National Older Persons Legal Services Network

Submission to Australian Law Reform Commission Elder Abuse Discussion Paper 83

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Introduction

This submission is made in response to Australian Law Reform Commission's Discussion Paper, Elder Abuse.

The submission is made on behalf of the Older Persons Legal Services Network (the Network), which is a Network of the National Association of Community Legal Centres (NACLC).

NACLC is the peak national organisation representing community legal centres (CLCs) in Australia. Its members are the state and territory associations of CLCs that represent around 200 centres in various metropolitan, regional, rural and remote locations across Australia. CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to their local or special interest communities. CLCs' work is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest.

The Older Persons Legal Services Network is a Network of NACLC, with its members consisting of CLCs across Australia. The Network undertakes social justice campaigns and advocates for the human rights of older persons in Australia and internationally. The Network members that contributed to this submission have specialist expertise in seniors' rights issues and elder law.

This submission does not respond to all issues canvassed in the Discussion Paper. Rather, it provides general comments on some of the key issues. The Network would welcome the opportunity to discuss these issues in more detail. The contacts for this submission are:

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National Plan

Proposal 2–1 The Network supports the ALRC **Proposal 2-1** to develop a National Plan.

An issue as complex and multi-dimensional as elder abuse requires a proportionate response. The Network welcomes the Commonwealth Attorney General's announcement of a $15M allocation toward the development of the plan. A proportionate response (national framework and plans) would however be more akin to the scale of the *National Plan to Reduce Violence Against Women and Their Children 2010-2022,* developed through the Council of Australian Government (CAOG) processes.

It is important that COAG is responsible because:

- The need for national leadership to establish elder abuse as a national priority requiring both 'whole of government' and 'whole of community' responses;
- The limited sources of Commonwealth power to legislate elder abuse measures;
- The traditional role of COAG in developing model, uniform laws in areas of high public importance; and
- The particular need for uniformity of state and territory laws with respect to personal autonomy, including powers of attorney, guardianship and administration laws.

We support the suggestion that the Age Discrimination Commissioner lead a number of strategies within and around the National Plan.

We note that since late 2015 members of the Network and the Older Persons Advocacy Network (OPAN) including representatives from five jurisdictions[1] have held discussions about the desirability of the formation of a national entity to represent the views of elder abuse prevention advocates and service providers. More recently those discussions have involved the Age Discrimination Commissioner.

At this time there is consensus amongst the potential membership of the national entity as to the establishment of *Elder Abuse Action Australia* (EAAA).

The Network looks forward to meeting with the Departments of Attorney General and Health and Ageing shortly to progress these discussions with a view to the EAAA becoming operational within a timeframe that would facilitate engagement with the Government during its initial consideration of the Commission's final report.

NACLC Recommendations: *The Australian Government engage and resource the Age Discrimination Commissioner to lead strategies and or processes within and around the National Plan.*

[1] Western Australia, South Australia, Victoria, NSW and Queensland

The Australian Government fund the establishment of an independent national body, representing service providers and advocates to:

- *participate in the development and implementation of the Nation Plan to better protect the rights of older Australians;*
- *coordinate independent research and evidence based policy development;*
- *promulgate best practice in elder abuse prevention, intervention and remediation measures.*

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

We support this proposal.

The Network recommends broad consultation on the terms of reference to ensure that a common definition of elder abuse is utilised for consistent interpretation and analysis of existing and future data. We reiterate our submission to IP47 (p.4) that the ALRC develop a definition of elder abuse for adoption in a national framework, plan, prevalence study and associated legal and policy responses.

Further the Network recommends that the ALRC detail the essential aspects of any future prevalence study, taking into account best practice from overseas.

Powers of Investigation

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.

It is fundamental to approach this issue from a rights based perspective. It must first be acknowledged there is no right to protection from all forms of violence, abuse and neglect (including self-neglect) under international law either universally or specifically in the context of ageing, older age and older persons.

Whilst violence against older women has been recognized by the CEDAW Committee in its General Recommendation No. 27,[2] this only applies to older women and, as a general recommendation, is advisory only. The experience of older women suffering violence and abuse is becoming better known and prioritised by many international agencies.

Similarly, the obligation of States to prevent all forms of violence and abuse and provide, under Article 16 of the Convention of the Rights of Persons with Disabilities only applies to older persons with disabilities and not all older persons.

[2] General Recommendation No. 27, Older women and protection of their human rights, 2010

The Optional Protocol to the Convention Against Torture (OP-CAT) has the potential to prevent torture and other cruel, inhuman or degrading treatment or punishment of older persons in long terms care facilities. OP-CAT establishes independent international and national bodies whose mandate is to make regular visits to places where people are deprived of their liberty, including social care institutions, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment (OP–CAT, Article 1).[3] However, as with other provisions under international law, this is limited in its scope since it only applies to older persons in social care institutions.

