Australian Government
Australian Law Reform Commission

Elder Abuse

DISCUSSION PAPER

You are invited to provide a submission or comment on this Discussion Paper

Discussion Paper 83 (DP 83)

December 2016

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The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Making a submission

Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is **27 February 2017.**

Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual proposals and questions: https://www.alrc.gov.au/content/elder-abuse-dp83. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few proposals and questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

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Please send any pre-prepared submissions in Word or RTF format.

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As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications.

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See the ALRC policy on submissions and inquiry material for more information http://www.alrc.gov.au/about/making-submission.

Content

Terms of Reference

Protecting the Rights of Older Australians from Abuse

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to:

- the principle that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse
- the principle that laws and legal frameworks should provide appropriate protections and safeguards for older Australians, while minimising interference with the rights and preferences of the person, and
- relevant international obligations relating to the rights of older people under United Nations human rights conventions to which Australia is a party.

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), the consideration of:

- existing Commonwealth laws and frameworks which seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. These should include, but not be limited to, regulation of:
    - financial institutions
    - superannuation
    - social security
    - living and care arrangements, and
    - health
- the interaction and relationship of these laws with state and territory laws.

Scope of the reference

In undertaking this reference, the ALRC should identify and model best-practice legal frameworks. The ALRC should also have regard to other inquiries and reviews that it considers relevant, including:

- the recommendations of ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws* (2014)

- the recommendations of the Senate Standing Committee on Community Affairs report on violence, abuse and neglect against people with disability (2015), and
- the recommendations of the Commonwealth House of Representatives report, *Older People and the Law* (2007).

In conducting this inquiry, the ALRC should specifically consider best practice laws, as well as legal frameworks including, but not limited to, the National Disability Insurance Scheme and the Aged Care framework, which:

- promote and support older people's ability to participate equally in their community and access services and advice
- protect against misuse or advantage taken of informal and formal supporter or representative roles, including:
    - formal appointment of supporters or representatives
    - informal appointment of support and representative roles (eg family members)
    - prevention of abuse
    - mitigation of abuse
    - reporting of abuse
    - remedies for abuse
    - penalties for abuse, and
- provide specific protections against elder abuse.

Collaboration and consultation

In undertaking this reference, the ALRC should identify and consult relevant stakeholders, including Commonwealth departments and agencies, state and territory governments, key non-government stakeholders, including advocacy and policy organisations and service providers, the Age Discrimination Commissioner and the Aged Care Complaints Commissioner.

Timeframe

The ALRC should provide its report to the Attorney-General by May 2017.

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Proposals and Questions

2. National Plan

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

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

3. Powers of Investigation

Proposal 3–1 State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:

(a) has care and support needs;

(b) is, or is at risk of, being abused or neglected; and

(c) is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

Public advocates or public guardians should be able to exercise this power on receipt of a complaint or referral or on their own motion.

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

(a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;

(b) the need to protect someone from abuse or neglect must be balanced with respect for the person's right to make their own decisions about their care; and

(c) the will, preferences and rights of the older person must be respected.

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

(a) furnish information;

(b) produce documents; or

(c) participate in an interview

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

Proposal 3–4 In responding to the suspected abuse or neglect of an older person, public advocates or public guardians may:

(a) refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;

(b) assist the older person or perpetrator in obtaining those services;

(c) prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or

(d) decide to take no further action.

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

(a) liable, civilly, criminally or under an administrative process;

(b) found to have departed from standards of professional conduct;

(c) dismissed or threatened in the course of their employment; or

(d) discriminated against with respect to employment or membership in a profession or trade union.

5. Enduring Powers of Attorney and Enduring Guardianship

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

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

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

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

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

Proposal 5–4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:

(a) legal practitioner;

(b) medical practitioner;

(c) justice of the peace;

(d) registrar of the Local/Magistrates Court; or

(e) police officer holding the rank of sergeant or above.

Each witness should certify that:

(a) the principal appeared to freely and voluntarily sign in their presence;

(b) the principal appeared to understand the nature of the document; and

(c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

Proposal 5–5 State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person's failure to comply with their obligations under the relevant Act.

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

(a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or

(b) a tribunal has authorised the transaction before it is entered into.

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

(a) is an undischarged bankrupt;

(b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);

(c) has been convicted of an offence involving fraud or dishonesty; or

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

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

(a) making or revoking the principal's will;

(b) making or revoking an enduring document on behalf of the principal;

(c) voting in elections on behalf of the principal;

(d) consenting to adoption of a child by the principal;

(e) consenting to marriage or divorce of the principal; or

(f) consenting to the principal entering into a sexual relationship.

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

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

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

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

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

6. Guardianship and Financial Administration Orders

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

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

(a) compulsory training;

(b) training ordered at the discretion of the tribunal;

(c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or

(d) other ways?

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

Question 6–2 In what circumstances, if any, should financial administrators be required to purchase surety bonds?

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

7. Banks and superannuation

Proposal 7–1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.

Proposal 7–2 The *Code of Banking Practice* should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

Question 7–1 Should the *Superannuation Industry (Supervision) Act 1993* (Cth) be amended to:

(a) require that all self-managed superannuation funds have a corporate trustee;

(b) prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;

(c) impose additional compliance obligations on trustees and directors when they are not a member of the fund; and

(d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?

Question 7–2 Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?

8. Family Agreements

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

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

9. Wills

Proposal 9–1 The Law Council of Australia, together with state and territory law societies, should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:

(a) common risk factors associated with undue influence;

(b) the importance of taking detailed instructions from the person alone;

(c) the importance of ensuring that the person understands the nature of the document and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and

(d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents.

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

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

10. Social Security

Proposal 10–1 The Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.

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

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

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

11. Aged care

Proposal 11–1 Aged care legislation should establish a reportable incidents scheme. The scheme should require approved providers to notify reportable incidents to the Aged Care Complaints Commissioner, who will oversee the approved provider's investigation of and response to those incidents.

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

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

(a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient;

(b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or

(c) an incident resulting in an unexplained serious injury to a care recipient.

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

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

Proposal 11–4 There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of:

(a) a person's national criminal history;

(b) relevant reportable incidents under the proposed reportable incidents scheme; and

(c) relevant disciplinary proceedings or complaints.

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

Question 11–1 Where a person is the subject of an adverse finding in respect of a reportable incident, what sort of incident should automatically exclude the person from working in aged care?

Question 11–2 How long should an employment clearance remain valid?

Question 11–3 Are there further offences which should preclude a person from employment in aged care?

Proposal 11–6 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

Proposal 11–7 The *Aged Care Act 1997* (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:

(a) when necessary to prevent physical harm;

(b) to the extent necessary to prevent the harm;

(c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and

(d) as prescribed in a person's behaviour management plan.

