ELDER ABUSE AUSTRALIAN LAW REFORM COMMISION SUBMISSION

Early in 2015 I had become a member of the ACT Council OF The Ageing (COTA) Elder Abuse Committee (EAC), and in 2016 I am now a member of the ACT COTA Culturally and Linguistically Diverse (CALD) EAC. As a volunteer researcher for the ACT COTA EAC I had assisted with the literature review in preparation for the ACT COTA Elder Abuse Forum (EAF) in 2015. In preparing for the EAF literature review on the issue it became evident that the content of the forum was solidly crowded with enough important issues that any legislative review would need to be addressed at a later date, and through a different forum. In July 2016 I had informed Jane Thomson, then Policy Manager at COTA ACT that I intended to submit my legislative review to the Australian Law Reform Commission as my own work and she was happy for me to to so. Therefore, I must stress that the opinions in this paper are mine and mine alone and references to the EAF are my perceptions of the discussions and general views of the participants present. Therefore, this paper represents my own opinions and perceptions and does not represent any views from any organisation that I have volunteered for, or work for on any professional capacity. I now submit my legislative review which suggests some Commonwealth and Territory/State amendments that could be enacted in order to better protect our older Australians.

Eva Cotterell

Very early on in my research it became evident that there are elements of elder protection which are already 'live' within Commonwealth and Territory legislation. As a resident of the ACT I initially focused on the relevant legislation that exists in the Territory. To date I have reviewed approximately 13 pieces of ACT legislation and one Commonwealth piece of legislation that I believe must be strengthened and which (with State/Territory/Commonwealth co-operation) could work as an effective barrier against Elder Abuse. And I have started to review other Commonwealth laws, however, although I have chosen to not include any more pieces of legislation in this current submission as I still have more research and reading to do[1].

In the course of my legislative review I then read about discussions which relate to the need for a new 'Elder Law', although most of this paper is focused on strengthening existing laws. I must emphasise, however, that the comments and opinions that I provide in this paper should be viewed as a discussion point, not least of which is because I do not hold any type of legal qualification. Well after the 2015 ACT Elder Abuse Forum (EAF), I continued on with my legislative Elder Abuse research with the view to using such a paper within a legal forum. I now present this paper as a discussion point on how to strengthen related and existing legislation that can be used to protect our older citizens, and comment on to comment on whether a new Elder Law is required.

Recently, I have graduated from a Bachelor of Behavioural Studies, Psychology at Swinburne University, and since January 2015 I have been working with the ACT COTA Elder Abuse Committee (EAC) as a volunteer policy officer. In June of 2015 the committee prepared a preliminary literature review and organised an Elder Abuse Forum (EAF). Now I am part of the ACT Culturally and Linguistically Diverse (CALD) EAC. I am a guardian for a family member in NSW, and I am a carer for elderly family member in the ACT. I have worked in the following sectors: education, information technology (17 years), banking, and justice sectors. It is this combined personal and professional experiences, which include 8 years working in remote-rural and Indigenous communities, that I have drawn upon in order to make suggestions for possible 'elder protection' amendments to be made against existing Commonwealth and Territory/State legislation. Moreover, even though most of the legislation that I have reviewed to date is ACT based, there are similarities in other Australian State/Territory jurisdictions for which suggested amendments may also be relevant. Additionally, I have examined how the ACT legislation could work in conjunction with the Commonwealth Banking Act 1959. With the mainly ACT legislative review I used a "multi-faceted lens", considering how legal frameworks may protect the elders from the criminal elements; from well intentioned but poor carer choices; and, how practitioners from a wide array of sectors could be able to legally assist or intervene in the event(s) of Elder Abuse. And while the focus within this paper is on making suggestions in order strengthen existing legislation, this paper argues that there is possibly a case for a new 'Elder Law' to be introduced. However,

[1] I have read over the Aged Care Act 1997 and an initial observation is that the legislation is heavily reliant on professional bodies have a code of conduct and process. I believe that there are possibly still avenues for abusers of elders to move between aged care centres. Some discussion may need to centre on the need to have some kind of licence with demerit points. The Working with Vulnerable People (WWVP) ACT 2011 has similar issues (see Attachment A)

I have chosen to not enter into any type of debate, at this stage, as to whether a new Elder Law should be State/Territory or Commonwealth generated and maintained.

The first pieces of legislation that I reviewed were the ACT Guardianship and Enduring Power of Attorney (EPA) laws, with the review of subsequent State laws occurring as one piece of legislation referred to another. The paper that I now present to the ALRC, represents my research to date on the issue of legislative changes that could be amended, or generated, in order to protect our older Australians. It is important to note that since my initial review of ACT legislation some may have already been amended, however, and some amendments may still need to be considered. It was after discussions at the 2015 ACT EAF, and on further research existing State and Territory inquiries on Elder Abuse, I also began to look at Commonwealth legislation. And with each legislative review I found it necessary to scour existing research in order to examine possible explanations and solutions to Elder Abuse.

Preliminary Findings

I found that the available literature on Elder Abuse, together with discussions at the EAF tend to point towards two main types of Elder Abuse: psychological abuse, which may stem from "carer stress"; financial abuse, which may stem from a sense of entitlement and/or possibly criminal intentions [1-3]. Either way, and interestingly the majority of participants at the 2015 ACT EAF felt that going down the prosecutorial pathways was not an entirely a helpful approach. A wide variety of organisation were encouraged to attend, many of who sent at least one representative: ADACAS, Canberra Community Law, Women's Legal Centre, National Council of Women, Office for Ageing, ACT Law Council (Elder Law and Succession Committee), ACT Policing, Seniors Liaison Unit, Consumer Law Centre, Salvation Army, St Vincent de Paul Society, Public Trustee for the ACT, Public Advocate of the ACT, WCHM (Women's Centre for Health Matters), Northside Community services, Communities@Work, Belconnen Community Services, Southside Community Services, Red Cross, Carers ACT, FECCA, Care Inc (also related to financial counselling and small loans to disadvantage people in ACT), ACT Ministerial Advisory Council on Aging, ACT Human Rights Commission- Older People Commissioner, ACT Civil and Administrative Tribunal, Victims Support ACT, Centre for Research on Ageing, Wellbeing and Health (CRAWH), Healthcare Consumers Forum, ACTCOSS, Karralika, ACT Medicare Local, Alzheimers ACT. COTA ACT Housing Adviser, Banking representatives, and Housing ACT.

Overwhelming, I perceived that most of the practitioners at the EAF felt that the prosecutorial approach too stressful and/or may create more stress for an elder at the centre of suspected abuse, and that there was a potential damage to existing family relationships for which an elder may be reliant on. It was felt that it may be more beneficial for both the elder and the carer, for the carer/families to get the extra support needed, and for family disputes to be resolved through informal methods [4]. It is important to note that at this stage Relationships Australia has been conducting trials on formulating family mediation settings which they believe have resolve many of the issues of financial abuse [5]. However, for agencies to provide support, to intervene particularly in cases of 'carer stress', there needs to be a legal basis to do so. This is so that families can access mediation services like the ones that Relationships

Australia mediate over, which are of a voluntary nature, in situations that require intervention.

Elder Abuse Defined

Another problem which has hampered efforts on addressing Elder Abuse, and in preventing the international knowledge on on the subject, has been the use of various definitions on the issue. Yet, while there is some debate as to how Elder Abuse may be defined I believe that the World Health Organisation (WHO) definition, tends to be the most often quoted and mostly captures the nature of the issue:

> *"Elder Abuse can be defined as "a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person". Elder Abuse can take various forms such as physical, psychological or emotional, sexual and financial abuse. It can also be the result of intentional or unintentional neglect"[6].*

The Beginning of an Elder Protection Movement

The fact that there are several definitions on Elder Abuse is evidence that the 'elder protection' movement is at the early days of inception. There are some similarities with issues raised by research conducted in the 70's/80's to address domestic violence: social isolation of the victim; the occurrence of physical, psychological or emotional, sexual and financial abuse; reliance by the victim on the perpetrator of abuse; issues of control, etc [7]. However, the difference with 65 and 85 years an older is that this demographic is more likely to have a lifetime of possessions, some with intrinsic value and some are assets which are required to fund the twilight year. Moreover, the statistics on Elder Abuse vary widely and are generally based on small sample sizes and on opinions of practitioners who are trying to address possibly the severest cases of Elder Abuse. Then there is varied elder definitions in use internationally which reflect that the 'elder protection movement' is still at the early stages conception. Yet there is growing body of international research on Elder Abuse that is increasing our understanding of Elder Abuse. So much so that there has been a vast 'teasing-out' of the demographics, precursors and dynamics of Elder Abuse.