Without the benefit of universal or specific guarantees, a scheme for investigation of elder abuse must entrench the rights that ought to be provided under a Convention on the Rights of Older Persons (CRPD). The Office of the High Commissioner for Human Rights,[4] the Open ended Working Group on Ageing[5] and the Independent Expert on the Enjoyment of all Human Rights by Older Persons[6] have identified violence abuse and neglect as key rights gaps for older persons globally.

Accordingly, we support measures to extend protection of older people who, due to their vulnerability associated with age, are at risk of experiencing elder abuse, notwithstanding that they do not lack capacity.

The Network does not consider that *older person* requires definition in the context of this issue.

We also consider the Office of the Public Guardian/Advocate is, on balance, the most appropriate agency to be vested with broader powers to respond to incidents of alleged elder abuse. We note that the guiding principles of any agency should be moving from using a least restrictive approach towards realisation of the CRPD in terms of rights, will and preferences.

The Network is concerned that the proposed trigger for investigation is too narrow and requires contextual adjustment. The triggers may exclude cases where the abuse of the older person arises not because of any care and support needs per se, but rather because of the actions of a third party or as a direct result of an abuse of power within a relationship of trust or where one might be expected. This is particularly relevant to cases of financial abuse, where for example, a perpetrator may be trusted with banking facilities notwithstanding the capacity of the older person. In such a case, the inability of the older person to protect themselves may not be because of their support needs but rather the abusive, coercive or fraudulent actions of the other person, usually a close relative.

The triggers, as currently framed, would only apply in some cases of vulnerability. The trigger should reflect best practice evidence of the risk factors of elder abuse. The WHO set out the evidence for the risk factors in its World Report on Health and Ageing as follows:[7]

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[3] Optional Protocol to the Convention Against Torture, 2002

[4] Office of the High Commissioner for Human Rights, *Normative standards in international human rights law in relation to older persons, Analytical Outcome Paper*, August 2012.

[5] https://social.un.org/ageing-working-group/documents/seventh/ChairsSummaryOEWG7.pdf.

[6] Human Rights Council, 33rd Session, *Report of the Independent Expert on the enjoyment of all human rights by older persons*, A/HRC/33/44, 8 July 2016.

[7] World Health Organization, World Report on Ageing and Health, 2015.

EVIDENCE OF RISK FACTOR FOR ELDER ABUSE (Victim)	
STRONG	***LOW-MODERATE***
Significant disability	Gender: female
Poor physical health	Older than 74 years
Depression	Financial dependence
Low income or socio economic status	Race
Cognitive impairment	Victim-perpetrator relationship
Social isolation	Marital status
Victim lives alone with perpetrator	Geographic location

While this may not be an exhaustive matrix, it highlights the important connection between risk factors and triggers for investigation.

Other relevant scenarios not captured by the proposal include situations where the older person is unable to protect themselves from abuse because of the pattern of endemic abuse within a trusting relationship and where strong cultural practices are present, for example, where custom dictates that eldest sons are to be deferred to.

It is important that the ALRC take the current opportunity offered by this Inquiry to recommend a proposal that will 'go to the heart' of the elder abuse problem. There is ample research to demonstrate that:

- financial abuse is the most common form of abuse;
- Multiple types of abuse may co-exist (most commonly financial and psychological) or there may be a continuum where one type leads to another; and
- the most common perpetrators of elder abuse are family members.[8]

We therefore suggest that the proposed powers of investigation should be extended to include the following terms:

> *State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause or basis to suspect that an older person:*
>
> *(a) is, or is at risk of, being abused or neglected, including by a family member, within a relationship giving rise to an expectation of trust; and*
> *(b) is unable to protect themselves from the abuse or neglect, or the risk of it.*

One issue not canvassed fully is how Public Guardians might come to have reasonable suspicion or cause to investigate. It would commonly be from a complaint by a family member or associate of an older person, on referral from a Tribunal or from a member of the public. However, the reporting of matters from institutional bodies (health, social welfare, law, financial) is still controversial. The attitude of our sector to mandatory reporting remains mixed. Some view it is an opportunity to ensure that where institutional actors see elder abuse or have a reasonable concern, they have an

[8] Australian Institute of Family Studies, Elder Abuse: Understanding Issues, Frameworks and Responses, February 2016; Advocare Incorporated, National Elder Abuse Annual Report, 2014-2015; University of Western Australia, Examination of the Extent of Elder Abuse in Western Australia, 2011.

obligation to report, leading to action. Others see it is as risky, paternalistic, lacking in subtlety, and potentially problematic for some groups in society including Aboriginal and Torres Strait islander persons or members of the Culturally and Linguistically Diverse community. Those in favour point to the obvious benefits of having an action that breaks the cycle of abuse and intervenes in a timely manner, in order to minimise the harm of abuse.