Proposal 11–8 Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

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

(a) provide policies and procedures for community visitors to follow if they have concerns about abuse or neglect of care recipients;

(b) provide policies and procedures for community visitors to refer care recipients to advocacy services or complaints mechanisms where this may assist them; and

(c) require training of community visitors in these policies and procedures.

Proposal 11–10 The *Aged Care Act 1997* (Cth) should provide for an 'official visitors' scheme for residential aged care. Official visitors' functions should be to inquire into and report on:

(a) whether the rights of care recipients are being upheld;

(b) the adequacy of information provided to care recipients about their rights, including the availability of advocacy services and complaints mechanisms; and

(c) concerns relating to abuse and neglect of care recipients.

Proposal 11–11 Official visitors should be empowered to:

(a) enter and inspect a residential aged care service;

(b) confer alone with residents and staff of a residential aged care service; and

(c) make complaints or reports about suspected abuse or neglect of care recipients to appropriate persons or entities.

1. Introduction to the Inquiry

Contents

The Inquiry

1.1 This Inquiry focuses on what has been called, in the shorthand expression, 'elder abuse'. The World Health Organization (WHO) has estimated that the prevalence rate of elder abuse in high- or middle-income countries ranges from 2% to 14%. As Australia faces the 'inescapable demographic destiny'[1] of an ageing population, the potential reach of elder abuse may grow. The *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) stated that '[p]reventing elder abuse in an ageing world is everybody's business'.[2]

1.2 On 23 February 2016, the Attorney-General of Australia, Senator the Hon George Brandis QC, asked the Australian Law Reform Commission (ALRC) to consider existing Commonwealth laws and frameworks that seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. The ALRC was directed to consider the interaction of those

1 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) foreword.
2 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).

laws with state and territory laws and to identify and model best practice legal frameworks which promote and support older people's ability to participate equally in their community and protect against misuse or advantage taken by formal and informal supporters or representatives.

1.3 In the background to this Inquiry are a number of particular reviews, including: the 2007 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*; the 2015 report of the Senate Community Affairs References Committee into violence, abuse and neglect against people with disability in institutional and residential settings; and the 2016 study by the Australian Institute of Family Studies (AIFS), *Elder Abuse: Understanding Issues, Frameworks and Responses*, by Rae Kaspiew, Rachel Carson and Helen Rhoades. The ALRC's previous work in its 2014 report, *Equality, Capacity and Disability in Commonwealth Laws* (*Equality, Capacity and Disability* Report)[3] also frames the Inquiry.

1.4 As stakeholders observed, elder abuse is 'complex and multidimensional'[4] and requires a 'multi-faceted response'.[5] The Law Council of Australia stated that 'the prevalence and devastating impact of elder abuse is abhorrent'.[6] The Queensland Law Society urged that:

> Older people as a group are deserving of special consideration, support and protection from abuse. Considering that the proportion of ageing residents in Australia is steadily increasing, substantial law reform is required to protect this growing demographic.[7]

1.5 In this Discussion Paper, the ALRC supports the development of a National Plan to address elder abuse that will facilitate a coordinated policy response to guide reform and action. A National Plan would provide a framework for a national and community approach to combat ageism, support older persons in protecting their rights and stopping elder abuse. The other proposals set out in this Discussion Paper focus on particular areas identified in the Terms of Reference, and can be seen as applications of aspects of a national strategy.

1.6 The ALRC was asked to consider not only laws, but also legal frameworks. The ALRC has therefore considered policy and practice guides, codes of conduct, standards, education, information sharing and other related matters.

1.7 The ALRC recognises that elder abuse strategies in Australia are, as Dr John Chesterman observes, 'typically found at the state and territory level' and include protocols and practice guidelines, with considerable variation among them.[8] Although

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3 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

4 United Voice, *Submission 145*.

5 Aged Care Crisis, *Submission 165*. See also Australian Securities & Investments Commission, *Submission 143*.

6 Law Council of Australia, *Submission 61*.

7 Queensland Law Society, *Submission 159*.

8 John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69(1) *Australian Social Work* 115, 116.

this reflects the fact that 'significant developments are occurring at the local level',[9] the National Plan will provide the opportunity 'for meaningful strategies to be developed that drive service improvement and coordination' of the kind that Chesterman suggests.[10]

1.8 The Discussion Paper commences the second stage in the consultation process in this Inquiry. The first stage included the release of the Issues Paper, *Elder Abuse* (IP 47), which generated 194 public and 16 confidential submissions.[11] Both the Issues Paper and this Discussion Paper may be downloaded free of charge from the ALRC website. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

1.9 In releasing this Discussion Paper, the ALRC again calls for submissions to build on the evidence base so far established and to inform the deliberations leading up to the Final Report, which is to be provided to the Attorney-General by the end of May 2017.

What is elder abuse?

1.10 Elder abuse may be broadly defined as causing harm to an older person. It usually refers to deliberate harm, such as assaulting an older person or stealing their money, but it may also be harm caused by neglect, such as failing to feed or provide prescribed medications to an older person. Elder abuse usually refers to abuse by family, friends, carers and other people the older person may trust, rather than abuse by strangers. Most elder abuse therefore has 'similar features' to family violence.[12]

1.11 While there is no universally accepted definition of elder abuse, a widely used definition is the one put forward by the World Health Organization, describing elder abuse 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.[13]

1.12 This description is used across a range of government and non-government bodies.[14]

Categories of elder abuse

1.13 Commonly recognised categories of elder abuse include psychological or emotional abuse, financial abuse, physical abuse, neglect, and sexual abuse. Using

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9 Ibid 121.
10 Ibid.
11 The public submissions are available on the ALRC website: <www.alrc.gov.au>.
12 Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) 1. This is considered further below.
13 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002).
14 See, eg, My Aged Care, *Elder Abuse Concerns* (22 June 2015) <www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns>; Elder Abuse Prevention Unit, *Elder Abuse: Definition* <www.eapu.com.au/elder-abuse>.

drugs to sedate older people when unnecessary is another type of abuse, sometimes called chemical abuse.

1.14 These types of abuse are considered throughout this paper, with case studies from submissions. A short overview is set out below.

Psychological abuse

1.15 Psychological or emotional abuse appears to be one of the most common types of elder abuse,[15] and includes verbal abuse, name calling, bullying and harassment.