And while the 'elder protection movement' is at the early stages of forming, particularly in Australia, caution needs to be applied on over-legislating and inhibiting healthy support networks. Hence, I believe that there is a very real danger, because of incomplete knowledge, that an overzealous approach to legislating for elder protection measures may in fact obstruct the informal and formal support networks and arrangements for which an elder may need in the long term. However, the converse and valid argument is that there is enough revealed from the Australian inquiries, with the common themes of mainly financial and psychological abuse emanating from someone (mainly familial) in a position of trust [2, 8, 9], that an initial and wider State/Territory/Commonwealth legislative review on the issue of Elder Abuse is warranted. Ultimately, there needs to be a balance between moral responsibility and obligations against the backdrop of dignity and aid (intervention) [10].

The Prevalence Of Elder Abuse

The WHO has reported the prevalence of Elder Abuse across nations to range anywhere from 1% to 10% but cautions that much is unknown about the true nature of Elder Abuse because of taboos, associated shame, or because of the private nature of the crime [6]. In 2011 the ACT Government, in a previous study found that the prevalence of Elder Abuse in the Territory is estimated to be 6% of the aging population [11]. There is also some indication that the prevalence of Elder Abuse may also depend on socio demographical measures. The WHO estimate that the prevalence of Elder Abuse may vary according to such socio-demographics as income. For instance, WHO report that in middle to high income families there is a difference to the level of Elder Abuse that may be experienced: physical abuse: 0.2-4.9%; sexual abuse: 0.04-0.82%; psychological abuse: 0.7-6.3%; financial abuse: 1.0-9.2%; and neglect: 0.2-5.5% [12]. And while there is enough information available to enable preliminary 'legislative Elder Abuse reviews', further investigation is still warranted, and more qualitative and quantitative data/research on Elder Abuse is required, in order for elder rights to be properly protected through legislative changes.

Caution about the Data Being Practitioner Based

Due to the nature of Elder Abuse, which tends to be hidden and familial, I believe has been a large factor in the paucity of Elder Abuse data available, either nationally or internationally. Consequently, there is much that we don't understand about the nature and dynamics of Elder Abuse which is more likely due to the familial and interpersonal nature of the act(s) which are often shrouded in shame [9]. And until the the lack of either qualitative or quantitative data on Elder Abuse is addressed, through national or international surveys and in-depth interviews, I believe that a steady and careful approach needs to be applied with any Elder Protection amendments on any given piece of legislation. Given also that the proportion of citizens aged 65 or older is expected to increase from 20% in 2017 to to approximately 38% of the population in 2056 [13], the issue of Elder Abuse is more than likely going to cause various governments greater concern. As such, society (government and not-for-profit agencies) will increasingly find it difficult to provide for the needs to assist in cases where an elder becomes destitute through financial abuse and hardship. More importantly for some elders there may be a shift from self-reliance to one of total reliance on such agencies as Centrelink and hence there may be a keenly sense of indignity felt in these type of situations. And with the increase in an aging population in Australian one could well expect an increase in elder cases being reported, potentially prosecuted or being addressed through other formal or informal State/Territory/Commonwealth agencies. It is crucial, therefore that we understand more about Elder Abuse and "Age-Friendly" societies, informal and formal networks, from the healthy fully-functioning end of the spectrum, to the dysfunctional lead up and maintenance of Elder Abuse scenarios. However, and disappointingly, I have found that there is much about Elder Abuse that we are yet to gain a truly balanced understanding of, from the fully functioning family/professional care scenarios to the opposite spectrum of the Elder Abuse cycle. Disappointingly, I have found that nearly all of the research material on Elder Abuse I have found to be mainly practitioner based. That is, the information that is available has been derived by a range of professionals from the health, legal or other fields, rather than from any data/opinions derived from the elders themselves. I suspect that there needs to be

careful consideration on the human rights of elders to make their own decisions (self actualisation and self determination) which need to be counter-balanced against moves to address the more extreme forms of Elder Abuse and exploitation. As such, I also believe that any legislative/legal recommendations made from the various national or international inquiries ought to be viewed from the standpoint that the opinions expressed are based on possibly the most extreme cases of Elder Abuse, whereby practitioners are required. I also believe effective legislative reviews needs to include representatives from the various agencies and organisations involved in addressing Elder Abuse, as well as a representative group of the over 65, over 85 demographic.

The Problem of Poor Qualitative and Quantitative Elder Abuse Data

Even at the preliminary stages of preparing for the ACT EAF it was evident to me that there was little in the way of satisfactory statistical data, with reasonable sample sizes and/or of a qualitative (interview) nature. At the start of my Elder Abuse research in 2015, and even in 2016 there is still a deficit of Elder Abuse data available for a proper analysis, a deficit which I have found to exist both nationally and internationally. Ultimately, I feel on one hand that there is enough knowledge on Elder Abuse that existing legislation can be strengthened, nevertheless, solid legislative changes need to come from a balanced standpoint, from a more solid foundation of understanding, through such tools as national surveys and in-depth interviews. More importantly, Australia could lead the way on producing such tools which focus not only on the self actualisation and self-determination aspect of growing older, but in capturing better data on the nature and prevalence of Elder Abuse across society. The ACT government I believe has cleverly gained some useful data in a less confronting and aptly named "A Baseline Survey of Canberra as an Age-Friendly City". At present, however, I would implore that Elder Protection changes are not over legislated for, so that the healthy frameworks and social support structures for our elders is not stymied or obstructed.

Disappointingly, there is very little in the way of qualitative or quantitative research from older Australians themselves on the issue of Elder Abuse, particularly in the way of any surveys or in-depth interviews. Moreover, there needs to be much more done in the way of gaining older Australian's opinions on how to protect themselves in their later years, and using a reasonable and representational cross section across the Australian community. However, while there may not been much in the way of quantitative or quantitative data available there would be some data available from government sources which could be further analysed. For instance, statistical census and other related data that may be available through the Australian Bureau of Statistics (ABS). Homelessness is considered to be one marker of poverty [3], and in order to understand the progression of an Elder Abuse one investigation could involve the analysis on the status of home ownership changes over the two main elder phases, age 65 to 85 and the over 85 aged group [3]. Questions like when is an elders key residence or properties sold?, and are the moneys used to pay for health fees, or retirement bonds, granny flats, etc?

Triggers To Identify Action on Individual Elder Abuse Cases

The ACT EAF participants talked quite a bit about having 'triggers' causing information to be sent and collated by a central case management agency, which can then co-ordinate an array of responses that may be required to address the complex issue of Elder Abuse, as it occurs. Even stronger was the emphasis in the forum that the 'triggers' should instigate some kind of action more in line with a strengthening and support mindset, rather than a prosecutorial approach. Again, as altruistic this may be, the legislation needs to provide the basis that agencies are able to intervene and provide support. Regardless of the lack of knowledge, however, about the precursors to Elder Abuse, across the various State and Territory inquiries and forums, financial abuse remained a strong and prevailing theme [1-3, 8, 14, 15]. In 2006 the Western Australian Public Advocate found that out of 600 reported cases of abuse: 47% involved dementia cases, 67% related to financial abuse, and 33% of referred cases relating to victims aged 65 years or older [14]. While at the 2015 ACT EAF there was some discussion on how all agencies and organisations, government and not for profit, could report concerns to a central agency, the specifics of how the tracking of unusual banking and/or other financial transactions could instigate an investigation into Elder Abuse was not explored. It was after the EAF that I then began to investigate how a central agency could gather data, what the data may be, how the data would then be channelled to the agencies like the Public Advocate for investigation.

Triggers Managed From a New Central Agency

At the 2015 ACT EAF I listened to the broad range of professionals/practitioners who have had to deal with Elder Abuse, and hence I am now acutely aware of the collective frustration that individual cases are addressed, in some cases when an elder becomes financially destitute, socially isolated or homeless. My perception was that the participants of the EAF believed that Elder Abuse needed to be identified earlier before such situations become as dire as the extreme cases that have presented themselves to their respective agencies. While there were no specifics discussed as to what or how Elder Abuse information could be captured or disseminated, it was felt that a central agency could oversee and manage such data, although there was no explicit view when such an organisation should be State/Territory or Commonwealth. Some EAF discussions explored the notion that Elder Abuse data could be somehow centrally collated and disbursed among a number of relevant agencies and organisations but there were no specifics that I recall being discussed as to what information would be gather, how it would be gathered, or how the information would be disseminated. I also believe it was felt, by the EAF participants, that there should be a mechanism(s) in the way the transfer of Elder Abuse information could be passed onto appropriate government agencies, for a more coordinated, and multidisciplinary approach to be executed. And while there was some discussion about the use of central Elder Abuse phone lines being used in other States, the general view was that the phone in systems were, for whatever reason, under utilised, and cases of abuse were more likely to be become apparent to such agencies as Health, Housing and the Public Advocate.