Others raise the paucity of evidence that adult protective regimes have impacted effectively on elder abuse where they exist. Concerns about respecting the will, preferences and rights of older persons are legitimate. In many ways it mirrors how we see family violence – it is everyone's problem and reporting violence to the police is an appropriate response for any member of the community who witnesses violence.

The context of elder abuse includes family violence but also includes other aspects that raise concerns about the outcomes from mandatory reporting of abuse. The potential negative and unforeseen consequences of reporting do need to be balanced where the intrusion of a protective regime can make lives worse, not better.

Proposal 3–2 Public advocates or public guardians should be guided by the following principles:

(a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;
(b) the need to protect someone from abuse or neglect must be balanced with respect for the person's right to make their own decisions about their care;
(c) the will, preferences and rights of the older person must be respected.

There should be guiding principle that the older person has the right to be informed about all investigations and supported (where necessary) to participate in the process. This includes the right to access timely, tailored and independent advice (including legal and financial advice) at all stages of any relevant processes.

Compliance with international standards such as the CRPD is a mandated guiding principle.

Further the reference to "about their care" in paragraph (b) may unduly limit the principle for respecting the need of older people to enjoy autonomy over personal decision making.

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.

We support the introduction of these powers. Any new powers should not diminish any existing statutory powers of investigation.[9] The powers should be modelled by COAG to ensure consistent powers across jurisdictions.

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.

An integrated approach should be mandated by any action taken by Public Guardians and Advocates. Critics of protective regimes such as Guardians often refer to a lack of transparency and accountability in the way in which they conduct themselves. Working together with service providers including non-government organisations and other service providers to build an integrated approach in the community will help alleviate those concerns and will provide a better process for remediating and rehabilitating abuse victims.

This sort of approach has long been used in the area of family violence and can be adapted to work across the area of elder abuse. Models on this approach have been suggested by State Inquiries into violence and abuse in Queensland, New South Wales and Victoria.[10] The Australian Federal Police might also be included in an integrated approach. Some exploration of their potential role in elder abuse cases would be useful.

Resource Implications

The implementation of this proposal is clearly dependent on the national harmonisation of guardianship and powers of attorney laws and a significant commitment by States to adequately and appropriately resource these statutory authorities. It is imperative that an authority intervening in the personal affairs of older people is working within a properly resourced, rights-based framework and scrutinised effectively by robust accountability measures. An under-resourced investigative regime would risk the imposition of inappropriate and unwarranted interventions which may well be counterproductive to victims of elder abuse and in some cases endanger their safety.

The proposal raises questions about the availability of support services. IP47 correctly identified the need for additional resources for Public Guardians to perform this support, assist and refer role. Which organisations however will assist older people to bring proceedings for example to recover

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[9] For example, the investigation powers set out in Chapter 3, Part 3 of the *Public Guardian Act (Qld) 2014.*

[10] Queensland Parliament, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Adequacy of Existing Financial Protections for Queensland Seniors, Report No.2 55th Parliament; State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132 (2014–16); Special Taskforce on Domestic and Family Violence in Queensland, Not Now, Not Ever, Putting an End to Domestic and Family Violence in Queensland; New South Wales Parliament, Legislative Council, General Purpose Standing Committee No. 2. Report no. 44, Elder Abuse in New South Wales.

funds lost through financial abuse? The resource implications for support services "on the ground" are equally important and must be addressed to ensure that the rights based approach is a reality for older persons involved.

There is a risk that an under-resourced system will lead to 'bottle necks' of older people with support and assistance plans prepared by public guardians that cannot be realised for lack of available services.

Proposal 3–5 Any person who reports elder abuse to the public advocate or public guardian in good faith and based on a reasonable suspicion should not, as a consequence of their report, be:

(a) liable, civilly, criminally or under an administrative process;
(b) found to have departed from standards of professional conduct;
(c) dismissed or threatened in the course of their employment; or
(d) discriminated against with respect to employment or membership in a profession or trade union.

As noted above, the Network does not have a settled position on the introduction of mandatory reporting. It is noted that the Australian Research Network on Law and Ageing suggested the "preferable option for law reform [to amending privacy laws] is to consider the introduction of mandatory reporting" (p.30). Proposal 3-5 effectively proposes a compromise arrangement to remove barriers to voluntary reporting. It is suggested that if mandatory reporting was to be introduced the most appropriate area would be to impose obligations upon financial institutions where the risk of undermining a trusting professional care relationship is not present, as is the case of health professionals.