1.16 Over a third of calls that reported abuse to a Victorian elder abuse helpline over two years were related to emotional abuse.[16] Verbal abuse was the most common complaint,[17] followed by 'pressuring, intimidating or bullying/harassment',[18] and 'name calling, degrading, humiliating or treating the person like a child, in private or public'.[19]

1.17 Other examples of psychological abuse include: repeatedly telling an older person that they have dementia; threatening to withdraw affection; and threatening to put an older person into a nursing home.[20] Stopping an older person from seeing family and friends may also be psychological abuse or 'social abuse'.

1.18 A US national study found that being ignored, humiliated or verbally abused were commonly reported types of 'emotional mistreatment' of older people living in the community.[21]

Financial abuse

1.19 Financial abuse appears to be the other most common type of elder abuse, accounting for over a third of the calls that reported abuse to the Victorian helpline.[22] Common types of financial abuse were: someone incurring bills for which the older person is responsible;[23] someone living in the older person's home for reasons other than for the benefit of the older person;[24] someone stealing the older person's goods;[25]

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15 Kaspiew et al state that the available evidence suggests that psychological and financial abuse are the most common types of abuse reported: Kaspiew, Carson and Rhoades, above n 12, 5.

16 National Ageing Research Institute and Seniors Rights Victoria, *Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria* (2015). Helpline data does not provide a complete picture of the prevalence of elder abuse, but the data may be somewhat indicative of the relative prevalence of different types of abuse and provide a constructive starting point. As discussed in Ch 2, Australia needs a national study of the prevalence of elder abuse.

17 36% of calls that reported abuse: Ibid.

18 25% of calls that reported abuse: Ibid.

19 19% of calls that reported abuse: Ibid.

20 Department of Health and Human Services (Tas), *Responding to Elder Abuse: Tasmanian Government Practice Guidelines for Government and Non-Government Employees* (2012) 22.

21 Ron Acierno et al, 'National Elder Mistreatment Study (US)' (Final Report, National Institute of Justice, 2009) 38–39.

22 National Ageing Research Institute and Seniors Rights Victoria, above n 16. After psychological and financial abuse, the next most commonly reported type of abuse, physical abuse, was reported in approximately 10% of calls that reported abuse.

23 14% (64/455) of the calls that reported abuse: Ibid.

24 9% of calls that reported abuse: Ibid.

25 8% of calls that reported abuse: Ibid.

'threatening, coercing or forcing an older person into handing over an asset';[26] and abusing power of attorney arrangements.[27]

1.20 The US study found that spending money without permission, forging signatures, and forcing someone to sign something, were commonly reported types of financial elder abuse.[28]

1.21 Other behaviours that may, in some circumstances, be financial abuse include: refusing to repay a loan; living with someone without helping to pay for expenses; failing to care for someone, after agreeing to do so, in exchange for money or property; and forcing someone to sign a will, contract or power of attorney instrument.[29] Many similar examples were provided by stakeholders, and are discussed throughout this Discussion Paper.

Physical abuse

1.22 Calls to the Victorian helpline reported a range of physical abuse, including: pushing or shoving;[30] kicking, punching, slapping, biting or burning;[31] and rough handling.[32]

1.23 Australian crime statistics suggest that older people are less likely to be murdered, robbed or physically assaulted than younger people.[33] But some types of physical abuse of older people may not be caught by these statistics—for example, the use of 'restrictive practices' in hospitals and residential care facilities, when such practices are not necessary. Examples of restrictive practices include restraining a person with ropes or belts, locking someone in a room, or unnecessarily giving someone a sedative.

Neglect

1.24 Neglect includes failing to provide an older person with such things as food, shelter or medical care. Family members may be responsible for providing such 'necessities of life'. Some may receive a social security payment for providing care to an older relative. Staff in residential care facilities and others who provide in-home care may also be responsible for providing such care.

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26 8% of calls that reported abuse: Ibid.

27 7% of calls that reported abuse: Ibid. Many examples were provided in submissions: see eg, Seniors Rights Service, *Submission 169*.

28 Acierno et al, above n 21, 53–54.

29 Peteris Darzins, Georgia Lowndes and Jo Wainer, 'Financial Abuse of Elders: A Review of the Evidence' (Protecting Elders' Assets Study, Monash University, 2009) 9.

30 9% (39/455) of the calls that reported abuse: National Ageing Research Institute and Seniors Rights Victoria, above n 16.

31 6% of calls that reported abuse: Ibid.

32 4% of calls that reported abuse: Ibid.

33 For example, of the 413 reported victims of homicide and related offences in 2015, 60 victims were aged 0–19, 138 were 20–34, 145 were 35–54, and 62 were 55 or over: Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, Cat No 4510.0* (2015) Table 23. In relation to assault, see Australian Bureau of Statistics, *Crime Victimisation, Australia, 2014–15, Cat No 4530.0* (2016) Table 14.

1.25 Neglect was the subject of relatively few calls to the Victorian helpline: only four people complained of others failing to provide an older person with the necessities of life, and one person said that someone received the carer's allowance but didn't provide care.[34]

1.26 Forms of neglect found by the US study included: failing to clean the house or yard, failing to obtain or cook food; failing to obtain medicine; failing to help the person get out of bed, dressed and showered; failing to make sure the bills are paid.[35]

Sexual abuse

1.27 Sexual abuse includes rape and other unwanted sexual contact. It may also include inappropriate touching and the use of sexually offensive language.

1.28 Sexual abuse of older people may be uncommon compared to other types of elder abuse.[36] Sexual assault was also the smallest category of assault found in the US study. However, a 2014 research study stated that, while the 'idea of older women as victims of sexual assault is relatively recent and little understood … it is becoming increasingly evident that, despite the silence that surrounds the topic, such assaults occur in many settings and circumstances'.[37] Australian crime statistics also suggest that older people are significantly less likely to be the victims of sexual assault than younger people, particularly younger females.[38]

Elements of elder abuse

1.29 In the Issues Paper the ALRC sought feedback on the elements of the WHO definition, namely the elements of: harm or distress; intention; and the issue of payment for services.[39] The other elements concern the kind of relationship involved, defined in the WHO definition as a 'relationship where there is an expectation of trust' and the target of the abuse, namely an 'older person'. Stakeholders offered a mixture of comments with respect to each element, summarised below.

1.30 The ALRC considers that, to obtain a full picture of abuse of older persons, a broad description of elder abuse needs to be used, like the WHO definition. This can serve a range of purposes, including to gain a better understanding of the experiences of older Australians. The Office of the Public Advocate (Qld) expressed this as follows:

> The primary consideration in the formulation of a definition for elder abuse is the purpose behind having a definition. If the purpose of defining elder abuse is to reflect the lived experiences of older people who have been victimised on the basis of their age, and to identify and better understand the social problem that is elder abuse to

34 National Ageing Research Institute and Seniors Rights Victoria, above n 16.
35 Acierno et al, above n 21, 48–49.
36 Kaspiew, Carson and Rhoades, above n 12, 11.
37 Rosemary Mann et al, 'Norma's Project: A Research Study into the Sexual Assault of Older Women in Australia' (Monograph Series No 98, Australian Research Centre in Sex, Health and Society, La Trobe University, 2014) 1.
38 Australian Bureau of Statistics, *Recorded Crime—Victims, Australia, Cat No 4510.0* (2015).
39 Australian Law Reform Commission, *Elder Abuse*, Issues Paper 47 (2016) Question 1.