The Case to Legislate for Interventions

There was a very strong theme at EAF that prosecution is often not helpful in cases of abuse, and is seen as a tool of 'last resort'. Moreover, it was felt that Carers who can become overly distressed can inadvertently become abusers through not having the appropriate support. Therefore, it was felt that prosecuting a stressed out carer would not be very helpful to the elder requiring assistance and intervention. Nevertheless, in order for interventions, assistance, and support to be provided to strengthen family members, carers and guardians, to look after the elders, there still needs to be a stronger legal framework for actions to be taken, or for assistance to be offered. In other words, there needs to be a legal basis for multiple agencies to be able to provide intervention and offer support. Another interventionist example could be where mediation body to offer neutral mediation and relationship support/negotiation.

Commonwealth Laws and Elder Law

While I believe that there are valid arguments for or against creating a new 'Elder Law', I believe that existing State and Commonwealth laws needs to be strengthened first. For instance, it may be that some State legislation such as the ACT's Working with Vulnerable People Act 2011 (see Attachment A) could be further strengthened and perhaps negate the need for a new law. Or it may be after tightening existing laws that there are special conditions which relate more to older citizens than any other group and hence a new law (like the Children and Young People ACT 2008) is required. Certainly, there are special conditions that affect older citizens who may be less likely to recover from financial abuse and catastrophes, either due to poor health or through lack of opportunities and time. At a Territory/State level there are youth Acts and a new law may be justified on that basis that older Australians, as a demographic, have the so or all of the special characteristics of: a lifetime of savings and investment; a reservoir of sentimental and valuable possessions; access to the pension and/or super; an inability/or greater difficulties in recovering from financial hardship/ or severe losses; declining health due to the natural aging process (and the associated financial hardship); the fluid nature of cognitive capacity which can be temporarily or permanently affected by physical ill health; health related expenses which can then lead to poverty; then there is the effect that progressive diseases (Alzheimer's, Parkinson's, etc) can have on cognitive capacity [16]. An elder may not be able to recover from a catastrophic financial situation other than through public assistance or through other avenues other than the financial self funded scenarios [3, 17]. Moreover, after a lifetime of amassing: wealth, intrinsically and/or uniquely valued items, there simply may be no possibility of recovering valuables lost [17]. Another justification for a new Elder Law may be because the problem of the individual abuse cases suggests that a central agency may need to be formed in order to coordinate issues to be addressed by a range of State/Territory/Commonwealth agencies. A new central Elder Agency may need a new piece of legislation in order to provide a legal framework for operating within the community. Yet another reason for a central agency may need to be formed to co-ordinate the Enduring Power of Attorney entities, which can place the elder and the protector in separate States or territories. Further more a central agency may need to ensure that an elder rights and obligations, for the older citizens are faithfully enacted. Although one could argue that the Commonwealth Department of Human Services could perform a central coordinating role, albeit with a amendment to

relevant Commonwealth acts. More pressing, however, is for Commonwealth and State legislation to be reviewed by: carers, guardians and individuals (health professionals, social workers, etc.) who are charged with the care and protection of elders, criminologists, together with a representative sample of elders. I do believe that such discussions surrounding a new Elder Law will need to continue. For now, however, there is plenty of individuals laws that need amended and which could provide the legal framework for agencies to address individual Elder Abuse cases. Therefore, I believe that once that existing Commonwealth and State legislation is strengthened it would be good timing to intensify investigations into the need for a specific Elder Law is required.

A Justification for a Central-Coordinating Agency

There were discussions at the EAF on the need for improved reporting and handling procedures for abuse and suspected Elder Abuse cases among ACT government agencies. Although, at a Commonwealth level it could be argued that there could be a central co-ordinating agency. Nevertheless, at the State/Territory level a central agency is needed to coordinate response/case management/reporting of Elder Abuse cases; at a Commonwealth level there may be a case for a central register for such things as wills, guardians and enduring power of attorney's particularly as the participant can be in a separate jurisdiction than the person with the formal role. At the ACT EAC there was discussion that there needs to be a central and co-ordinated case management approach to addressing Elder Abuse, so in the future there may be a case for a Territory/State central co-ordinating agency for the case management issues and a Commonwealth central agencies to the registration of legal instruments. Therefore, future discussions need to begin with what kind of central agency or agencies are required before the subsequent discussion on how these organisations can exist in any kind of legal framework. Moreover, the information that is gathered by a central agency would, would need to funnel upwards or downwards to other organisations whose functions make use of such instruments as Guardianship, Enduring Power of Attorney and the like.

Enduring Power of Attorney and Guardianship

Some inquiries have discussed the need to have a central register of Enduring Power of Attorneys, however, once such instruments become active there really still needs to be extra protection automatically applied to significant property such as the family home. For instance, once an Enduring Power of Attorney (EPA)(or instrument like it) becomes active, then some form of process/regulation needs to be automatically applied to elder properties. In the ACT caveats can be applied to properties through the Land Titles Office, and in the future as a matter of course this method of protecting property from mismanagement could become a matter of course (rather than an exception). During my initial legislative review focus on the EPA and Guardianship laws, and it was later that I thought that the Commonwealth Banking Act 1959 could provide the legal basis to collecting Elder Abuse data, to provide a 'data trigger' if you you like, particularly as it relates to financial abuse[2]. The abuse of

[2] We cannot be certain at this point of time, particularly in relation to the inadequate quantitative or qualitative data on Elder Abuse, whether financial abuse can occur

EPA role has been discussed as a major issue at several Australian State inquiries [2, 3, 8, 15]. There appears to be several main issues that have been implicated in instances of financial abuse by EPAs; a lack of knowledge as to who holds the EPA role; lack of training; loose interpretation of an elder 'Capacity' (cognitive capacity); and carer stress, , and possibly a small criminal element [2, 3, 15].

Commonwealth Banking ACT 1959 and AUSTRAC

At the end of the 2015 ACT EAF I continued on with my legislative review. During the course of my legislative review I found that there is existing legislation that is already "live" but which needs to be strengthened. In addition, I found that not only do State and Commonwealth legislation need to be strengthened, but they also have to complement each other in order for Elder Protection changes to be effective. The purpose of the Commonwealth Banking ACT 1959 is to regulate any Authorised Deposit-taking Institution. Possibly this may be one act that can be used to regulate the detection of financial abuse of elders through the interception of irregular movements of monies (transactions). For instance, bank accounts maybe quickly depleted by unscrupulous individuals, at a rate which is contrary to an individual's normal banking pattern, either through transfers and/or withdrawals. The Commonwealth Banking ACT 1959 that could provide the legal framework for detecting elder financial abuse, and somehow a central agency would then contact the relevant State/Territory public advocate agency about 'protected accounts' which fall under the Enduring Power of Attorney (EPA). Therefore, the Commonwealth Banking ACT 1959 could be used to detect, at the early stages, elder financial abuse, while the Territory legislation could provide the 'ground-level' limits on 'trust roles'. In addition, the definition of 'protected account' could be better refined, in the Commonwealth Banking ACT 1959, to include examples such as the EPA, Guardianship, Victims of Crime, etc. Therefore, a protected account could be better refined again as belong to a 'protected person'. Yet, having previously worked in IT for over 17 years, and understanding that there may be limitations on such systems; my suggestion would be to determine what capacity our banking systems may have to be able to determine individual abnormal banking patterns, and then legislate, for a central agency accordingly.