The Network is also wary of providing a statutory defence to perpetrators of abuse who use reporting procedures to avoid sanctions. Any protections should only be available to those reporters who are not perpetrators of abuse.

Part 4 Criminal Responses

The Network's members hold varied positions on the desirability of introducing criminal sanctions for elder abuse.

Whilst the criminal justice system may be ill-adapted to responding to the complex multidimensional dynamics of elder abuse, and there are existing criminal offences proscribing conduct that may amount to elder abuse (such as misappropriation of property), the role of criminal law enforcement agencies in the national response to elder abuse warrants recognition and further exploration by the ALRC.

Enduring Powers of Attorney and Enduring Guardianship

Proposal 5–1 A national online register of enduring documents powers of attorney also, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

We support this proposal.

Proposal 5–2 The making or revocation of an enduring document should not be valid until registered.

We support this proposal.

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

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

The principal, Public Guardian, Public Trustee, principal's lawyer, the principal's treating medical practitioner and other organisations with written consent for example banks, residential aged care providers, police and public health service providers.

Consideration should be given to limiting access by health professionals to only those enduring documents which include advanced health directives.

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

Yes, public guardians should have the power to undertake audits. The risk of detection may act as a deterrent for misuse of enduring documents.

The power to conduct checks of financial affairs and records should include documents that the attorney or guardian is required to keep as part of their statutory obligations. It should also include any documents that the public guardian has a reasonable cause for suspecting contains or is relevant to the principal's financial affairs including documents related to financial, legal and personal decisions as described by the relevant Powers of Attorney legislation in each respective jurisdiction[11]. This might include documents of the attorney such as their own bank accounts.

However random checks should not be seen as an adequate substitute to effective educational programs for both principals and attorneys.

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.

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[11] The schedule of these matters in the POAA contains a good list of the powers that an attorney has in respect of the types of decisions that can be made. The power to check should align with these decisions. Can they check documents that are beyond scope of the scheduled decisions, such as those subject to confidence or privilege?

We support this proposal. Anyone witnessing documents should have to do training on issues such as legislative requirements, capacity, responsibilities and duties, elder abuse, correct witnessing procedures (e.g. not in the presence of the attorney) and the consequences of any failure to comply with statutory obligations.

Attorney's signatures should also have to be witnessed for the purpose of the attorney being informed of their responsibilities and duties either by the witness or by showing to the witness their certificate for completing an online learning module.

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.

We support this proposal and recommend that it be extended to include the availability of a suite of equitable remedies and related orders. In our submission these powers need not be limited to older persons who have enduring impaired capacity and should extend to adults seeking redress against attorneys acting at a time of incapacity or acting under a general power of attorney. In the case of enduring incapacity, the question arises as to who is going to bring these proceedings given the adult's lack of capacity. It has been our experience that some Public Guardians have been reluctant to initiate proceedings for the recovery of such losses.

Proposal 5–6 Laws governing enduring powers of attorney should provide that an attorney must not enter into a transaction where there is, or may be, a conflict between the attorney's duty to the principal and the interests of the attorney (or a relative, business associate or close friend of the attorney), unless:

a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or
b) a tribunal has authorised the transaction before it is entered into.

We support this proposal. A general conflict transaction clause should not be sufficient. We submit that a useful additional proposal would be to impose a requirement that an enduring power of attorney not be registered unless the specific conflict transaction is adequately identified and a lawyer certifies that the principal has received independent legal advice about the nature and effect of the enduring document.

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;
(d) is, or has been, a care worker, a health provider or an accommodation provider for the principal.

We support this proposal and suggest that a person declared by a State Tribunal to be unsuitable for the role of attorney should also be ineligible.

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.

We support this proposal and suggest that 'entering a plea on a criminal charge' should be added to the list of proscribed actions.

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.

We support this proposal. The records required to be kept should be identified.

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.

We support this proposal.

Proposal 5–11 The term 'representatives' should be used for the substitute decision makers referred to in proposal 5–10 and the enduring instruments under which these arrangements are made should be called 'Representatives Agreements'.

We support this proposal.

Proposal 5–12 A model Representatives Agreement should be developed to facilitate the making of these arrangements.

We support this proposal.

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

We support this proposal.

Guardianship and Financial Administration Orders

Proposal 6–1 Newly-appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations.

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?

We consider that training of newly appointed guardians and financial administrators should be compulsory, perhaps in the form of a requirement to complete an online module. Training members of the community could also be part of the ongoing community obligations of justices of the peace or similarly qualified persons.