> inform strategies to reduce and prevent it, the definition should be appropriately broad.[40]

1.31 The information obtained through using a wide definition can then inform policy responses depending on the particular purposes of those responses, viewed along a spectrum from, at the one end, community education, and on the other, criminal offences.

1.32 In Chapter 2, the ALRC proposes that a national prevalence study of elder abuse be undertaken. In that context attention can be paid to breaking down the description of abuse into its various elements for the purposes of building a detailed evidence base and to inform future data collection and policy responses. As the Older Persons Legal Services Network observed, any definition needs to be 'illustrative not exhaustive', and

> needs to be broad enough to incorporate all types of abuse, while at the same time identifying a number of different forms of abuse so that this behaviour can be easily recognised by a wide variety of organisations and people.[41]

Older person

1.33 The idea of someone being an 'older' person is a relative concept—chronologically, medically and culturally. It does not have a precise definition and specific ages may be used for particular purposes. For example, the Australian Bureau of Statistics groups people into population age cohorts, and differentiates between '15–64', '65 years and over' and '85 years and over'. People over 65 are generally classified as 'older' for ABS purposes.[42]

1.34 For some purposes, treating all people of over a particular age as warranting special treatment under the law may be appropriate from a public policy perspective. Whether someone may access their superannuation funds or age pension, for example, turns on the person's age. However, differences in longevity and ageing have also been identified, particularly in relation to Aboriginal and Torres Strait Islander peoples. As Legal Aid ACT observed:

> There is a significant gap in the life expectancy of Aboriginal people and other Australians, with many Aboriginal people becoming grandparents at relatively younger ages.[43]

1.35 The national prevalence study of elder abuse proposed by the ALRC could identify the age of the older person in instances of elder abuse that will be relevant, and

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40 Office of the Public Advocate (Qld), *Submission 149*.

41 National Older Persons Legal Services Network, *Submission 180*.

42 This is also the age reference for 'older' used by the Australian Institute of Health and Welfare and incorporated into House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) Terms of Reference. In an earlier ALRC Inquiry, into barriers to work for older Australians, the Terms of Reference defined 'older persons' as anyone over the age of 45 years, which is consistent with the ABS definition of 'mature age worker': Australian Law Reform Commission, *Access All Ages—Older Workers and Commonwealth Laws*, Report No 120 (2013).

43 Legal Aid ACT, *Submission 58*. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.26]; ARAS, *Submission 166*.

particularly identifying particular age cohorts—for example, distinguishing between 'old' people, 65–84 years; and 'old old' people, over 85 years.[44] The Financial Services Institute of Australasia, for example, said that this distinction was a useful one for financial services providers and researchers 'in identifying differences in financial decision-making capability across the lifecycle'.[45]

1.36 Being over the age of 65 years does not necessarily make someone more vulnerable to abuse. There are no doubt many healthy and effective older people who are much less vulnerable to abuse than most people aged under 65. Furthermore, some people under the age of 65 may be vulnerable to abuse for many reasons, such as ill health, frailty, disability, impaired decision-making ability, poverty or other factors. Legal Aid ACT, for example, while recognising the utility of using the ABS reference point of 65 years and older, said that that 'the experience of ageing is far from uniform, and that conceptualising elder abuse within a framework of capacity, and not simply age, may be a more useful metric'.[46] NARI asked:

> Should age (and what age) be a defining feature, or should the definition focus on frailty, dependence, vulnerability or other similar factors that may contribute to power imbalances between the parties? Advanced age is not, in and of itself, an impairment and some research suggest a definition of elder abuse should concentrate on issues of vulnerability, isolation and dependence rather than age.[47]

1.37 The Queensland Law Society suggested that a focus on chronological age by itself 'can be misleading',

> because individuals over the age of 60 often continue to enjoy good health and full independence. Retirement is not necessarily an appropriate trigger. However, some Australians experience the characteristics associated with being 'elderly' because they are more susceptible to experiencing ill health, disability and death at a younger age (for example, Indigenous Australians).[48]

1.38 Such concerns point to the importance of ensuring that all relevant elements of the dynamics and presentation of elder abuse are identified and captured in research and prevalence studies.

Harm or distress

1.39 Gadens Lawyers submitted that the phrase 'harm or distress' should be defined widely 'so as to capture all types of conduct or inaction which is harmful to the care recipient':

> Specifically, 'harm' should include physical and verbal harm, as well as social, cultural and economic harm. Furthermore, the definition should not be limited. As the elder rights arena expands and the literature becomes more settled, it is likely that

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44 Jo Wainer et al, 'Diversity and Financial Elder Abuse in Victoria' (Protecting Elders' Assets Study, Monash University, 2011). ASIC drew attention to its 'segmentation analysis' as part of its research regarding 'how to best support the consumer education needs of the over 55s': Australian Securities & Investments Commission, *Submission 143*.

45 Financial Services Institute of Australasia, *Submission 137*.

46 Legal Aid ACT, *Submission 58*.

47 National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*.

48 Queensland Law Society, *Submission 159*.

> more examples of elder abuse will come to the fore. In the light of this, the definition should not be limited as it may pejoratively confine the meaning of elder abuse to certain activities and consequently other activities which should be characterised as elder abuse may not fall within the scope of the definition because it has been drafted in narrow terms.
>
> The term 'distress' should again be construed broadly. … We note that in some circumstances, a victim of elder abuse may not realise that they have been abused. Therefore, we consider that the presence or non-presence of distress should not be used to determine whether or not elder abuse has in fact occurred. Perhaps what is more relevant is whether harm has been inflicted.[49]

1.40 The Law Council of Australia distinguished 'harm' from 'distress':

> While harm denotes the direct effect of action or inaction, distress captures the indirect effect in causing 'extreme anxiety, sorrow or pain'. Distress is subjective: what distresses one person may not distress another.[50]

1.41 The Public Trustee (Qld) said that the aspect of 'harm' as an alternative to 'distress' was important in the context of older persons with diminished decision-making ability, such as cases of advanced dementia, who may not experience distress 'in a subjective sense', although financial abuse may amount to 'harm'.[51]