Interestingly, the Western Australia report on Elder Abuse recommended the use of AUSTRAC to identify suspicious transactions [15] and this could well be a system to utilise for the purpose of creating a "trigger" for a range of agencies and institutions to investigate and address instances of Elder Abuse. In addition, further investigation needs to be made whether at an individual level, the volume and/or type of transactions can be detected as "unusual". Furthermore, further discussion needs to centre on what criteria would constitute a "normal" decline in account funds, and alternatively what would be considered unusual. For example, would a 40% depletion of funds over a period of 5 years, at a particular age, be considered unusual, or what would the measure be? Would the measure be the number of spurious transactions into another account? Then the next set of questions would be once a measure of unusual set of transactions occur then how would this be legislated for? Needless to say, a further investigation on what is technically possible in the detection of financial

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separately, or whether all abuse types occur together in a cluster of a precursor victimisation history, situations and conditions.

abuse among elders has to occur, followed by such discussions as to how to create the legal framework across Commonwealth and State laws for such information to be utilised (and within the limits of privacy legislation). Therefore, there should be further investigation as to how the AUSTRAC system, or a more suitable system that is in existence, could be used for the purpose of detecting Elder Abuse, and if so, this facility must, at the very least be legislated for in the Commonwealth Banking Act 1959.

Education Awareness and Other Interventions

Educational awareness was a very strong theme which emanated from the many discussions which emerged out of the ACT EAF. While most of the talk centred on education education/awareness campaign targeted at older people, the general community, and government and non-government staff of relevant agencies, yet how this issue would link in with a legislative review was not discussed. However, in the case of the 'guardian' or 'attorney' it would be difficult to prosecute in abusive cases when adequate training had not been provided by a respective agency. Likewise, if government booklets outlined the respective roles in complex language or in culturally inappropriate, and in ways that contrary meanings can evolve then there is room for a 'naïve' argument to be included in formal proceedings. Either way in the many forms that are available from a range of agencies there should be some kind of sign off to understanding the contents and accepting one responsibilities and limits to positions of trust. The training should be in addition to and compliment existing State/Territory court proceedings relating to positions of trust. The question then becomes: with positions of trust like EPA and Guardianship the legislation should include caveats in relation to responsibilities and understandings of such roles through training.

Cognitive Capacity

Currently when there is a question on whether a client has 'capacity' to make reasoned decision a solicitor is still making an initial assessment on whether it is appropriate to formulate a legal representation. When the capacity of a client is in doubt a solicitor can then refer a client to a doctor for assessment [18]. Therefore, any doctor can provide an assessment on the capacity of an elder to make signification decisions, in particular as it relates to financial decision. Yet currently, there is no restriction on which doctor can provide a cognitive capacity assessment, leaving the way open for 'doctor shopping'. Hence, some consideration could be given to including such wording as 'normal treating doctor' (if available) into such legislation which relate to EPAs and Guardianship. A normal treating doctor would have more insight into the fluid or static nature of an elder's cognitive State, which at advanced ages, can be greatly affected by stress, temporary or chronic illness, leading to a temporary or permanent State of capacity. And while some elders may not have a normal treating doctor a clause in existing laws ensuring that the regular practitioner (where applicable) be consulted should prevent some instances of doctor shopping. Then there is further discussion warranted by legislators how to make allowances for fluid nature of capacity which can be affected temporarily or permanently by illness or conditions like Alzheimer's and dementia and other such degenerative illnesses [3, 16, 19]. However, without greater investigation it would be impossible to estimate

how much of the EPA (and like instruments) are being misused due to the ambiguity of capacity related issues.

Yet a benefiting of acknowledging training for ‘positions of trust’ which was not discussed at the EAF was that it removes any argument of ‘ignorance’ when matters are presented to the courts. As such it would be wise for those who have ‘position of trust’ to have some type of training, in order to understand the limits and responsibilities of such roles.

Attachment A

ACT Legislative Review

Attachment A comprises of ACT Legislation which I have reviewed on their effectiveness to protect our older Citizens and is essentially my working paper. The comments in this legislative review I have intended to be discussion points only.

Australian Capital Territory - Human Rights ACT 2004

The Act explained

- The central tenant of the Human Rights Act 2004 is that all individuals deserve and have the right to respect, dignity and value. It is a community concern that individual rights are a reflective of a fair and just society, and that one person's individual rights must be balanced with another individual rights, in accordance to the principals of a democratic society. Accordingly, individuals must be free to express their civil, political, economic, social, and cultural rights, without any discrimination or recrimination. Individuals have a right to life, free from torture, cruel, inhuman and degrading treatment. Individuals have a right to be not subjected to medical or scientific experimentation, and to have their privacy unlawfully or arbitrarily tampered with, or to have their reputation unlawfully attacked. Everyone has the right to: freedom of movement, thought, conscience, religion, belief, expression, and education. It is the right of each person to be able to take part in: public life, peaceful assembly and freedom of association, and accorded with the liberty and security consistent with the principles of a free and just society. Civil and political rights extend to being entitled to a fair trial, with the presumption of innocence, and in a language that one understands. Rights extend to legal aid for those who are unable to pay for such assistance, and compensation when wrongful conviction occurs. No one must be forced to work, or held in slavery or servitude [20].

ACT Elder Abuse Forum Discussion

- The forum discussed the need to have elders, the agencies, employers and their staff who are tasked with their protection and care to be able to recognised Elder Abuse through education. A person may not be aware that they have contravened someone's human rights; as such considerations may be outside of their experience, culture or general background. The legislation should allow for agencies to be able to offer services which reduce the isolation, and to provide increased support to carers who may be distressed [21]. In the event that someone had Human Rights training, a stronger case could be made for someone to be prosecuted, or fined, for one who has blatantly disregarded another person's human rights. The trigger for this legislation could allow for agencies to provide education and general awareness training as the first point of call.
- The forum discussed the need for someone ascertain that an elder is able to make informed consent [21]. The common thread throughout ACT legislation is the need to engage in participative decision-making, yet there is no mention on the need for someone to make a concerted effort to ascertain a persons wishes, in the event of cognitive impairment.

Possible amendments to the act:

- 10(1). Possible amended recommended, in 'protection from … degrading treatment… no one may be …' threatened and intimidated to the effect that significant distress is experienced.
- 3A. Centres on economic, social and cultural rights of individuals consistent with the International Covenant and Economic, Social and Cultural Rights (ICESCR). Future discussions could centre on whether some tenants of the ICESCR should be explicitly included in the Human Rights Act 2004.

Australian Capital Territory - Working with Vulnerable People (WWVP) ACT 2011

The Act explained

- The purpose of the Working with Vulnerable People Act 2011 is to provide the legislation, which regulates activities engage in with those who are at greater risk of harm and exploitation in comparison to the wider population. The act applies to anyone from employee, employer, volunteers, and anyone who engages in activities, through: physical, oral, in writing, electronic means; with vulnerable people. Holders of the Working with Vulnerable People card are able to work in the ACT with individuals who are potentially at greater risk of harm or disadvantage. The ACT legislation is quite broad, covering not only vulnerable people like children but also an array of individuals and groups who may also be at greater risk of harm or exploitation than the rest of the population. Example of persons who are at greater risk of harm are the: homeless, victims of crime, require the use of community service; migrants, refugees, and asylum seekers. Included in the list of vulnerable people are also those with a disability, mental illness, those suffering addictions, children and other individuals or groups who may be at a significant disadvantage. Negative risk assessments centre of information relating to unacceptable risk of harm: sexual, physical, emotional and financial, due to neglect, adverse conduct and behaviour[22].

ACT Elder Abuse Forum Discussion

- It was generally agreed that elders are particularly at risk in institutions whereby abuse remains unchecked. While the prevalence of the problem of abusers moving from one institution is not known, it was generally acknowledged that there is currently nothing to stop such a situation from occurring (even repeatedly)[3]. Legislation could provide the trigger to allow agencies to provide extra training and support for institutions and professional carers [21]. However, there is currently no mandatory reporting mechanism in the Act, or a central reporting route stipulated, which allows agencies to prevent Elder Abusers from moving between institutions.

Possible amendments to the act:

- While the WWVP card is required to work with vulnerable people, there does not appear to be consequences for 'non-offending' assessments. That is, while crimes specified in the Criminal Code may constitute a negative assessment, or removal

[3] This would also be true for workers in Aged Care settings which is currently legislated in the Aged Care Act 1997, and is heavily reliant on the professional guidelines for professionals in the field.

from WWVP status, there is no mechanism for compulsory reporting of Elder Abuse behaviour. For instance, if an employer has noticed that an employee treats elders with contempt, there is no mechanism to compulsory report this event or behaviour. Without such a mechanism, an employee who engages in bullying tactics with elders may be able to get employment with another provider (under the Aged Care Act 1997) whom has no access to any kind of track record. Ideally, providers, regardless of whether they are employers to community-based programs, could treat the WWVP like a licence with demerit points for negative assessments. How do employers access 'non-conviction information'?