We recognise that creating impediments to the successful appointment of attorneys is undesirable and that some stakeholders such as public guardians and advocates may wish to ensure that there is an easy take up rate of attorneys. There is a need to strike the right balance between maintaining standards of decision making and providing easily accessible guardianship and administration.

Proposal 6–2 Newly-appointed guardians and financial administrators should be required to sign an undertaking to comply with their responsibilities and obligations.

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?

A person subject to an application for guardianship or administration should be notified of the application. A Tribunal should not make a decision about an application in the absence of proof of notification. Persons subject to applications should have access to an advocate who has a duty to consult and represent the views of the person. Access to Tribunal proceedings via personal appearance, video link ups, and the conduct of 'bedside' tribunal hearings in aged care facilities would all assist in ensuring adequate participation in the process.

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.

Proposal 7-1 to amend the *Code of Banking Practice* to make enforceable some of the protections provided by the Australian Bankers' Association (ABA) industry guideline *Protecting vulnerable*

customers from potential financial abuse (the guideline) is sound but insufficient. The guideline refers to a range of activities banks ought to already be undertaking to comply with the existing *Code of Banking Practice* and their other legal obligations and clarifies those for the specific situation. The guideline, apparently focused mainly on women in intimate partner domestic violence situations, gives guidance in situations of unusual withdrawals or transfers of money, but does not specifically refer to the products or transactions which, in our experience, are the most vulnerable to abuse in elder abuse situations.

It is also our experience that bank staff can, and often do, intervene under existing protections where there is an obvious abuse such as an unusually large withdrawal or transfer of money.

This is less so the case when the abuse is in the form of taking a guarantee over an older persons' place of residence, procuring a reverse mortgage or entering into joint debt where only one party benefits. In fact, at least in respect of guarantees and reverse mortgages, much bank marketing and even political commentary suggests that these sorts of transactions are appropriate in the redistribution of resources among the generations. It is now seen as relatively normal to ask older parents to provide some financial support or guarantee to a child seeking to buy their own home as some sort of 'early inheritance'. In our experience, the normalising of this particularly dangerous transaction is troublesome. Unless explicitly stated, it is unlikely that front line bank staff would identify this as a potentially abusive situation that may ultimately lead to an older people becoming homeless.

We recommend that the amendment to the *Code of Banking Practice* explicitly provide guidance on those areas of banking practice which affect older people in particular as well as the general guidance on abusive situations more broadly.

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.

The wide spread practice of allowing third parties to operate the bank accounts of older people is partly related to a shift away from age (and disability) friendly banking and the notion of supporting decision making and autonomy. Further it is our experience that many older people rely on adult children to operate internet banking and that passwords are routinely accessible by those children. The risk of financial abuse created by these circumstances requires action.

Any proposal regulating this practice ought to also require banks to:

- provide services that are accessible for older people, particularly those who struggle with internet services and automated telephone programs.
- ensure that online banking is being operated (and capable of being operated) by the account holder, or under an appropriate authority.

Where it is not possible to provide better access via better banking facilities, third party authorisations ought to be considered as seriously as any other substituted decision making instrument. If it is not possible in a particular situation to obtain an EPOA or an administration order

(and we struggle to think of a situation when this would not be more appropriate), then a third party authorisation should have as close to possible the features of an EPOA.

Other matters

FOS Terms of reference

In our experience a substantial barrier to accessing remedies in situations of abuse through the banking system is the difficulty in taking some sorts of matters to the Financial Ombudsman Service (FOS).

FOS cannot assist in any cases between a FSP and their customer in which any sort of fraud may be present. Fraud is often a feature of disputes with lenders in which elder abuse is a factor, particularly where an older person's signature has been forged or where there have been unauthorised withdrawals from a bank account. This has the practical application of either preventing access to the only reasonably useful system for resolving banking disputes or, more often, not drawing attention to the fraud in complaints where fraud is in fact present.

The lack of access to FOS for third parties can also impede older people who have provided substantial sums of money to a son or daughter in connection with a loan (normally in the form of a deposit) taken out by that family member but where no guarantee has been taken.

Privacy and fair treatment versus protection from abuse

There is an argument that in order to protect bank customers from abuse that there would need to be relaxation of (or immunity from) the rules relating to privacy and/or discrimination. In our view this is unnecessary.

In most abusive situations, the primary strategy should be to talk directly and alone to the person who is the suspected victim, and to then offer a range of acceptable strategies to that person to protect their interests. This is in fact a primary duty within the bank/customer relationship. While it may not reach a fiduciary duty, it might found a higher duty where a Bank is aware or should be aware of abuse and fraud. It is obviously in the bank's obligations to take proactive or remedial action within their power, in consultation with the older person. They can move money into another bank account, refuse loan applications investigate and report matters where appropriate – all with the undisclosed consent of the apparent victim.

