**Submission to ALRC reference in to Elder Abuse**

**Introduction**

This is a complicated issue because the aged person is often vulnerable in a number of areas and open to abuse physically, emotionally and financially.

The people most likely to abuse the aged person are their loved ones, neighbours and those in a professional carer relationship.

In this submission we will recount experiences from caring for a relative in aged care over a number of years and insights we have gained from interviews and research.

**Important areas requiring research include:**

\*The intersections of law, health and ‘helping’ professions. The different philosophies expressed in these disciplines.

\*The ‘autonomous’ older person, as the bearer of rights. In particular, the right to practice religion/culture in the facility.

\*The right of the elder person to electronic communication with family and friends.

**Questions**

**What is Elder Abuse?**

Q 2. The elements of best practice in legal responses are those that ensure transparency and accountability.

Q 4. There is little research to provide empirical evidence of (see Greta Bird and Jo Bird, ‘No Place Like Home: Human Rights of Women in Aged Care’ in Jocelynne Scutt (ed), *Intersections*, Palgrave Macmillan (forthcoming).

\* the extent of the abuse of the Power of Attorney (Financial) and the Medical Guardianship Power.

\* the ability of aged care residents to practice their cultural and spiritual heritage.

\* the extent of abuse in aged care centres.

\* the efficacy of the current Tribunal system in the Guardianship area.

**Recommendation:** Further research is needed in those areas.

**Aged Care**

Q 11. As stated there is insufficient research in the area of abuse in aged care facilities. This information is difficult to gather. However a better system of government inspection and perhaps cameras in private areas, such as bedrooms would assist.

Q 15. The close monitoring of drugs, especially anti-psychotics and epilepsy prescriptions that increase drowsiness and the risk of falls, would reduce the potential for abuse.

Q 16. See Q 15, there is an urgent need to improve the quality of medical care, especially in relation to the prescription of ‘mood altering’ drugs.

Q 19. We would like to see a Commissioner appointed and a specialist Tribunal set up with civil offences as part of the aged care sanctions regime.

**Appointed Decision Makers**

Q 29. The Power of Attorney (Financial)

The opportunity for financial abuse is very prevalent in the case of a person holding a POA. This type of abuse could be uncovered and dealt with if there was a Royal Commission set up to investigate. Importantly people should not be able to hold this power without being registered, having undertaken training in the legal responsibilities entailed in exercising the power and being required to provide audited financial statements each financial year to the new Elder Tribunal.

Q 31. There should be a legally qualified person appointed to assist elders with ensuring that the elders are not abused by people holding their POA.

Q 34. Adult protection legislation should be introduced along the lines of the mandatory reporting of child abuse. In respect of elders, financial abuse should be included as incidents to be reported.

**Recommendation**: A Royal Commission to be set up into Elder Abuse.

**Health Services**

Q 36 Professional codes could include mandatory reporting where there are signs of abuse, such as significant bruising. There should also be a closer monitoring of the prescription of ‘mood altering’ drugs. These are often used where resources do not allow for one on one care by staff to cope with challenging behaviours.

**Forums for redress**

Q 39 There is an urgent need for accessible tribunals to hear and determine matters of abuse. However, in our experience there are serious deficiencies in the current tribunals.

Q 40 Most of our experience is in Victoria with VCAT. One of us attended a mediation session by a Senior Member which was conducted in an adversarial manner. The Member sat up high on a bench with family members at a table at floor level. We could not get eye contact with her. She did not display any empathy to the family members appearing before her. I left feeling frustrated that our relative (mother/grandmother) in aged care had not been given due consideration.

The role of VCAT (and other guardianship Tribunals) requires a thorough overhaul. The staff members are inadequately prepared for their role. The matters are rushed and there is not enough time to give feedback about the hearing.

There is a need for further empirical research into the operation of these Tribunals and publication of the findings in a transparent fashion.

**Criminal Law**

Q 42 The passing of legislation to provide criminal offences for serious elder abuse of a physical, emotional or financial type is an urgent priority.

There is research needed to identify the best type of legislation and how to implement it.

Q 45 The template here for reporting is the machinery set in place to provide mandatory reporting where abuse against young children is suspected. The aged person, particularly one with advanced dementia, is as vulnerable as a toddler and in need of similar protection.