- The WWVP is still very centred on children, for instance there is mandatory reporting phone number for children but not for Elder Abuse?
- 12(2)(n). There are special events, which can be deemed as appropriate to negate the WWVP. This point is particularly worrisome as one significant and negative event can have a disastrous effect on general health and wellbeing for an older citizen.
- 18. It is less clear exactly how the 'cut of' for a negative risk assessment is deemed to be significant enough for a negative assessment.
- How does cross checking with other States work, how should collaboration between the States ensure that people who engage in Elder Abuse do not simply switch States. Here there is reference to the Criminal Code and Spent Convictions Act 2000.
- There is mention in section 22 in considerations of timeline and type of criminal activity. What is appropriate? Should some acts be automatically ruled as unacceptable? At the moment, because this area is a little grey, there is room for the wrong type of people to appeal negative assessments. Tightening of this legislation would disallow the wrong type of people obtaining appeals against negative assessments.
- 23(1) Reckless indifference to harm, safety and wellbeing should be listed as potential risk factors.

Australian Capital Territory - Powers of Attorney Act 2006

The Act explained

- In terms of decision making, in the ACT the Powers of Attorney Act 2006, govern the functions of powers relating to a Power of Attorney (PA) and Enduring Power of Attorney (EPA). The PA and the EPA are two key functions, which enable an individual (the attorney) to make key decisions relating to: financial, person care and health care, on behalf of another person (the principal). They key tenant of the act, however, is that even if the principal is impaired, there is an expectation that decisions made on the principal's behalf are consistent with previous decisions, actions, and beliefs that were held in the principal's past. Moreover, there is an expectation that principal is involved with decisions made on their behalf, in particular, when key financial or health decisions need to be made. The principal is able to stipulate broad guidelines or may be more prescriptive, stipulating: when, how, and what an attorney can enact on the principal's behalf. The key functions under the PA and EPA are: property matters (including financial matters), personal care matters and health care matters. The PA or EPA can be kept in a safe place, or alternatively can be registered with the Office of Regulatory Services (ORS).

- The difference between the two functions is that The Power of Attorney is effective while the principal has decision-making capacity; the Enduring Power of Attorney in comparison, is effective while the principal has impaired decision-making abilities. The 'loss of capacity' refers to the principal having lost the ability to make decisions that cater to their health and general wellbeing needs. Impaired decision-making does not relate to individuals who are eccentric; hold different beliefs, values and religion, which are in conflict with the attorneys' views. In some cases, when a principal is cognitively impaired, temporarily loses capacity, or there is a gradual declined caused by something like dementia, just when the Enduring Power of Attorney becomes effective is less clear. In such cases a medical certificate from the treating doctor of the principal can be presented to the Guardianship and Management of Property Tribunal in order to make a determination on the matter.
- Several Attorney's can be nominated and the terms of the attorney/principal agreement can stipulate whether the attorney's operation together, separately and/or in specific event or situation. Where the attorney/principal agreement relates directly to a specific event, then the role may cease, if stipulated, once the event has ceased. Regardless, of the attorney powers, both the PA and EPA cease if the principal is deceased. There are some decisions that cannot be made by an attorney, such as consent to a marriage, adoption, sterilisation, termination of a pregnancy, participation in medical research, or the revoking of a will or another attorney (see legislation). The attorney cannot make a decision which is contrary to any other Commonwealth or State law, such as the Mental Health Act, or another other law. The Medical Treatment (Health Directions) Act 2006, and the associated form, allows for the principal to have wishes in relation to health care enacted according to specific circumstances and/or events.
- The PA or EPA must not interfere with the principal's wish to access family members and relatives. Additionally, decisions made on the principals' behalf need to respect their human worth and dignity, value their role as a member of society, allow for participation in the community. In all cases, an attorney needs to ensure that there is the optimal quality of life upheld across all decisions made on behalf of a principal. In particular, medical treatment, and decisions made thereof, need to consider the consequences of treatment (or non treatment), and made in consultations with appropriate health care professionals (such as the treating/family doctor). Concerns over decisions or harm can be referred directly to the ACT Public Advocate or the ACT Civil and Administrative Tribunal (ACAT) [23].

ACT Elder Abuse Forum Discussion

- The legislation could provide a trigger to allow agencies to provide better support to carers to ensure they are aware of their responsibilities and that the elders are not being deliberately or inadvertently exploited. If, for example attorney blatantly disregarded legislated training, or some kind of acknowledgement of responsibilities, then this could be a case for prosecution. The point which was made by participants in the Elder Abuse forum was that without checks and balances currently in place (no auditing for instance), it is believed that financial abuse is a big risk factor for and elder. As such there is no clear indication as how prevalent financial exploitation occurs, although it was agreed that the issue is a common problem. The Public Advocate has produced a high quality publication, a

guide on the Enduring Power of Attorney [24], which is in high demand, could be used as a less interventionist approach for agencies. However, how is it known that those who are tasked with such responsibilities are adhering to the act, and or are acting in good faith? Should it be legislated that those that have Powers of Attorney be audited (annually), like those who are nominated and court appointed external financial managers?

Possible amendments to the act:

- Terms defined in the Power of Attorney Act 2006 are defined in the Legislation Act 2001. In the Powers of Attorney Act 2006 and attorney is deemed to be unable to execute power if one is qualified as bankrupt or personally insolvent. In relation to Elder Abuse, does personal insolvency relate to an individual who is unable to pay bills (debtors) or is on welfare? And should there for a greater restriction on individuals who can hold positions of trust. Such a clarification may protect elders from being financially exploited by an attorney who may be pressed for funds, and/or who aims to obtain financial advantage to the detriment of the elder.
- What is the heuristics for 'a rational judgment', and 'understand the nature and effect of making the power of attorney'? For example, how is it judged that a principal/elder understands the nature of a PA or EPA agreement? How can 'competency' to consistently judged? How can 'doctor shopping' be prevented when those who propose, or have been nominated as a PA/EPA are not happy with a particular practitioner's stance on the elders capacity? A Statement about informed consent with terms and conditions may protect an elder from agreeing to something they are not fully informed about (coercion).
- Does the section 'an enduring power of attorney expressly authorises an attorney to authorise someone else to exercise all or any of the attorney's powers, the attorney may, in accordance with the express authorisation [for the principal?], authorise someone else to exercise the attorney's powers' open an elder to abuse [financial]? For instance, what if one attorney effectively appoints someone with specific functions whom may not have the elder's best interests/concerns in mind? What happens if several members of a family collude and made a decision to the detriment of the elder? Considering that some elders may have amassed considerable assets, this could be an acute concern for some principals.

Australian Capital Territory - Guardianship And Management Of Property ACT 1991

The Act explained

- The purpose of the Guardianship and Management of Property ACT 1991 is to outlay the expectations and guidelines that formulate the scope and limitation of the court (ACAT) appointed decision-maker(s). The premise of guardianship awarded by the courts is one of the least restrictive decision making responsibilities. Consistent with other ACT government legislation there is an overarching expectation that the principal's wishes are determined, and where practical implemented according to the protected persons wishes. In the event that the protected person has diminished capacity, there is still an expectation that persons wishes that decisions made are consistent with the principals thoughts, feelings, beliefs at a time when there has been capacity. Impaired decision making ability can be due to a physical, mental, psychological or intellectual condition

which severely disrupts decisions which prevent the principal from coming to physical or mental harm, or some other significant deterioration in health and wellbeing. A guardian in relation to property may also be deemed to be necessary if the principal has been missing for at least 90 days. The guardian is expected to make decisions, which enable the principal to look after him or herself; promote community participation, and foster financial security. ACAT must be satisfied that impaired decision-making by the principal leads to unreasonable risks to the general health, welfare or property of the protected person. An appointment guardian may make decisions in relation to: accommodation, education, and employment, medical, and legal matters, in order represent the principal in legal proceedings. The guardian must consider of a power of attorney/enduring power of attorney, even if it has been revoked by the courts. Moreover a direction given under this act mush be consistent with the Powers of Attorney Act 2006. The guardian may not, yet ACAT may consent to, prescribed medical procedures such as: an abortion, sterilisation, hysterectomy, contraceptive procedure, and transplantation of non-regenerative material. Treatment for mental illness is covered by the Mental Health (Treatment and Care) Act 1994. In addition, guardians may not, on behalf of the principal: vote, make a will or other legal document, consent to an adoption or marriage. Unless the public trustee has been appointed as the manager of the principal's property (as part of the Public Trustee Act 1985), this function may be included, through a Supreme Court ruling as part of the guardian's responsibility. While recuperation of reasonable costs associated with the operation of the guardianship role is considered reasonable, 'remuneration or reward does not include the carer's pension'. In the examination of accounts submitted to the Public Trustee include a breakdown of expenses awarded to the guardian, as part of managing the principal's affairs. ACAT may consider urgent circumstances as an Emergency Management Order (EMO) in order to revoke or instigate guardianship roles and responsibilities [25].