It is more complex when the suspected victim is unable to protect their own interests and in those situations the advice of the suitable public guardian or advocate should be sought.

Discrimination law also already permits, and in fact encourages, differential treatment of a person with an attribute (including age) in appropriate situations. We understand that the complex nuances of anti-discrimination legislation are a frustration for many banks, including those with good intentions, but this does not mean that they are not necessary to protect the interests of bank customers. There is no need to unlawfully discriminate in order to protect from abuse. The whole customer protection regime considered together (including the protection from unlawful

discrimination) asks the bank to be thoughtful, careful and focused on their customer's individual interests. There is no conflict between the existing law and the proposed improvements.

In any event the process that Banks observe in such cases could be spelled out to clients as part of their banking terms and conditions, so agreement can be reached at the start of the relationship between banker and customer. Customers enter banking transactions that include a range of conditions that might be considered disadvantageous so entering those that will lead to future advantage or protection ought to be considered as a part of the standard bank/customer interface.

Protection of joint account holders

These proposals do not protect the other joint account holder when a duly appointed attorney withdraws all the money.[12] If there are to be any authorities on joint accounts, there should be some form of protection for the other account holder, e.g. their consent should be required for transactions involving amounts above prescribed limits.

Family Agreements

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

The ALRC needs to reach a broad definition of the terms 'family' and 'assets for care'. Granny flats are not necessarily assets for care. Further, if State Tribunals are to be vested with jurisdiction for these disputes, then consideration should be given to extending jurisdiction over loans and other matters including those giving rise to equitable claims.

Further the issue of how older people are able to protect their interests as third parties in family law proceedings requires some consideration. There needs to be some realignment of how older persons are involved in matrimonial property settlement where assets are likely to be lost through the property settlement process. Access to the Federal Circuit Court could be better facilitated by providing a third party right in certain circumstances (e.g. significant contribution to marital assets) to apply for orders or to commence their own proceedings as a separate cause of action rather than having to wait to intervene as a third party. Similar issues should be decided in the bankruptcy jurisdiction so the interplay between family law property matters and bankruptcy also allows older person's interests to be tested and prevail where appropriate.

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

This relates to the question of who the parties are within the context of elder abuse. Any relationship that satisfies that definition should also be considered in respect of assets for care.

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[12] There is anecdotal evidence that this practice is occurring more frequently with the increase in blended families.

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.

The Australian Solicitors Conduct Rules need to include commentary on the importance of legal practitioners being aware of elder abuse in their practice. This is particularly important for legal practitioners that work in areas such as will and estates, guardianship, property, family law and family violence. Elder abuse can easily be prevented in some cases by following existing ethical obligations including the requirements for:

- Professional conduct issues about testamentary capacity
- Professional liability issues such as capacity negligence and third party liability
- Specific issues including unconscionable conduct, undue influence, suspicious circumstances
- Assessment of capacity and record keeping

Advance care planning should also canvass the whole range of documents available to older persons from Statements of Choices,[13] Wills, Powers of Attorney, Health Directives and Advance Care Plans. Legal practitioners must also be aware of the need for referral of older persons to financial specialists in some cases where planning for entry into aged care. All of the listed documents have the propensity to be both a sword and shield. They can prevent harm and be used to cause harm.

Proposal 9–2 The witnessing requirements for binding death benefit nominations in the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) should be equivalent to those for wills.

We support this proposal.

Proposal 9–3 The *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) should make it clear that a person appointed under an enduring power of attorney cannot make a binding death benefit nomination on behalf of a member.

We support this proposal.

[13] See for example https://metrosouth.health.qld.gov.au/acp/statement-of-choices-form

Social Security

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 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.

Proposal 10–3 Centrelink communications should make clear the roles and responsibilities of all participants to arrangements with persons of Age Pension age that concern social security payments.

Proposal 10–4 Centrelink staff should be trained further to identify and respond to elder abuse. Checks on use of carer's pension.

We endorse the submission of the National Social Security Network (submission 247) which in turn supported each of the above proposals.

In response to Proposal 10-2 we note there is an opportunity provided to Centrelink to garner evidence about assets for care arrangements that could become important in the event of a subsequent dispute about the nature and terms of any agreement, for example an arrangement about a 'granny flat' investment.

There is also an important opportunity for Centrelink to engage in preventative action. In many cases older persons avoid asking their family members to formalise family agreements despite having the sense that this would be in their best interests. Centrelink might assist older people to protect themselves if there was a requirement to provide even the basic terms of such arrangements. Such a requirement would also:

- encourage family members to educate themselves about the pitfalls and benefits of the arrangement,
- facilitate planning for events such as the need for the older person to move into aged care or the marital separation of the older person's adult child, and
- provide clear evidence of contractual arrangements.

