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The Executive Director
ALRC Elder Abuse Inquiry
GPO Box 3708
Sydney NSW 2001

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Dear Sir or Madam,

Re: NLA response to ALRC Elder Abuse Discussion Paper 83

Thank you for the opportunity to provide these comments on the Elder Abuse Discussion Paper 83 (DP).

About National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

These comments

These comments are made on behalf of all LACs.

They follow our more detailed submission to the IP which described the substantial role of LACs in legal assistance service delivery including to older people, provided relevant data, and confirmed legal needs and the funding shortfall in relation to access to justice services.

We are generally supportive of the proposals in the DP. This support is based on our respective LAC experience of service delivery to older people.

Each of Legal Aid NSW (LANSW) and Legal Aid ACT (LAACT) has made a submission to the DP addressing particular proposals in the DP in detail, and we endorse those comments.

Chapter 2. National Plan

Why there should be a National Plan

Proposal 2-1 A National Plan to address elder abuse should be developed.

Improving the evidence base

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

NLA strongly supports Proposal 2-1 for a National Plan to address elder abuse, and Proposal 2-2 that a national prevalence study of elder abuse should be commissioned.

We note the suggestion in the DP that the National Plan to Reduce Violence against Women and Their Children 2010-2022 be used as an instructive model. Our experience of that Plan is that it has further facilitated the personal protection and social support of women and children by LACs and other legal assistance service providers in each of our respective states/territories.

NLA also notes the suggestion that “In developing the National Plan, national consultations should be undertaken to provide opportunities for contributions by individuals and organisations.”¹ and that a national steering committee under the imprimatur of the Law Crime and Community Safety Council of COAG could develop the Plan, and that “the Age Discrimination Commissioner may be well placed to lead a number of strategies and actions of the plan, in consultation with key stakeholder groups.”² NLA believes that legal assistance service providers including NLA/LACs, could make a valuable contribution to such consultations. In this regard it is noted that LAC service delivery is to both older people and also to other people who are involved in the issues raised by the DP, e.g. because they manage the affairs of the older person, and/or are an alleged abuser.

In relation to the proposed prevalence study, in 2012 NLA funded the Legal Australia-Wide Survey (the LAW Survey) from the Law and Justice Foundation of NSW. The findings of the LAW Survey yielded both instructive data and a platform for future research, and the results of ongoing work continue to inform access to justice service delivery.³ NLA accordingly agrees with the statement in the DP that “in that context attention can be paid to breaking down the description of abuse into its various elements for the purposes of building a

¹ ALRC Elder Abuse Discussion Paper 83 p.50 2.13

² Ibid p.49

³ See NLA submission to ALRC Issues Paper 47 for further information.

detailed evidence base and to inform future data collection and policy responses.”⁴ The prevalence study will need to be carefully crafted.

Chapter 3. Powers of Investigation

Outcomes of an investigation

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.*

A timely referral for legal advice is likely to be appropriate in many cases where the public advocate/guardian considers an investigation is warranted. Timeliness is particularly relevant where personal protection orders may be necessary and/or the investigation could have the capacity to ultimately result in a criminal prosecution.

In the context of circumstances which might result in a criminal prosecution, a right not to self-incriminate is not a right at all unless it is known, understood and capable of being exercised, and accordingly we would suggest that an alleged perpetrator should always be referred early for legal advice, and before being required to attend an interview or produce documents.

As the DP suggests in a number of places an alleged perpetrator may also be in circumstances of vulnerability. Such circumstances may include poor mental health or addictions (e.g. gambling, drugs/alcohol) which may be factors in the alleged abusive behaviour. They may also be a result of the strain associated with providing care for a particular older person with high needs or challenging behaviours. They may indicate a need for more extensive legal help, e.g. in the area of credit/debt relief, in addition to the provision of social supports.

LACs have well-established legal assistance telephone hotlines. These hotlines, and other LAC services, are already relied on by many people in connection with issues arising out of alleged/elder abuse and, appropriately funded, are an existing infrastructure which could be

⁴ ALRC Elder Abuse Discussion Paper 83 p 21 1.32

used by public advocates/guardians as referral points for each of the older person and the alleged perpetrator.⁵

Chapter 5. Enduring Powers of Attorney and Enduring Guardianship

Privacy

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

In the event that a register was to be implemented, then it is suggested that anyone should be able to search the register to ascertain the existence of an enduring power of attorney but only the nominated attorney, the principal and someone acting with the authority of a court should be able to access the details of the document. This should help balance the individual's right to privacy and the need for authorities to protect those vulnerable to abuse.

