have been able to

successfully manage their finances on their own, can find themselves in financial distress within months of the representative's appointment. This means, annual requests for evidence of compliance, should be combined with more immediate interventions – such as random audits, urgent applications and investigations – for time-sensitive matters. The use of oversight mechanisms should be informed by the wishes and preferences of the older person and, if relevant, respectful of their desire to maintain a relationship with their representative.

Question 6–3 What is the best way to ensure that a person who is subject to a guardianship or financial administration application is included in this process?

Decisions made regarding the appointment of guardians or administrators should be informed by the wishes and preferences of the older person, irrespective of their capacity. Often the older person's desire for independence can conflict with a health professional's or family member's desire for the older person to be safe. For this reason, the tribunal should speak to the represented person before an administrator or guardian is appointed.

There is also a need for greater guidance in making applications for a formally appointed representative to ensure risks are consistently assessed in a way that balances an older person's right to autonomy and safety. For example, exploring less restrictive alternatives – such as setting up direct debits before appointing a financial administrator; or encouraging advance care planning and case management before appointing a guardian.

7. Banks and Superannuation

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.

Seniors Law supports the proposal that the Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers.

However, as stated in our submission to the Issues Paper, any concerns should at first instance be raised with the customer directly if possible, and it is then up to the customer whether to take any further action.

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.

Seniors Law recommended and strongly supports the proposal that the Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts.

However, we also note that an EPOA financial also enables a third party to access the bank account of the donor or the EPOA, but that the operation of the EPOA is subject to review by VCAT in the event that there are any concerns. Whilst we support the introduction of stronger witnessing requirements in relation to third party nomination forms, we would encourage older people use an EPOA which provides a level of

accountability and scrutiny that does not apply to a person acting pursuant to a nomination form. Any changes to the Code of Banking Practice should ensure that people are not directed to complete a third party nomination form without being aware of the alternative of using an EPOA.

The Code of Practice should also ensure that staff training includes training on EPOAs, including the different types of EPOAs and the various options for commencement and how multiple attorneys are required to make decisions.

8. Family Agreements

As indicated in our response to the issues paper, Seniors Law supports a proposal offering older people a timely and accessible forum to resolve issues arising from an ‘assets for care’ arrangement. However, this forum should be able to resolve disputes arising from arrangements where the ‘assets’ provided are residential property or a monetary equivalent; and ‘care’ is provided by a trusted person, including a non-family member.

Further, the utility of this forum will depend on people having a greater awareness of these arrangements. We would, therefore, recommend a broader campaign educating older people about the legal, financial and social risks associated with ‘assets for care’ arrangements and encouraging people to seek professional assistance as early as possible.

Proposal 8–1 State and territory tribunals should have jurisdiction to resolve family disputes involving residential property under an ‘assets for care’ arrangement.

Proposal 8-1 may exclude older people who: (a) have provided an ‘asset’ that is not residential property, such as cash; and (b) entered into the arrangement with someone who is not a family member, discussed further in our response to question 8-1. Any jurisdiction established to resolve ‘assets for care’ arrangements should be accessible to parties who had entered into these types of arrangements.

Further, often older people will approach our service seeking legal help following a failure of these agreements – rarely will they seek out legal help beforehand. We would, therefore, recommend a broader campaign educating older people about the legal, financial and social risks associated with ‘assets for care’ arrangements and encouraging people to seek professional assistance as early as possible.

Question 8–1 How should ‘family’ be defined for the purposes ‘assets for care’ matters?

As referenced in the Discussion Paper, elder abuse is underreported and many of these ‘assets for care’ arrangements are informal and inadequate. We, therefore, have a very limited understanding of these arrangements – their prevalence, the relevant parties and how they may be used to perpetrate elder abuse – and of caring relationships generally involving older people. In making our submission, Seniors Law can only draw on the limited evidence available and on our casework; and hypothesise about how undisclosed issues arising from these arrangements have been addressed in the past and what types of arrangements may be formed in the future.

While it appears a majority of older people live with relatives, there are a proportion of older people who live with non-relatives, who may form caring relationships with non-relatives, and may enter into some type of ‘assets for care’ arrangement with non-relatives.