Centrelink should also have a strategy to check in with the older person about the use of carer's pensions to meet their care requirements.

Aged care

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.

We support this recommendation.

Importantly the scheme needs to flow through to accreditation and service standards in a systemic manner. The scheme needs to balance and address two important interests. Firstly, the interests of the individual user. Secondly the interests of the aged care system (Government, taxpayers, users and those who rely on it such as family and carers). Accountability to each through the reporting process is crucial to its success. For example, a reported incident must provide a critical response to those involved (victim and perpetrator), it must translate into accountability outcomes through systemic accountability including service standards, accreditation etc.

Other reporting schemes that focus on reporting abuse of vulnerable persons (e.g. child protection and disability services) provide best practice and a range of comparable reporting structures. For example, child protection reporting is predicated on reporting that a child has "suffered significant harm, is suffering significant harm, or is at unacceptable risk of suffering significant harm."[14] 'Harm' is very broadly defined to include:

- any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.
- It is immaterial how the harm is caused.
- Harm can be caused by physical, psychological or emotional abuse or neglect or sexual abuse or exploitation.
- Harm can be caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances.[15]

While this is only one example of reporting, it provides an example of how a scheme operates which seeks to cast its net wide among the various types of harm that might impact on a vulnerable child.

Proposal 11–2 The term 'reportable assault' in the *Aged Care Act 1997* (Cth) should be replaced with 'reportable incident'.

With respect to residential care, 'reportable incident' should mean:

(a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient;
(b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or
(c) an incident resulting in an unexplained serious injury to a care recipient.

With respect to home care or flexible care, 'reportable incident' should mean a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient.

The way reportable incident is defined above may be limiting in that it does seek to provide a taxonomy of incidents. Examples are useful in definitions but only where it does not lead to watering

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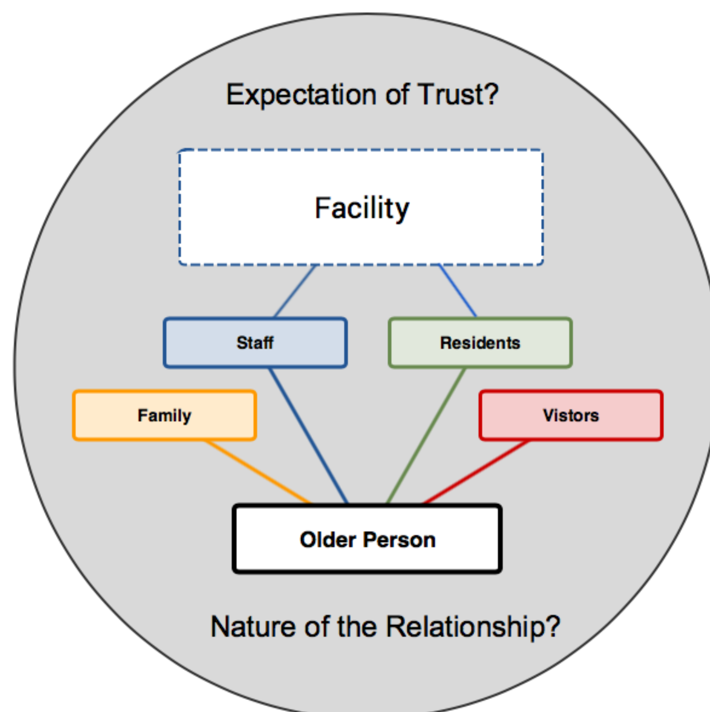
[14] Child Protection Act 1999, section 13C.
[15] Child Protection Act, section 9.

down of how the definition is read and importantly translated into policy and service standards. For example, sexual misconduct might be read to only include serious sexual 'incidents" when in fact it should include acts that are usually known as sexual harassment, which carries a reasonable threshold test to exclude matters that would not ordinarily find unwelcome or offensive.

It is not clear why the incident does not include death as an additional category. Further consideration given to how deaths in aged care are treated within the aged care regulatory framework and within state Coroners' jurisdictions. Deaths in aged care are rarely investigated for systemic causes and the lessons that might be learned are inevitably lost.

Additionally, it is not clear why the definition does not cover incidents between care recipients and others such as visitors, including visiting family members. Many examples of elder abuse continue into aged care settings or begin there given the added vulnerability of the older person. Incidents between care recipients should not be excluded but may also require an additional overlay of management action to ensure the ongoing safety of all involved.