ACT Elder Abuse Forum Discussion

- General discussion from the forum centred around the need for agencies to be able to provide extra support and potential services to guardians, carers [21]. However, there is nothing in the legislation that stipulates that Guardians need to acknowledge and understand the magnitude of their role in the care of the elder. For instance, where the Act talks about keeping property separate, do external managers understand that bank accounts between the principal and guardian need to be kept separate? Do external managers understand that there is not provision to 'borrow' from the principal, with the intension of paying back said monies? In the Act there could be triggers, which allow, for agencies to provide better education and support for guardians. Currently, there is no central point of call, for guardian Elder Abuse to be reported to.

Possible amendments to the act:

- 7B (b). It is mentioned that powers of guardians do not have the power to make a will or other testamentary instrument, an amendment is possibly needed in order to prevent the modifications of wills or other legal instruments.
- 8AA. While ACAT can appoint the guardian to make property related decisions, it is not clear in the legislation whether the property manager function extends to organising the sale of the principal's property. If so, there may need to be further protection needed in the act which prevents the sale of property after 90 days,

thereby rendering the returning principal homeless. If the sale of property is deemed appropriate, should the monies not be put 'in trust' for a longer period?

- It would make sense to stipulate the various roles as functions, thereby making it easier to identify the guardian with specific responsibilities i.e. accommodation function, personal care function, health care function, services function, property function, financial function. The service function could include the ability to make decisions relating to, but no exclusive of: gardening, general household cleaning, all of which maximise the quality of care afforded to the principal. The court then appoint a guardian with a set of functions, in addition to further specific limits awarded according to each set of guardianship responsibilities.
- 10(2)(c). A rewording of this section may need to include something like 'a person who has been… convicted… refused appointment…personally insolvent may not been appointed as a guardian for the principal. As it stands, the current wording implies that there is a possibility of such individuals being appointed as guardians as long as ACAT is informed during proceedings. Furthermore, a reference in this section to the Criminal Code 2002 may be needed in this section to rule out such individuals from being awarded Guardianship (or even PA/EPA).
- 14(1)(b). 'A manager of the person's property must keep the manager's property separate from the person's property'. It is a little unclear what this section is alluding to. Does this mean the title of the principal's property cannot be changed? Or does this mean that the actual management of the principal's property must be kept separate from the management of the guardian's property? And if so how practical would this condition be?
- Part 2A. This section defines 'consent to medical treatment without formal representation', however, formal representation as a term is not defined. What is formal representation?
- 32G. This section mentions 'health attorney'. Instead this section could refer to the 'health function' thereby identifying the Guardianship And Management Of Property Act 1991 as separate and distinct from the Powers of Attorney Act 2006.
- 74. This section refers to criminal liability of executive officers (corporation) as committing offence through reckless acts that cause an offence to occur. Should there not be general protection that a guardian/decision act in a reckless fashion, thereby causing harm to the elder, be liable for reckless decisions made?

Australian Capital Territory - Public Advocate Act 2005

The Act explained

- The purposed of the Public Advocate Act 2005 is to contextualise the operational framework of the office, which advocates for the rights of members of the community who are vulnerable, such as those with a disability or those who are an advanced age [26].

ACT Elder Abuse Forum Discussion

- There was not a lot of discussion in relation to the Public Advocate Act, however there was a great deal of discussion, surround having a central agency, tasked with the responsibility of an Elder Abuse hotline. There was quite a bit of discussion, more relating to guardians, on the need to better support carers, particularly those who are struggling to cope [21]. However, given that it is not realistic for the Public Advocate to be a guardian for every elder, given the potential size of the

ACTs ageing population future, there is a need to examine how the act can nominate, and better support existing guardians.

Possible amendments to the act:

- Part 3, 10 (b) Talks about representing people with disabilities for citizens who are disabled. Discussion on this point could centre on how, when certain risk factors such as age and/or complications relating to age, such as dementia could trigger the requirement for an standardised assessment of cognitive capacity. Such a provision in this section may prevent the elder from being taken advantage of, or consenting to actions, arguments put forward in proceedings, which may be being made under duress, or during a time of vulnerability (memory lapse).
- Part 3, 10 (j). There is reference to the Public Advocate to exercising function under various acts Children and Young People Act 1999. Should there be reference here to the Human Rights Act 2004, which would then include the functions of the Public Advocate as protecting the human rights of elders?
- 12 (a). There is mention that the Public Advocate being a guardian of last resort should there not be a similar Statement in the Guardianship and Management of Property act. Given that it is not realistic for the State to, by default, advocate on elder's behalf, particularly when the aging population will continue to increase the pressures on a already stressed health system, then should there not be a provision here which stipulates that 'an appropriate family member, carer or friend' is by default chosen as a elders guardian.
- 17 (1). Information needs to be delivered as is necessary, reasonable and in a matter, which respects the dignity of the elder and treated with the utmost, care.

Australian Capital Territory - Public Trustee Act 1985

The Act explained

- The purpose of the Public Trustee Act 1985 has provides the legal framework for the Public Trustee, as a government corporation to conduct the business for the: creation and management of wills, trusts, estates; management of Powers of Attorney (financial), financial management for ACAT tribunal orders clients, ACT Official Visitor Scheme, and the Greater Good (philanthropy) [27].

ACT Elder Abuse Forum Discussion

- The forum did discuss the need for people with powers of attorney to be audited, thereby creating a disincentive to elder financial abuse [21]. What would the Public Trustee Act look like if this responsibility was attributed to this self-funded agency. And how would this self-funded agency recoup the costs? If financial mismanagement was detected by the Public Trustee, what would be the trigger for a review by the courts? Or referral to another agency which can better support the carer/guardian or principal?

Possible amendments to the act:

- 13. In order to be consistent with the Powers of Attorney Act 2006 'the public trust may be appointed and act under that name' needs to be changed to the 'principal'.
- 23 (b) Would be beneficial for 'Gratuitous bailee' to be included in the Legislation Act 2001 as this term would be unfamiliar for someone from a non-legal background?

- 25A (1) ..'personal under disability' [and limited capacity]. Discussion on this point could centre round the public perception of disability and 'limited capacity'. Limited capacity may be relevant, as a reference, to elders who have limited or sporadic moments of clarity, particularly as this relates to progressive effects of dementia.

Australian Capital Territory - Wills Act 1968

The Act explained

- The purpose Wills Act 1968 is to outlay the framework for which the deceased bequest is distributed among the intended and entitled recipients. The Wills framework outlay the general rules for which a will is considered to be valid, particularly as it relates the nature of construction, amendments and final distribution of an estate. Provisions have also made in the act that refer to the place where the will has been made, in particular where the testator was domiciled at the time. The owner of the will estate is known as the testator. The role of the executor is to dispose of the property contained in an estate, to those who have been named in a will, and those who may also be entitled to the current future interest in the disposals of assets and related income. For a will to be deemed valid it must be written, and witnessed by to or more signatories in the presence of the testator. In recognition of validity issues, formerly the Supreme Court may determine whether the creation, amendments, or revocation of a will reflected the decease true wishes. Amendments to the Wills Act could well reduce the incentive to displace an elder for the purposes of obtaining financial, or otherwise gain, through cohesion. The potential displacement of the elder may not be in the best interests of the elders' quality of wellbeing and health [28].

ACT Elder Abuse Forum Discussion

- Wills were discussed in the forum as a instrument which can be misused [21]. The practice is currently that if a person resides in the ACT, then the Will is drafted in the ACT, and registered with the land title with the Office Of The Regulatory Services (ORS). However, the ORS do not currently register every will, therefore how is one to know if an elder has been coerced into changing a will against their true wishes if there is no central historical records which can be consulted?
- In relation to Elder Abuse, if it is legislated that a sudden change or departure from a will amendment pattern, may trigger a central agency to be alerted.