Q 46 There is a need to change police culture in respect of elder abuse. Just as violence against women was seen as ‘just a domestic’, so too the treatment of elders may be regarded as purely a ‘family matter’. The aged care facility is often regarded as acting in a virtual ‘loco parentis’, carrying out the wishes of some family members or acting in what they deem as the ‘best interests’ of the elderly in their care.

Q 50 Civil penalties could provide a useful role in responding to elder abuse. Often a family member with a financial power of attorney may reward themselves or favoured family members with gifts from the aged parent/s assets. A family member may resist the ‘gifting culture’ concerned about the parent’s future needs. However the ‘whistle blower’ may want to preserve the family intact and avoid a criminal charge being brought against a sibling. In such cases the laying of a civil charge with a Tribunal hearing and a fine imposed if the abuse is established on the balance of probabilities could be a good outcome. It would provide a level of protection for the elder person and serve an educative function for the person holding the power of attorney.

**Further Issues**

There is a strong link between the financial power and the medical power. For example a person holding the financial power may not agree to the elder person having sessions with a physiotherapist or seeing a psycho-geriatrician. There is a need for an accessible method of requiring the person holding the financial power to pay for these medical bills.

There is also a strong link between the financial power and the lifestyle power, as lifestyle decisions frequently involve money. One example of this is the decision as to which aged care facility that a person living with dementia will reside.

**The Power of Attorney (Financial)**

The aged person may begin to lose capacity cognitively and/or physically and become dependent on others. There is the temptation for those others to take advantage of the aged person.

For example the ‘Power of Attorney’ (Financial) is in our experience open to abuse. If only one person, a son or daughter or trusted friend, obtains this power they may in reality ‘become’ the aged person in financial matters. This often starts with the justification: ‘mum (or dad) would like me to have this as a Thank You for all I am doing for them’. The gifts to self, to partner to children may grow as time passes. If one or another sibling asks about the money and how it is being spent they may be seen as ‘interfering’. The person with the ‘power’ may demand that the one questioning them acknowledge that they have the parent’s ‘best interests’ at heart. In a family that is dysfunctional, the aged person may be left with a reduced quality of life.

In my opinion, ‘unfinished business’ from childhood surfaces during these traumatic times as a parent loses their physical and cognitive powers. Family members are suffering grief as they lose the elder person as they knew them and death approaches. Family members require counselling to assist in dealing with the ‘unfinished business’ of childhood and to help them cope with their new responsibilities.

**Recommendations**: A financial Power of Attorney to require 2 persons at least to authorise payment. That a person holding a POA to be educated about the nature and extent of fiduciary duties. An audited financial statement in the form required by Tribunals such as VCAT to be made mandatory every 12 months to ensure that the aged person is being properly looked after.

Extra Elder Law Centres are required with specially trained lawyers to assist family members.

The government could provide a set number of counselling sessions for family members in distress and/or dispute over caring for their elders.

**Medical (Guardianship) Power**

**Medical Power**: this is the power to decide what medical treatment or health care an aged person should receive. There is often a dispute between family members over the type of treatment a person should receive as they approach end of life, particularly where they are suffering from advanced dementia. The aged care facility is able to authorise treatment in the person’s ‘best interests’, or to protect staff or other residents from aggressive or other unwanted behaviours. They have a duty of care to staff, all residents and visitors to the facility.

From our experience, there were meetings with senior nursing/management staff a couple of times a year and quarterly Residents and Relatives meetings. Relatives were not always able to access these meetings and the Minutes were not very informative. The facility asked that the resident’s doctor by chosen out of a small pool of doctors who currently visited the facility. While this was convenient for the facility it shifted medical power from the resident and their family to the facility. The doctors often made perfunctory visits. One day I visited our relative after receiving a phone call that she had a fall. The doctor arrived, stood at the doorway of the common room and said nodding in our relative’s direction: ‘You look to be OK.’ They then left the doorway and headed down the hall. I did not feel this was a proper medical examination of our relative. The doctor had only spoken to me on the phone and obviously did not recognise me.