Further, even if the definition were left as is, 'staff member' is a potentially limiting definition, given it may not apply to contractors and sub-contractors. The diagram below shows the range of interactions possible in the aged care setting. If the aim is to protect older persons from harm, there is little point protecting from some aspects but not others, especially those most prevalent such as financial abuse.



Proposal 11–3 The exemption to reporting provided by s 53 of the *Accountability Principles 2014* (Cth), regarding alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, should be removed.

We support this recommendation.

Proposal 11–4 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:

(a) a person's national criminal history;
(b) relevant reportable incidents under the proposed reportable incidents scheme; and
(c) relevant disciplinary proceedings or complaints.

We agree with this recommendation.

Further we view that ongoing suitability must be assessed by a disclosure regime similar to 'working with children' laws. Suitability holders must be subject to ongoing obligations to disclose suitability matters. A check on entry to the system only has serious limitations that need not be expanded on here.

Proposal 11–5 A national database should be established to record the outcome and status of employment clearances.

We support this recommendation.

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.

We support this recommendation.

We question how effective a Code of Conduct will be in terms of enforcement and acknowledge that the scheme needs to balance the interests of the worker with the interests of potential care recipients. Obviously any incident that causes harm should initiate a proper inquiry into the ongoing suitability of that worker.

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.

We support this recommendation.

Further we recommend that an overall plan be put in place in this area. The plan should include induction and training, a system of data collection and complaints and accountability mechanisms, including for family of care recipients.

The ALRC work on this issue in previous Inquiries has given it insight into the necessity for reform in this area. There should be opportunity for service providers to self-define what is a restrictive practice, the process through which a decision to use one is reached or the ongoing accountability for the use of that practice.

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.

We support this recommendation.

Proposal 11–9 The Department of Health (Cth) should develop national guidelines for the community visitors scheme that:

(a) provide policies and procedures for community visitors to follow if they have concerns about abuse or neglect of care recipients;
(b) provide policies and procedures for community visitors to refer care recipients to advocacy services or complaints mechanisms where this may assist them; and
(c) require training of community visitors in these policies and procedures.

We support this recommendation.

Proposal 11–10 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:

(a) whether the rights of care recipients are being upheld;
(b) the adequacy of information provided to care recipients about their rights, including the availability of advocacy services and complaints mechanisms; and
(c) concerns relating to abuse and neglect of care recipients.

We support this recommendation.

We note the independence of official visitors is fundamental to their success as an accountability mechanism. This includes ensuring that their consultations and consequent records are protected by confidentiality.

Proposal 11–11 Official visitors should be empowered to:

(a) enter and inspect a residential aged care service;
(b) confer alone with residents and staff of a residential aged care service; and
(c) make complaints or reports about suspected abuse or neglect of care recipients to appropriate persons or entities.

We support this recommendation.

Other Issues

Funding and Resources

It has been estimated that the cost of elder abuse to the Australian health system will be in excess of $350 million by 2025.[16] This figure does not consider the costs to other systems, including the legal system.

However, an issue not directly addressed in IP47 and which is fundamental to attempts to implement reform in practice or to address and respond to elder abuse is the need for increased funding to services assisting older people. This issue is also mentioned later in this submission in the context of best practice responses to elder abuse.

While the Network welcomes the announcement by Attorney-General Brandis of $15 million to develop the National Plan, funding cuts to other services assisting older people experiencing elder abuse, including CLCs will have a significant impact on the ability of these people to access the legal assistance they need. The importance of these services have been recognised in a range of reviews and inquiries, including for example the landmark 2007 Older People and the Law Report completed by the House of Representatives Standing Committee on Legal and Constitutional Affairs. [17]

In particular, CLCs play a key role in best practice legal responses and see hundreds of thousands of clients, including older people, each year. A holistic, multi-disciplinary approach provides a model for prevention and remediation of elder abuse. This is typified by the CLC mixed service model which uses a combination approach of casework, community education, policy and law reform and community development to address the issue. The breadth and nature of CLC work in this area is reflected in part in the submissions to this Inquiry from CLCs across Australia. However, CLCs are facing a 30% cut nationally from 1 July 2017, which will have a direct impact on the ability of CLCs to provide legal assistance to older people. In light of these issues, the Network suggests that it is important that the ALRC consider and make recommendations about the funding and resources of services (as part of best practice legal responses and access to laws and legal frameworks), including CLCs, that assist people experiencing elder abuse.

Recommendation: The Federal, State and Territory Governments provide funding and support to services assisting people experiencing elder abuse, including Community Legal Centres.

[16] See, for example, Relationships Australia, *January 2016: Elder Abuse* (January 2016) <http://www.relationships.org.au/what-we-do/research/online-survey/jan-2016-elder-abuse>.

[17] Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007) recs 38-40.