Compensation

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.*

The DP states that vesting of the proposed powers in state and territory tribunals "would provide a practical way to redress loss for older persons unable or unwilling to take criminal action or action in the Supreme Court. Tribunals aim to facilitate the just, quick and economical resolution of proceedings."⁶

As indicated in NLA's submission to the IP, LAC data confirms that the bulk of older person's needs are in civil law including, amongst others, proceedings of this nature and those arising where family agreements have broken down (see also proposal 8-1 Low cost options to resolve disputes, Chapter 8).

The Australian Government Productivity Commission report on its Inquiry into Access to Justice Arrangements⁷ found that generally grants of legal aid in civil law are limited due to funding constraints, and that as an interim measure around \$124 million⁸ per year was necessary to address this.⁹ Any simplification of civil law proceedings and the expense

⁵ See NLA submission to ALRC Issues Paper 47 for further detail about LAC services

⁶ ALRC Elder Abuse Discussion Paper 83 p.103 5.85

⁷ Productivity Commission 2014, Access to Justice Arrangements, Inquiry Report No. 72, Canberra

⁸ Ibid Appendix H p1026

⁹ See NLA submission to ALRC Issues Paper 47 for further detail

associated with them is therefore welcomed. Legal advice and legal assistance to navigate proceedings self-represented, and full legal representation in some cases are however likely to continue to be necessary.

Restrictions on conflict transactions

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.

LAAC has suggested that legal advice should be mandatory prior to signing an enduring power of attorney, and although there are different views amongst LACs about this, if it were to happen then all LACs would be well placed to provide such services as considered appropriate within jurisdictions, and with the necessary funding.

The valuable role played by all LACs in providing community legal education, and legal advice and information as timely intervention and prevention strategies is noted generally in the context of supporting understanding of legal responsibilities, particularly where legislative change is envisaged.¹⁰

Chapter 8. Family Agreements

Low cost options to resolve disputes

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

Please refer our comments above in response to Proposal 5-5.

Chapter 11. Aged Care

Compulsory reporting of abuse and complaint handling

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*

¹⁰ See NLA submission to ALRC Issues Paper 47 for further detail about LAC services

Complaints Commissioner, who will oversee the approved provider's investigation of and response to those incidents.

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.

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.*

NLA supports the ALRC proposal for “the establishment of a national reportable incidents scheme designed to respond to concerns raised about the limited scope of the current reporting regime, and the lack of transparency and accountability in responses to reportable assaults. The scheme would replace the existing reporting regime in the Aged Care Act and, to be effective, it will be critical that adequate investment and resourcing is allocated to ensure that the scheme can function effectively.”¹¹

NLA notes LANSW comments in relation to clarity around powers, and that investment and resourcing considerations should also include those associated with the downstream effects of a scheme.

For example, in relation to the proposal to remove the exemption to report alleged or suspected assaults committed by a care recipient with a pre-diagnosed cognitive impairment on another care recipient, does the matter then rest with the Aged Care Commissioner, or must it be referred to the police to ultimately determine that no/further action is required?

¹¹ ALRC Elder Abuse Discussion Paper 83 p.205 11.62

Employment screening in aged care

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.*

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

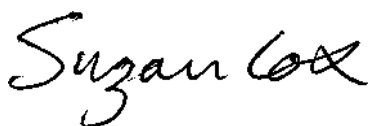
Whilst the protection of older people is the primary consideration, it is also important that appropriate work forces are maintained¹² and that the livelihoods of individual carers who pose no future risk to older people are not jeopardised, and the LANSW suggestions about discretion and procedures for review are supported with the capacity for affected individuals to obtain legal advice and assistance about the personal situations from LACs.

Conclusion

Please do not hesitate to contact us if you require any further information.

Thank you again for the opportunity to provide these comments.

Yours faithfully,



Suzan Cox QC
Chair

¹² ALRC Elder Abuse Discussion Paper 83 p.235 11.223 identifies the staffing issues raised by stakeholders.