In our experience our relative was quickly put on Zyprexa, a heavy anti-psychotic, in the aged care facility by her new doctor. She had no history of psychosis. She was, however, disturbed at being ‘tricked’ into care. She thought she was going on a holiday and became agitated when this was proved untrue. Our relative was already suffering from dementia, though she was able to spend 2 years in a low level care unit. She spent 6 years in care before her death. Research studies show that Zyprexa triples the fall rate and the death rate when prescribed to elderly people. We arranged for an independent psycho-geriatrician to examine our relative. He said that anti-psychotics should not be prescribed to people who did not have a history of psychosis.

There is research that demonstrates that one on one care is more successful than anti-psychotics and sedatives at managing ‘challenging’ behaviours in aged care. We arranged for our relative to have a carer sit with her, settle her into bed and help her with her night fears. We spent many shifts with her ourselves. In time she adjusted to her new surroundings.

**Link between Financial Power of Attorney and Medical Guardianship**

There is a link between the financial power and the medical power. A matter in dispute may be the subject of mediation at VCAT. At a VCAT session one of us attended the Senior Member was astonished that an elder’s money was being used for extra over-night care. She described it as ‘unsustainable’ when sufficient money from the sale of a house was available for this purpose. The member said: ‘I don’t know what the beneficiaries would have to say about this.’ Two of the 4 beneficiaries were sitting in front of her. However she made no inquiry of them and spoke in what I felt to be a condescending manner.

**Recommendation:** Members of tribunals be properly trained in the purpose and techniques of mediation, specifically for this vulnerable population.

That Members of tribunals to undertake inter-disciplinary study in Legal and Health issues in Aging before being appointed as members in the Guardianship area.

**Advanced Care Directives**

Recently the subject of death, palliative care and euthanasia are being more openly discussed. It is possible to make an Advanced Care Directive, while of sound mind, to give details of what the person would like to happen in the event they lose cognitive power and are being fed, toileted and so on by carers and will never recover the ability to sit up, walk, speak or eat or drink independently.

If one of these is in place and updated at appropriate times the family has good information about the wishes of the elderly person.

**Recommendation:**

\*People who hold a medical or financial power for an aged person to be educated about the Advanced Care Directive.

 \*Persons on or over 65 years of age to receive information annually about the role and purpose of the Advanced Care Directive.

\*Legal and medical practitioners to be trained in their undergraduate degrees and in professional upskilling in the role and purpose of the Advanced Care Directive.

**Human Rights of the Elderly**

**Recommendation**: The Australian government work internationally on the drafting and passage of a UN Convention on the Rights of Older Persons.

**Conditions for Staff at Aged Care Facilities**

This is based mainly on visiting a facility 6 days a week over a period of 3 years for a number of hours each day and keeping a diary. We have also visited other aged care facilities while undertaking research into cultural issues in aged care.

The staff, particularly the personal care staff, are generally motivated by a sense of responsibility and dedication. They receive very low rates of pay – less than they could get working in the retail field. The feeding, showering and changing of continence aids, for example, is work that is not accorded dignity in the mainstream. However where it is done from a place of love it is very impressive. In most cases we were full of admiration for the personal care staff. They had very little time allocated for their duties and still would do the important ‘little’ things, like brushing a resident’s hair or painting her nails, to bring some joy into her life. We have fond memories of staff in the ‘high care’ (dementia) area dancing and singing for residents and lifting their spirits. An atmosphere like this reduced ‘challenging behaviours’, though a variety of sedative type drugs were being prescribed for many residents.

**Recommendation**: Personal care staff should have their work reclassified to a professional level and their salary raised accordingly. They should be encouraged to undertake further study in the health field, particularly in the area of dementia and other cognitive problems.

**Funding for Proposed Changes**

The federal government could raise the money for the proposed changes outlined above by requiring a percentage of the assets paid to aged care to be set aside for health/legal responses to aging. Alternatively all people could be required to take part in a national insurance scheme to provide for proper legal and health advice/advocacy once this is required. Further, an amount could be deducted from estates before they passed to beneficiaries.

Again alternatively, perhaps there could be a levy on council rates, like the fire levy, to cover these costs.

 **Training and Education**

All Law Schools could be required to offer an elective in Elders and the Law as part of the professional bodies’ requirements for practise in the area.

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