Possible amendments to the act:

- 12A. It may be imported to emphasise the benefits of gaining professional assistance in the drafting and amendments of wills, particularly as it relates to 'testator is so expressed' wording. Hence problems in the administration of an estate may stem from poorly worded wills, which do not reflect the intention, or expected outcomes of the testator. Ultimately the elder, who has worked hard and amassed assets and other effects should have their wishes respected. A provision within 12A that stipulates 'in the assessment as to the validity of the will, subsequent amendments may be examined according to historical precedence. Likewise, the revocation and execution of wills may be reviewed according to historical precedence'. Such an amendment may make the displacement of elder persons between residences of interested parties a futile exercise. Moreover, an

elder who has a history of a will creation and subsequent revisions has a greater potential to provided evidence of a 'consistent set of wishes'.

- 12B. Further clarification is needed 'testator's dispositive intention is not admissible to establish any of the circumstances referred to…'. By dispositive intention one could assume that this section refers to the 'how' a will is distributed, leaving such decisions up to the executor. However, overall this sentence is not clear.
- 14A. 'instrument inter vivos'. A reference to the legislative act would be useful here. Although this is a well known legalistic term for a trust set up while the testator is alive, a lay person should be able to refer to the Legislation Act for a definition of this term.
- 16A. relates to the capacity of the testator at the time a will was drafted. Such a provision that capacity should reasonably include the 'normal treating doctor' which would prevent an alternative doctor being chosen, whom may not have the full comprehension of the elders capacity. Such a provision would prevent 'doctor shopping'. Moreover, there could be questions as to whether such a provision should be included in the ACT Mental Health (Treatment and Care Act 1994).
- 20. The knowledge that subsequent marriage, civil union or partnership, and termination thereof, revokes a will may require the testator to be notified. One option could be to inform testators through online newsletters and seminars.
- 28(1). 'die without issue…prior estate tail. This whole paragraph could be written in plain language. For instance, instead of the word issue, instruction may prove to be a better substitute. The term issue may need to be defined in this legislation, or alternatively the term issue could be included in the Legislation Act.
- 32. Reference to the 'Office of the registrar' needs to be change to the Office Of Regulatory Services. The Office of the registrar no longer keeps copies of wills. A central register, which contains, at the very least, basic details of a will and where it may be kept would ensure that the elders last known wishes be enacted.

Australian Capital Territory - Criminal Code Act 2002

The Act explained

- The Criminal Code Act 2002 outlays event and actions, which contravene societal norms and which could be considered as deviant. Thereby there are a number of elements which combine into criminal proceedings: intention, cause, effect; culpability consideration that relate to admissible evidence and restitution; which have been outlaid in the act, which constitute criminal offences, regardless of how the unlawful actions transpired. Additionally, the code stipules the elements that are considered when there is cause to believe there is contravention of the law through evident intention, knowledge, recklessness or negligence. In terms of liability other considerations included considering mental impairment and illness, the age of the offender, the influence of drugs and alcohol. Offences can be defined as theft (robbery, aggravated burglary, etc), fraudulent conduct, bribery, forgery, perverting the course of justice, sabotage, wilful damage of property, computer related offences and drug related offences [29].

ACT Elder Abuse Forum Discussion

- There was discussion in the forum which centred on the unique vulnerabilities experience by some elders, particularly as it related to elders with dementia, or the

early effects of the disease [21]. Having said that there may be a case for particular elements that specifically relate to elders to be included in the criminal code, in order for Elder Abuse to be recognised as a crime.

Possible amendments to the act:

- 12 (1) (a). A person must not be found guilty unless the offence has the existence of 'physical elements'. Physical elements may need to be changed to 'criminal elements' as the damage to a victim can be physical, emotional, or psychological.
- 30 (2). This section talks about intoxication. An additional paragraph is needed which stipulates that if the offender had a known antisocial or abusive history of their behaviour while under the influence of drug and alcohol, then there is wilful disregard for the victim, hence complete culpability for the crime.
- 38 (3). Claim of right. While the victim may lose property, there is no mention as to how this property is to be returned to the owner (elder). There are the proceeds of crime law which talks about assets wrongfully obtained through trafficking, but what of assets, obtained from an elder through threats or cohesion which should rightfully be returned to the original owner.
- 55. Elder Abuse can occur in institutions. There needs to be an additional comment something to the effect of 'the corporation must take all reasonable actions to ensue that the offensive conduct is contained and addressed'.
- 56. Legalistic term 'averment' could be changed to plain language.
- 65. This section talks about the geographical nature of the crime. An additional explanation that the victim is considered to be a resident of the ACT if residing in the Territory for a period of 1 year (or another value). Such an explanation would allow the impact of being a displaced elder entered into as evidence.
- 307. 'money or other property' needs to be changed to property. Other legislation uses the term property to explain a range of assets: cash, shares, residential, commercial etc.
- 309. Should include theft 'involving the undue cohesion' as a type of robbery. That is the elder feels so pressured in order to commit to an issues which affects one or many aspects of their property, health and wellbeing.
- 326. Obtaining property by deception. An condition could be included here to stipulated that returned property is put in trust when there is evidence of abuse. As the elder be vulnerable again to have property taken wording to the effect 'the court must be satisfied…' would be helpful.
- 400. Reference to the term property being defined in the Legislation Act , however the term is used inconsistently in the Criminal Code Act 2002.

Australian Capital Territory - Crimes Act 1900

The Act explained

- The key difference between the Criminal Code 2002 and the Crimes Act 1900, is that the former relates to behaviours which could be deemed to be deviant while the later refers to particular types of crimes such as: threat to kill, industrial manslaughter, money laundering, etc. Examples of events or behaviours which are considered to be criminal include: misbehaviour at public meetings; sale and/or possession of offences weapons, threatening objects, and the culpable use of poisonous substances; possession and distribution of drugs and other banned substances; violence, indecent exposure and other sexual assault types; public

mischief and misbehaviour; and the grounds for ordering construction and framework required for an inquiry [30].

Possible amendments to the act:

- (27) Act endangering life. Considering the issues raised at the COTA Elder Abuse Forum held in 16 June, potentially the other life threatening events should be added to this section, such as: intentional withholding medical care, services and other functions which are required by vulnerable people.
- (31) The intentional and sustained used of stress against the elder, thereby causing a life-threatening health conditions could be a point of discussion but may be to difficult to incorporate into legislation. The topic is further extrapolated in section 32.
- (36) This section relates to Torture and makes reference to Australian Human Rights Act 1986. Should there not be a general reference in the Crimes Act 1900 which makes it illegal to contravene the Human Rights Act 2004? Furthermore, should there not also be a reference in the Human Rights Act 2004 to the Australian Human Rights Act 1986 (Commonwealth legislation)?
- (67)(2). This subsection talks about the lack of physical resistance to sexual intercourse as not constituting consent. Likewise, discussion on the need to consider lack of verbal resistance, even explicit compliance (a potential sign of domestic abuse), where there is evidence of Elder Abuse needs to be considered.

Australian Capital Territory - Domestic Violence And Protection Orders 2008

The Act explained

- This legislation has been designed to provide a mechanism to minimise the impact of the perpetrator of domestic and personal violence on the victim. Personal violence is aggression that is directed toward someone who is in an intimate relationship with another person. Intimate relationships can be between people who are: personally and financial dependant on one another, sexual, the depth and level of involvement in the others life. In essence protection orders prevent the need to necessarily resort to legal intervention through the court system. Interpersonal violence. There are several types of domestic violence orders: interim, consent, final and emergency. Domestic violence entails: physical or personal injury, damage to the property, threats, harassing or offensive behaviour, and violence toward the pet of the victim. During the proceedings this is the potential for mediation to be used in order to resolve interpersonal issues. Interim order may be granted for some respondents who have a legal disability that needs to be taken into account, together with views from the guardian [31].

Possible amendments to the act:

- 35 (2). There is mention about the need to make interim orders for children, but what of elders who need to be taken immediately out of an abusive context?
- 35 (5). There is mention that personal items can be returned back to the aggrieved person. Change personal items to property a more generalised term? Discussion on this point could centre on the recovery of victim's property.
- 46 (1). The grounds to making final orders should include the considered belief that a elder is at a unreasonable risk of continued and sustained abuse.

- 49 (a). Workplace orders include child facilities but what of aged care facilities. Organisations, which cater to the health and welfare of elders, should be included in this definition.
- 53 (1). Considerations to making a workplace order include the amount of hardship experienced by the victim, how much this conduct has previously be engaged in the conduct, but shouldn't this be a condition of all of the orders. Perhaps the different types of orders would depend on the severity of the behaviour. Should thereby a reference to the Confiscation of Criminal Assets Act 2003, and hence should this act contain details as to how misappropriated property is returned to the rightful owner and/or compensation made to the elder victim?