1.42 Hervey Bay Seniors Legal and Support Service pointed to situations which may cause harm, but not distress:

> This would be the case where the older person is unaware of the harm due to ignorance or where they have no memory, recollection or knowledge of it due to dementia or some other incapacity. This type of abuse can be carried out by a person to whom the older person has entrusted their finances or health and safety including paid carers or institution. It can also be both intentional and unintentional. Often the harm or abuse is insufficient to warrant criminal action but would give rise to some form of civil cause of action.[52]

1.43 Other examples concern situations where the wishes and preferences of an older person are not respected. The Law Council provided a case study of a man who had been an eminent engineer in his working life:

> He acknowledged he had high care needs but wanted to travel interstate to attend an annual dinner which was named after him and being held in his honour. He needed assistance with his plans to travel as he was immobilised and could not leave the residence without assistance. The residential care provider refused to allow him to travel and said he needs two people to accompany him and the people were not available. (In fact there were many people who volunteered to do this for him). The residential care facility misinterpreted their duty of care as extending to his absences and refused to take the risk of being liable for his wellbeing during a time of absence.[53]

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49 Gadens Lawyers (Melbourne), *Submission 82*.
50 Law Council of Australia, *Submission 61*.
51 The Public Trustee of Queensland, *Submission 98*.
52 Hervey Bay Seniors Legal and Support Service, *Submission 75*.
53 Law Council of Australia, *Submission 61*.

1.44 Examples of causing distress to an older person by placing them in an aged care facility against their wishes and selling their home against their will were cited by stakeholders.[54] Townsville Community Legal Service said that, on occasions, such actions may be warranted, but this is not always so:

> Many older persons find themselves in care because of the decisions of others, including medical professionals and appointed or substitute decision makers. When this occurs, the older person at the centre of the decision making process can be confused, angry and the process can have elements of elder abuse or even be a manifestation of elder abuse. In most cases care is warranted but in some it isn't—it is simply a way of removing an older person from an asset base.[55]

1.45 Similarly the Office of the Public Advocate (Qld) referred to the 'practice in Australian society of moving older people against their will from their homes and into residential aged care'—decisions 'often made by family members and supported by medical professionals'.[56] The Office of the Public Advocate (Vic) provided an example of where this was done to facilitate personal gain, concerning

> an older woman whose younger relatives supported her premature placement in aged care in order to gain control of her house through fraudulent use of a power of attorney.[57]

1.46 Distress caused to transgender people by not acknowledging their gender identity was another example provided by stakeholders, as in this illustration by ADA Australia:

> Amy is a transwoman, aged 70. Amy was placed in an Aged Care Facility after a stroke by her children as joint Enduring Power of Attorneys. Her family consists of two sons, one daughter and 4 grandchildren.
>
> The Attorneys instructed the Aged Care Facility that only family were able to visit and everyone else was to be turned away or told that the resident was not at the facility. Amy's telephone was to be removed from her room and Amy was to be dressed as a man and no assistance was to be provided for Amy to dress as a woman. Amy was only to be referred to by her birth name and gender.[58]

1.47 The ALRC supports taking a broad view of the 'harm or distress' element in the WHO definition. However, with respect to particular kinds of elder abuse, if specific causes of action arise, or are to be defined, more precision is required. As the Law

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54 See, eg, Ibid; N Smith, *Submission 127*.

55 Townsville Community Legal Service Inc, *Submission 141*.

56 Office of the Public Advocate (Qld), *Submission 149*. See also Justice Connect, *Submission 182*.

57 Office of the Public Advocate (Vic), *Submission 95*.

58 ADA Australia, *Submission 150*. ADA Australia was contacted by the Aged Care Facility as they had concerns regarding the legitimacy of the directions. ADA Australia provided Amy with support to revoke the current Enduring Power of Attorney document and to change gender identity on her passport and access medical letters from a gender clinic to facilitate change of gender on Medicare and the Aged Care systems. The Aged Care Facility Lifestyle staff provided safety and support for Amy to 'transition' to herself again. Another stakeholder referred to 'prejudice and hostility' to LGBT older persons in institutional care facilities where staff 'may deny an LGBT elder's visitors, refuse to allow same-sex couples to share rooms, refuse to place a transgender elder in a ward that matches their gender identity': National LGBTI Health Alliance, *Submission 156*.

Council commented, for example, it is 'difficult to envisage how distress can helpfully be incorporated into a legal definition'.[59]

Intention

1.48 The WHO definition of elder abuse does not address specifically the question of intention to cause harm or distress to an older person.[60] Elder abuse guidelines in Tasmania and Victoria note that abuse may occur as a result of ignorance or negligence, or it may be deliberate.[61] The importance of including unintended abuse was noted by the Office of the Public Advocate (SA):

> If intent must be present, then more subtle or evolving abuse may not be detected. Often, people including family members do not understand the rights of older persons and/or believe that they have a right or entitlement to an older person's assets, finances or decisions through the relationship they have with the older person.[62]

1.49 The Office of the Public Guardian (Qld) observed that

> There may be multiple factors leading to abuse. While abuse may in some instances be deliberate neglect, or abuse, there may also be situations where the carer lacks the ability, knowledge, skill or support to manage the increasing burden of care. Therefore, any proposed legal definition of elder abuse should recognise that elder abuse may be intentional or unintentional in nature.[63]

1.50 The Tasmanian guidelines also suggest that for the purposes of identifying and defining abuse of older persons, 'the focus should be on the effects on the older person, rather than the intention of the perpetrator'. A similar view was expressed by the Northern Territory Anti-Discrimination Commission (ADC):

> The ADC's experience in the area of complaint resolution and advocacy for equality of opportunity for vulnerable groups across the Northern Territory is that the impact of the conduct is far more relevant than the intention of the person or family member perpetrating the abuse. It is important in an area where attitudes need to change to ensure society's condemnation of financial abuse, neglect and psychological abuse of older Australians. It is the impact on these vulnerable people rather than the intention of those abusing that should be the focus. Proving intention moves the focus away from the vulnerable older person to the perpetrator.[64]

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59 Law Council of Australia, *Submission 61*.

60 It refers expressly to 'intentional or unintentional neglect' and also to 'lack of appropriate action', which may be unintended.

61 Department of Health and Human Services (Tas), *Responding to Elder Abuse: Tasmanian Government Practice Guidelines for Government and Non-Government Employees* (2012) 12; Department of Health (Vic), *Elder Abuse Prevention and Response Guidelines for Action 2012–14* (2012) 2.

62 Office of the Public Advocate (SA), *Submission 170*. Speech Pathology Australia supported a broad description of elder abuse, 'taking into account mistreatment and neglect': Speech Pathology Australia, *Submission 168*.