In our casework we have observed different types of caring relationships between people who would not be considered ‘family’. The most devastating abuse can be perpetrated by a person who has opportunistically formed a friendship with an older person and taken control of their lives, on the premise they will be their carer. Conduct may include refusing essential community-based services, misappropriating significant sums of money, obtaining execution of important legal documents and receiving the carers’ pension but failing to provide the necessary care.

While it appears these caring relationships between non-family members comprise a small proportion of all caring relationships, they may involve the most disadvantaged older people in our society and, with isolation a recognised risk-factor of elder abuse and a barrier to disclosure, may be underrepresented in current prevalence data. It is conceivable these caring relationships may involve some form of ‘assets for care’ arrangement.

Not only do we have a limited understanding of caring relationships with our current ageing population, it is also difficult to project what types of relationships may be formed in the future, as the idea of ‘family’ evolves over time. There are many factors that may challenge the traditional role of the adult child caring for their ageing parents, including: pressure on children to remain in the workforce as their parents age; ageing adults who decided not to have children; older people who have become estranged from their ‘family’, for example some members of the LGBTI community, and have ‘family members of choice’¹¹.

As we have a limited understanding of ‘assets for care’ arrangements and caring relationships with older people generally, Seniors Law does not support a restriction on the jurisdiction to resolve issues arising from these arrangements to those involving ‘family’ members. It is an unnecessary precondition that may deny justice to the most disadvantaged members of our older population.

We recommend, in the alternative, using key concepts and definitions arising from frameworks

regulating substitute decision-makers and care relationships. For example, the *Guardianship and Administration Act 1986* (Vic) and the *Medical Treatment Planning and Decisions Act 2016* (Vic) uses the definition of ‘primary carer’ and the *Carers Recognition Act 2012* (Vic) defines a ‘care relationship’.¹² The use of these terms would ensure the jurisdiction to resolve ‘assets for care’ arrangements was available to older people who had entered into, or had expected to enter into, caring relationships with non-family members.

However, this jurisdiction should be limited to resolving disputes between parties where there is an element of trust – it should not extend to arms-length arrangements with professional carers. There could be a series of express exclusions limiting the jurisdiction, such as those contained in the *Carers Recognition Act 2012* (Vic) narrowing the definition of a ‘care relationship’.¹³ The *Powers of Attorney Act 2014* (Vic) also manages to apply different rules to people who are a ‘care worker’, a ‘health provider’ or an ‘accommodation provider’¹⁴.

10. Social Security

Whilst supportive of the proposals in this Chapter of the Discussion Paper, Seniors Law remains concerned that waiting periods for qualification for payments or the assurance of support scheme can have a negative impact on older people experiencing elder abuse.

We receive inquiries from older people who are experiencing elder abuse and not receiving the care they need from the provider of the assurance of support. These older people not only have no income support, but are also ineligible for many social services. They are often extremely isolated and dependent on the family member who promised to support them. In many cases they are

also reluctant to take any action that might get the family member into trouble. These circumstances result in the older person being forced to endure abuse and neglect with very few avenues available for any support at all.

We recommend that consideration is given to amending social security laws to include elder abuse as a special circumstance which justifies the cancellation of an assurance of support, or that the older person is entitled to another form of income support in circumstances where elder abuse has been alleged.

¹¹ Victorian Law Reform Commission, *Funeral and Burial Instructions*, Report (2016) 24.

¹² *Guardianship and Administration Act 1986* (Vic) s 3; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3; *Carers Recognition Act 2012* (Vic) s 3.

¹³ *Carers Recognition Act 2012* (Vic) s 4.

¹⁴ *Powers of Attorney Act 2014* (Vic) s 3.

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

Seniors Law supports this proposal. As recommended in our submission to the Issues Paper, the strategy should include a requirement that Centrelink staff undergo professional development to ensure that cases of suspected abuse are identified and that staff have the skills and confidence to respond to a disclosure of abuse in accordance with the strategy.

The strategy should also require staff to look behind the relevant transaction when allegations of elder abuse arise, before stopping payments. It may be that a transaction that appears on the face of it to be a gift was in fact a transfer for genuine consideration, usually in the form of an offer of care. Similarly, any allegations of abuse should be considered when raised in the context of the failure of an “assets for care” arrangement within 5 years.

Proposal 10–2 Centrelink policies and practices should require that Centrelink staff speak directly with persons of Age Pension age who are entering into arrangements with others that concern social security payments.