Australian Capital Territory - Domestic Relationships Act 1994

The Act explained

- The Domestic Relationships Act 1994 determines the nature of such relationships to be of a dependant relationship based on shared personal and property between 2 adults. Recognition on the discussion surrounding this act needs to centre of the protection of elders and their carers from being displace, and to protect the human rights of the elder in order to enjoy the highest degree of health and wellbeing to the time of passing [32].

Possible amendments to the act:

- 11 Provision needs to be made in the act to cater to elders who have mainly residing in the ACT and then are pressurised into relocating (potentially displaced) /or not relocating to a more suitable premises with a higher level, or more appropriate care. Likewise, carers need to be protected within this provision. Include Carers who live with their elderly parents in order to give them the highest quality of health and wellbeing, into the 'twilight' years. Furthermore, there needs to be a reference in this act, or a more suitable act that elders current place of residence be assessed as adequate, or inadequate. There is a reference to the relationship of both parties relating to 1/3 of the period of their relationship', and the length of the relationship 'not less than 2 years'. What of the family member who moves back into the familial home in order to care for the elderly family member? Hence consideration needs to be made to both the elder and the carer when amending this legislation. Another point of discussion is that it is not practical, nor possible for the State to intervene, nor provide alternative suitable accommodation given the limited places [33].

Australian Capital Territory - Discrimination Act 1991

The Act explained

- Victimisation caused by discrimination is potentially an area where elders, as a demographic may be obstructed from utilising needed services or employment. The Discrimination Act 1991 has been designed to rule inadmissible actions or non actions which cause on of the following groups to be unfavourably treated based on: sex, sexuality, gender identity, relationship status, status as a parent of carer, pregnancy, breastfeeding, race, religious or political conviction, disability, industrial association (those that represent the views of others), social association, age, or occupation. Discrimination can be in a form of unfair treatment or imposition, a disproportionate disadvantage, expressed through action or inaction,

either overtly covertly, deliberately or unintentional. Additionally, there can be indirect discrimination through the inciting of others to behave in an unfavourable manner to a particular individual or group. Discrimination can occur at work, ether through restrictive or unfair conditions, with the obstruction to accessing facilities or resources (goods and services), dismissal or obstruction from employment opportunities or professional development. Providing of accommodation are also not allowed to discriminated against the listed groups, this includes, those who are in a share house, and the actions on an individual or group unfairly affect another individual or group. Similarly, discrimination can occur between government and private contractors, commission agents, partnerships, trade organisations, employers, or volunteers. There may be a case, given some circumstances, to discriminate against individuals or groups who may be incompatible with doctrines, tenants, beliefs and teachings, particularly as it relates to religious organisations. Similarly, particular disabilities or conditions may preclude some individuals to be effective in some situations where particular abilities and capacities are required. However, exemptions may only be granted through the Human Rights Commission [34].

Possible amendments to the act:

- A general amendment could be added that includes something like: it is expected that the engaging entity make a concerted effort to ensure that discrimination is based on solid statistical data and research and justifiable given the circumstances. There is mention of how one should provide evidence for a reason for discrimination in the Superannuation section, however, perhaps there needs to be a broader clause that covers most situations.
- 67 Talks about serious vilification against race, someone intentionally commits an offence, is reckless, threatening, incites hatred, commits serious contempt or ridicule. This section should be moved closer to the beginning of the act articles, and it explains what vilification is, that is less overt forms of discrimination. There should be a general reference to all known groups that can be discriminated against. At the moment there is only mention of: race, sexuality, gender identity, HIV/AIDS.

Australian Capital Territory - Medical Treatment (Health Directions) Act 2006

The Act explained

- The purpose of the Medical Treatment (Health Directions) Act 2006 is to ensure that person's true wishes in relation to a catastrophic health event are respected. In essence, the principal is able to identify particular events, treatments and medical procedures, which are deemed, unwanted. In such events, which are governed by decisions previously made by the principal, there is a right to receive the maximum amount of pain relief that is reasonable expected, given the present circumstances. Alternatively, it is the right of the individual to decline some treatments. Regardless, it is particularly important that professional ascertain that a principal still wishes to refuse medical treatment. While medical professionals are permitted to withdraw rejected treatments and services, there is still an obligation to make every effort to properly advise and inform the principals and guardians, or to explore other potential treatment options. Health professionals are protected from liability when there is evidence of making certain decisions to not apply treatments, particularly when the actions a taken in good faith. Moreover, a

health professional must inform the principal, the: nature of the illness, all forms of available treatment, including alternatives, and the consequences of being treated and not treated. Furthermore, a health professional, or an employee in a health care facility, or another witness may inform the person in charge of the principals' treatment that there has been a revocation. An appointed Guardian, under the Guardianship and Management of Property Act 1997, may not make a health direction [35].

ACT Elder Abuse Forum Discussion

- There was a little bit of discussion in relation to Guardians and Attorneys which highlighted that people who occupy these roles should have some kind of training.

Possible amendments to the act:

- 6(3)(b). There is mention of the guardian and patents agent, however there is no mention of other 'stakeholders' who should also be informed, for instance: carer, or dependent, and cohabitating relative, it could be argued have a right to be informed. Indeed, it could be detrimental to the principal if those tasked with their care are not informed of potential actions.
- 7(3)(a). It is a little unclear whether this section relates to when the principal has lost capacity. For instance, does this mean that if the principal loses capacity, the guardian is not allowed to make a health direction? Also if someone had Enduring Power of Attorney (EPA), could their wishes override the principal's wishes, when capacity is significantly reduced? (See, Enduring Power of Attorney). This may be covered where under that act the attorney must act consistently with the principal's wishes.
- 13(1). There is mention that 'someone becomes aware' of a revocation, a term which is a little vague. Is there an assumption that the 'someone' has the bests interests of the principal, if so, the act does not outlay what checks the professional in charge should activate?
- 20. Also has the same problem in that there is mention that there must not be a dishonest inducement of revocation, without any mention of what steps should be made in relation to confirming principals' current wishes. It is not deemed as unlawful if measures to restrict one group are for the purpose and providing equality opportunity to marginalised groups, and some positions may be deemed to be suitable for a particular sex or ethnic group.

Australian Capital Territory - Health Professionals Act 2004

The Act explained

- The purpose of the Health Professionals Act 2004 is to regulate and provide a professional framework for those who occupy a position in the area of health provision. For instance, the Act outlines some processes which need to be followed in order for a professional to meet the required standards of their profession and how complaints may be directed. A report may be received by the Human Rights Commission 2005, under the Human Rights Commission Act 2005; a professional board investigates and actions a complaint; a report is made under the Act directly to ACAT. Under such circumstances where a matter has been referred to ACAT Under the Act, a Professional, as well as a Personal Assessment panel may be set up in order to assess the physical and mental abilities which may adversely affect client outcomes and confidentiality. An

example of a health professional would be: a doctor or nurse, who provides a health service, as part of a regulated profession. The Act also allows members of the public to make formal complaints about regulated health professionals, and under section 81 individual are protected when making adverse reports to a professional body[36]. Mandatory reporting as such is mandated through professional bodies such as the: Nursing and Midwifery Board of Australia or the Medical Board of Australia.

Possible amendments to the act:

- 13 (1). Not necessarily an required amendment as such although the text stipulates "people who provide a health service". Should there be another act or an amendment to this act that covers for mandatory reporting of: Elder Abuse in General, or in specific contexts like abuse that occurs in health services?
- 21 (d). The Act recognises that there may be health professionals who are not in regulated environments "whether the profession can be regulated". Hence, there is an overall need in a more general piece of legislation, like the Youth Act which requires the mandatory reporting of Elder Abuse regardless of the act.
- 32 As a Health Professional Board can be sued, there may be reluctance to pursue matters that require greater evidence, there may be a call to have a point system, potentially as part of a licence (possibly covered under the Working With Vulnerable People Act 2011). For example, a negative assessment may not impact a professional who engages in, either deliberately in inadvertently in Elder Abuse, however a cumulative loss of points may. Furthermore, a cumulative deduction in points from a range of organisations would be prove futile for a claimant, who continues to engage in Elder Abuse, to pursue damage or one's reputation of professional standing. Another discussion point, is that if the Children and Young People Act 2008 became a broader Act that covered Vulnerable People (e.g Vulnerable People Act), then mandatory reporting would apply to all citizens in relation to reporting instances of Elder Abuse. Further more a Vulnerable People act would be complimented by the already broader Working with Vulnerable People Act 2011.

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