63 Office of the Public Guardian (Qld), *Submission 173*.

64 Northern Territory Anti-Discrimination Commission, *Submission 93*.

1.51 The Law Council of Australia also said that, while intention is important, 'what is essential is the impact of the behaviour'; and that what is critical is changing attitudes to behaviour—'particularly when some may not regard it as abusive'.[65]

1.52 Seniors Rights Victoria observed that

> Abuse of older people can be subtle or extreme, intentional or unintentional, made up of one act or many acts and change or escalate over time. The impact of the abuse is exacerbated by the relationships of trust which involves a heightened level of vulnerability for the older person.
>
> …
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> Despite the ultimate consequences for the older person, … there can be significant differences in the ongoing relationship with the perpetrator if the abusive act occurred through an intentional as opposed to unintentional or ignorant circumstances. However, where abuse has occurred unintentionally, the focus should be directed to the consequences experienced by the older person and not the perpetrator's intention.[66]

1.53 An example of conduct that may cause distress, but which is not necessarily intended to cause harm, was provided in the submission from Alice's Garage, with respect to LGBTI older people:

> family members who perpetrate homophobic or transphobic abuse may not be aware that their behaviour is abusive because they believe their responses are aligned with societal norms. Recent debates about LGBTI people have included homophobic and transphobic comments being made by high profile community leaders. These comments influence broader community values and beliefs. When families emulate these views in their responses to LGBTI family members—they may not see their behaviour as abusive. The absence of intention to cause harm here should not excuse abuse.[67]

1.54 Intention may be particularly relevant to developing appropriate responses to elder abuse. In responses involving the criminal law, matters of intention may be crucial—in offences such as assault, fraud, theft or criminal neglect.[68] In others, where the abuse arises for example through ignorance rather than, say, malevolence or greed, the response may be to provide better understanding to those undertaking roles—like carers or those acting under enduring powers of attorney.

1.55 The Caxton Legal Centre identified the importance of intention in some contexts:

> Intention to cause harm may be relevant to any criminal sanction associated with elder abuse, however for the purposes of identifying and responding to the societal problem of the mistreatment of older people, intention to cause harm should not be a necessary pre-condition. Aside from the difficulty in proving intent, there have been many

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65 Law Council of Australia, *Submission 61*. Gadens Lawyers refer to situations where a carer may not realise that their actions are causing harm or distress: Gadens Lawyers (Melbourne), *Submission 82*.

66 Seniors Rights Victoria, *Submission 171*.

67 Alice's Garage, *Submission 36*. 'The battle for self-determination and recognition of sexual orientation and identity' may also continue post-mortem, 'with family members refusing to acknowledge trans people's nominated gender at their funeral'.

68 Intention may also be relevant to criminal penalties: Office of the Public Guardian (Qld), *Submission 173*.

> occasions where perpetrators of harm have started out with the best intentions however have inadvertently mistreated older people (including by neglect) in response to extenuating circumstances.[69]

1.56 Gadens Lawyers referred to the complexity of an element of intention for the purposes of defining elder abuse:

> The term implies that an individual has a degree of awareness that their actions will result in a particular outcome. … In many cases, the perpetrator of elder abuse will possess an intent to cause harm or distress to the older person. Having said this, it may also be the case that the perpetrator of elder abuse does not intend to cause distress to the older person.
>
> That is, elder abuse may occur in situations where the carer has acted out of frustration towards the elder person. Or, in some circumstances, carers may not even realise that their actions have resulted in harm or distress to the elder person. In circumstances such as this, the carer may not possess the requisite 'intention' and therefore the abuse complained of may not be caught by the definition.[70]

Expectation of trust

1.57 The WHO definition of elder abuse refers to abuse occurring within any relationship where there is an 'expectation of trust'. Some stakeholders wanted the definition of elder abuse widened beyond situations involving trust relationships, to catch abuse by strangers, such as telemarketing scams. Alzheimer's Australia, for example, said that the inclusion of the concept of 'expectation of trust' may be problematic:

> as it will exclude abuse that occurs outside of trusting relationships, such as in the case of a sales person or telemarketer who does not necessarily have a relationship of trust with the vulnerable individual. [71]

1.58 Hervey Bay Seniors Legal and Support Service raised similar concerns, where an older person 'is taken advantage of because, due to their age or frailty, they are unable to stand up for their rights', including in dealings with telemarketers.[72]

1.59 The ALRC acknowledges that problems with intrusive telemarketing may cause distress to many people, and that older persons may be particularly affected.[73] In collecting data on abuse of older persons, such situations may also be identified, in addition to those otherwise captured a definition of elder abuse. Addressing such situations may require specific policy solutions.

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69 Caxton Legal Centre, *Submission 174*.
70 Gadens Lawyers (Melbourne), *Submission 82*.
71 Alzheimer's Australia, *Submission 80*.
72 Hervey Bay Seniors Legal and Support Service, *Submission 75*.
73 Penny Jorna, 'The Relationship between Age and Consumer Fraud Victimisation The Relationship between Age and Consumer Fraud Victimisation' (Trends & Issues in Crime and Criminal Justice No 519, Australian Institute of Criminology, November 2016).

1.60 Gadens Lawyers suggested that rather than 'expectation of trust', the focus should be on 'implication of trust', as used in the Victorian Department of Health's *Elder Abuse Prevention and Response Guidelines for Action 2012—2014.*

> The term 'implication' is not as restrictive as 'expectation'. The 'trust' element can therefore be implied into most relationships that a care recipient has, specifically, with family, friends, carers and facility providers.[74]

Payment for services

1.61 Should abuse by doctors, nurses, carers and others who are paid to provide a service to older people be considered 'elder abuse'? The WHO definition does not specifically refer to the issue of payment for services, only that the relevant abuse occurs within a relationship where there is an expectation of trust. The Terms of Reference for this Inquiry refer to abuse by 'formal and informal carers, supporters, representatives and others'. The inclusion of 'formal' carers and others, means that abuse by paid carers has been considered in the Inquiry, for example in relation to aged care. In the Issues Paper the ALRC invited comment on the extent to which payment for services should be taken into account in describing or defining elder abuse.[75]

1.62 Seniors Rights Victoria noted that neither the WHO definition nor the one used by the Australian Network for the Prevention of Elder Abuse identified payment for services as a 'key determinant' in elder abuse cases.[76]

1.63 The Law Council said that it considered the definition of elder abuse should not include harm caused by a person who is in receipt of payment for services:[77]

> Whilst this behaviour is abusive, the Law Council submits that the term 'elder abuse' should be limited to personal relationships and not extended to relationships which have an economic basis. A tighter definition will ensure accurate data collection of the specific phenomenon of abuse within families and in other trusting relationships.[78]

1.64 While not supporting the inclusion of 'payment for services' in a definition of elder abuse, Advocare added that 'older people should be adequately supported when they find themselves victims of "payment for services" type abuses'.[79] The Office of the Public Guardian (Qld) submitted that definitions should be 'focused upon the victim': whether or not the person who perpetrated the abuse is paid, or not paid for the service provided, 'should be irrelevant in determining whether abuse has occurred'.[80]

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74 Gadens Lawyers (Melbourne), *Submission 82*. See also Office of the Public Advocate (SA), *Submission 170*. Another stakeholder said that 'any definition should include implications or expectations of trust': National Older Persons Legal Services Network, *Submission 180*.