Seniors Law strongly supports this proposal. Centrelink staff should ensure that they speak directly with the older person on their own to ensure that they understand the arrangement and are entering into the arrangement voluntarily. We note the comments in the Discussion Paper that this requirement would also enable staff to ensure that

the older person is aware of the criteria required to show a granny flat interest.

However, Seniors Law remains concerned that some “assets for care” arrangements might not fall within the provisions of the granny flat rules, for example when an older person sells a share of their property in return for an adult child moving in to the older person’s home to provide care.

Proposal 10–4 Centrelink staff should be trained further to identify and respond to elder abuse.

Seniors Law supports this proposal which was recommended in our submission to the Issues Paper.

11. Aged Care

Restrictive Practices

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.

Seniors Law strongly supports the proposal to regulate the use of restrictive practices in the Aged Care Act 1997 (Cth). Regulation should ensure that restrictive practises in aged care facilities be used only in circumstances of last resort.

Oversight of Admission into Aged Care

What was not considered in the Discussion Paper however, is the lack of oversight around the decision to admit a person to Aged Care.

In Recommendation 9 of our submission responding to the ALRC’s Issues Paper, Seniors Law raised concerns about the lack of oversight and scrutiny in admitting a person to aged care.

The following extract is taken from our submission to the Issues Paper¹⁵:

Based on our casework, Seniors Law has identified two key decisions where regulation is required to clarify the person responsible for making the decision and safeguards and oversight of those decisions:

- *the decision to enter the aged care facility; and*
- *the decision to use restrictive practices while the person resides at the aged care facility*

These decisions may result in the deprivation of liberty of vulnerable older people in aged care facilities, many of whom have no means of seeking independent advice.

In response to the VLRC review, Aged Care Crisis submitted that:

‘Older people who are perceived to have cognitive impairment are the only group of people who can

be placed in locked facilities, against their will, without any reasonably accessible procedures for appeal. Clearly, people must be kept safe but we are aware of several instances where the basic human right, not to be kept locked away or otherwise restrained without due process, has been disregarded. We can think of no other group of people where this situation would be regarded as acceptable.’¹⁶

Due to the failure of current laws to provide a comprehensive framework, we support the development of a national or nationally consistent regulatory approach to guide the making and oversight of these important decisions. In developing the appropriate regulatory response, the following principles should be considered:

- the older person is presumed to have capacity to make decisions;
- if the capacity of the older person is in doubt, the proposed decision-maker must have medical evidence that the older person lacks capacity before making the decision;
- the decision-maker should comply with the National Decision-Making Principles proposed by the ALRC in its Review into Access to Justice for People with a Disability, and consider options that promote the older person’s liberty and autonomy – admission to an aged care facility and use of restrictive practices are measures of absolute ‘last resort’;
- the possibility of supported decision-making is to be explored before imposing substitute decision-making;

¹⁵ Justice Connect Seniors Law, Submission to the Australian Law Reform Commission, *Elder Abuse Issues Paper* 47, September 2016, 15.

https://www.alrc.gov.au/sites/default/files/subs/182_justice_connect.pdf

¹⁶ Victorian Law Reform Commission, above n 8, 329 [15.81].

- these decisions should be reviewable and regularly reassessed by a tribunal or court; and
- if an older person does not consent to entry to the aged care facility, the proposed decision-maker can only make these decisions under formal appointment as a substitute decision-maker

When identifying the appropriate decision-maker, principles from existing statutory regimes should also be followed. For example, section 37 of the Guardianship and Administration Act 1986 (Vic) (the Vic G&A Act) details the priority of people who are eligible to be a 'person responsible'. When a decision-maker has not been appointed, the spouse

of the older person takes priority over other relatives. As noted in our submission to the VLRC review, this approach is not regularly followed:

“Current practice in relation to medical decision-makers often involves an element of ageism, in that elderly spouses are regularly discounted by staff at medical facilities or carers when a person responsible is needed. This, combined with the potential for a conflict between the represented person and family members in relation to decisions to admit the older person into care, increases the risk of abuse and the need for the types of safeguards discussed in the Consultation Paper.”¹⁷

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.

Seniors Law supports this recommendation.

¹⁷ Seniors Rights Victoria, above n 6, 71.

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A Articles/Books/Reports

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B Legislation

Carers Recognition Act 2012 (Vic)

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