75 Australian Law Reform Commission, *Elder Abuse*, Issues Paper 47 (2016) Question 1.

76 Seniors Rights Victoria, *Submission 171*.

77 Law Council of Australia, *Submission 61*.

78 Ibid.

79 Advocare Inc (WA), *Submission 86*.

80 Office of the Public Guardian (Qld), *Submission 173*.

1.65 In contrast, Relationships Australia commented that the definition should be consistent 'for informal and formal relationships, regardless of payment for services';[81] and N Smith said that:

> Payment for services should definitely be considered as an element. This is definitely an area where there should be an 'expectation of trust' as people are paying for services.[82]

'Elder abuse' in particular contexts

1.66 While 'elder abuse' is a recognised shorthand phrase, and a useful descriptive starting point, it is not without difficulty, both in terms of the use of the word 'elder' and in the composite expression 'elder abuse'. Older people are not homogenous and the experiences of different communities bring different dynamics into play.

1.67 For example, the National Aboriginal and Torres Strait Islander Legal Services said that in the Aboriginal and Torres Strait Islander community, in addition to referring to the age of a person, 'elder' is also 'a title of respect'.[83] Legal Aid ACT commented, similarly, that

> The way that we conceptualise elder abuse is problematic in respect to Aboriginal and Torres Strait Islander (ATSI) communities. The concept in itself is contested—'eldership' is often associated with community contribution, authority, or knowledge.'[84]

1.68 In the 2005 report by the Office of the Public Advocate (WA) into elder abuse in Aboriginal Communities, it was observed that '[t]erminology plays a huge part in the defining and understanding of concepts' and that some Aboriginal people were concerned that the term 'elder abuse' was 'too confrontational'.[85] Two factors were identified as having particular implications for developing an understanding of elder abuse: cultural obligations and the circumstances of grandparents.[86]

> From a cultural perspective, Aboriginal norms in relation to reciprocity, the expectations that resources will be shared and kinship, where a wide variety of relationships are involved in familial and community networks, were dimensions that complicated understandings of whether and how elder abuse was occurring. The position of grandparents caring for grandchildren and the extent to which calls on grandparent resources were culturally reasonable or unreasonable were also highlighted by the research.[87]

1.69 Kaspiew, Carson and Rhoades urge that '[s]ubstantially more work is required to understand and conceptualise elder abuse in the Aboriginal context, especially

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81 Relationship Australia, *Submission 185*.
82 N Smith, *Submission 127*.
83 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.
84 Legal Aid ACT, *Submission 58*. See also L Hammond, *Submission 83*.
85 Office of the Public Advocate (WA), *Mistreatment of Older People in Aboriginal Communities Project: An Investigation into Elder Abuse in Aboriginal Communities* (2005) 22.
86 Ibid 28–29.
87 Kaspiew, Carson and Rhoades, above n 12, 12. See also Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [2.16]–[2.19].

among different communities in different circumstances given the diversity among Aboriginal and Torres Strait Islander communities'.[88]

1.70 With respect to culturally and linguistically diverse (CALD) communities, the Ethnic Communities' Council of Victoria noted the difficulties of 'translating the term "elder abuse" in different cultural contexts and languages':

> There is no direct translation for 'elder abuse' in some languages, and can connote primarily physical violence. Using it as an umbrella term may deter discussion within certain communities and provoke feelings of shame or stigma. The approach of this project has to be to consider this with the different communities we work with and adapt the language accordingly. For example the ECCV project has used language such as 'mistreatment of older people' or focussed on the message that everyone deserves respect and dignity.[89]

1.71 A study undertaken on elder abuse in Victoria, demonstrated that 'financial management practices and expectations of future care and support are culturally bound'; and that there were 'identifiable differences between language and cultural groups, including rural older people, in their family patterns and expectations of relationships, and in the rules about managing money within families'.[90]

1.72 A number of factors have been shown to heighten vulnerability in CALD communities, especially 'language difficulties for those whose primary language is not English, social dependence on family members for support, and the potential conflict caused by cross-generational expectation in relation to care'.[91]

1.73 For people living in rural and remote areas there are also distinct dynamics at play in the context of elder abuse. 'Any discussion of Australian rurality', however, 'must avoid the assumption of homogeneity'.[92] As summarised by Kaspiew, Carson and Rhoades, particularly relevant issues include

> the complexity of assets held by families resident in rural areas such as farming properties; lack of access to services that may assist with asset management arrangements and responses to situations where elder abuse is occurring or expected; and the dynamics involved in reporting or disclosing elder abuse in rural communities, where shame and concern to protect the family name potentially play an inhibiting role.[93]

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88 Ethnic Communities' Council of Victoria Inc, *Submission 52*.

89 Ibid.

90 Wainer et al, above n 44, 15.

91 Kaspiew, Carson and Rhoades, above n 12, 12. Reference is made to Dale Bagshaw, Sarah Wendt and Lana Zannettino, 'Preventing the Abuse of Older People by Their Family Members', (Stakeholder Paper No 7, Australian and Domestic Violence Clearinghouse, 2009). Bagshaw et al make observations about these factors at 8–9.

92 Cheryl Tilse et al, 'Managing Older People's Assets: Does Rurality Make a Difference?' (2006) 16(2) *Rural Society* 169, 170. The authors point to the diversity in rural and remote areas of Australia in terms of population size, demography and services.

93 Kaspiew, Carson and Rhoades, above n 12, 13. Tilse et al point to 'issues with distance from services, absence of services and the lack of choice in services that can pose particular challenges for responsible financial management for older people living in rural areas': Tilse et al, above n 92, 178.

1.74 Other features identified the 'complex and potentially conflictual dynamics around farming properties with the multi-generational interests involved where the farm is the family business':

> These included complications about the treatment of farms as inheritance, and the balance between providing for children and maintaining the family business, placing one child in a different position from the others, and the treatment of labour and other contributions to the improvement of the farm in estates.[94]

1.75 Understanding the dynamics of elder abuse in particular contexts will be a crucial aspect of developing informed policy responses.[95] Research undertaken as specific actions under the proposed National Plan, as well as the instigation of a national prevalence study of elder abuse, will assist towards this goal

Conceptual framework

Elder abuse in the federal context

1.76 Issues surrounding elder abuse relate to areas of Commonwealth, state and territory and possibly local government responsibility. For example, the Commonwealth makes laws relating to financial institutions, social security, superannuation and aged care.[96] Laws relating to substitute decision making, including guardianship and powers of attorney, and most criminal laws, are the province of the states and territories. In the 2007 report, *Older People and the Law*, the House of Representatives Standing Committee on Legal and Constitutional Affairs described the legal landscape in this way:

> Among the nine legal jurisdictions within Australia there are a number of laws that have particular relevance to older Australians. At the Commonwealth level, legislation in the areas of aged care, superannuation, social security and veteran's entitlements is of particular relevance as we age. In state and territory jurisdictions, legislation relating to substitute decision making, guardianship, retirement villages, wills and probate affects the population as it ages. Criminal matters, such as fraud and other forms of financial abuse, are dealt with primarily at the state and territory level, although Commonwealth legislation covers certain criminal matters. Unlike a number of overseas jurisdictions, there are no specific laws in Australia dealing with what might be broadly classed as 'elder abuse'.[97]

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94 Kaspiew, Carson and Rhoades, above n 12, 13. The complexity of family relationships over farms and farming assets is noted by Tilse et al, above n 92, 180.

95 This was highlighted by a number of stakeholders, eg: Office of the Public Advocate (Vic), *Submission 95*; National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*.

96 The Commonwealth's powers to make laws relating to aged care arise from its legislative power to make laws regulating corporations providing aged care, funding programs administered by states and territories, and its powers relating to age pensions, carer pensions and other welfare regimes: Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99, 102. The Commonwealth's powers in relation to taxation, financial institutions, social security and superannuation arise from the banking, social welfare and powers respectively: *Australian Constitution* s 51(ii), (xiii), (xxiii), (xxiiiA). The Commonwealth does not have an enumerated power to legislate with regard to the welfare of adults generally.

97 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.7].

1.77 This makes responding to elder abuse a complex issue—both from the perspective of laws, but also in terms of practical responsibility. Kaspiew, Carson and Rhoades commented that

> responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across different levels of government, and various justice system frameworks within the private sector and across non-government organisations.[98]

1.78 On the one hand, as Professor Wendy Lacey points out, the 'responsibility for safeguarding vulnerable adults lies primarily with the state and territory governments', but, on the other, 'responsibility for ageing and aged care has increasingly been appropriated by the Commonwealth'.[99]

1.79 In the ALRC's 2010 Family Violence inquiry, the ALRC considered the complex interactions across the federal landscape, particularly between the *Family Law Act 1976* (Cth) and state and territory family violence and child protection laws.[100] In that context the ALRC identified, as a key policy goal, the aspiration of 'seamlessness'. Where legislation includes different definitions and requirements, consistency has been identified as an important goal. As it was in the Family Violence Inquiry, a need for consistent laws was a dominant theme among stakeholders in this Inquiry.[101] As National Seniors observed:

> It makes little sense that the legal frameworks to protect older Australians from abuse differ across the various states and territories. National laws or at the least nationally consistent laws are required to reduce confusion and improve protections for older people.[102]

1.80 National consistency of laws, such as state and territory powers of attorney and guardianship and administration laws is one goal, among many, that could be led through the National Plan process. A number of the proposals also express the idea of consistency that seamlessness embodies.

1.81 The idea of seamlessness is also seen in an emphasis on effective interventions to protect older persons from, or to respond to, abuse. This presents particular issues for this Inquiry in the federal context. As Kaspiew, Carson and Rhoades observed, 'Commonwealth, state and territory governments have intersecting responsibilities in relation to ageing, aged care and health'.[103] The Proposals in this Discussion Paper recognise the jurisdictional responsibilities of the different levels of government within a federal system and the need for integrated pathways to achieve a seamlessness of response. The Proposals also recognise where there are gaps in the current complaints and investigatory frameworks and where monitoring and supervision may be improved.

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98 Kaspiew, Carson and Rhoades, above n 12, 1.

99 Lacey, above n 96, 101.

100 Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010).

101 See, eg, Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Queensland Law Society, *Submission 159*; National LGBTI Health Alliance, *Submission 156*; National Seniors Australia, *Submission 154*; Townsville Community Legal Service Inc, *Submission 141*.

102 National Seniors Australia, *Submission 154*.

103 Kaspiew, Carson and Rhoades, above n 12, [1].

Elder abuse and family violence

1.82 Elder abuse is often committed by a family member of the older person—notably, by adult children, but also the older person's spouse or partner. The essence of elder abuse in the WHO definition is the harm or distress caused by the person in a position of trust. Family violence exhibits similar dynamics. For example, it is defined in the *Family Law Act 1975* (Cth) as meaning 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful'.[104]

1.83 The approach reflected in the WHO definition is wider than the concept of 'family violence', in that the relationships of trust may be wider than 'family' and the group of relationships listed in the Terms of Reference. However, elder abuse is closely related to family violence and, as Chesterman observed, 'elder abuse is often also an instance of family violence'.[105] Like family violence, elder abuse can be physical, sexual, psychological or financial in nature, and is usually committed by a family member; and available research also suggests that women are more likely to experience elder abuse than men.[106] Some instances of elder abuse may be a continuation of family violence that began when the perpetrator and victim were not old. In other cases, ageism, cognitive impairment, social isolation or relationships of dependence may contribute to the risk of elder abuse.[107]

1.84 The Office of the Public Guardian (Qld) said that

> elder abuse manifests differently to the usual conceptions of domestic and family violence, particularly in terms of the perpetrator and type of abuse. For example, adult children are more likely to be perpetrators of abuse against an elderly parent, than the parent's partner. The type of abuse is also more likely to be financial abuse, including misappropriation of finances and property; emotional abuse, including intimidation and controlling behaviour; or neglect, including under-medicating, over-medicating or not taking someone to the bathroom.[108]

1.85 There may be some differences in the dynamics of family violence and elder abuse. Family violence is often characterised as a manifestation of power and control.[109] There is less agreement about the dynamics of elder abuse. In 1999, it was said that 'research to date has not been successful in identifying theoretical frameworks that are useful in understanding the issue as a social phenomenon' and this may still be true today.[110]

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104 *Family Law Act 1975* (Cth) s 4AB(1). This provision was introduced in 2011.
105 Chesterman, above n 8, 117.
106 Kaspiew, Carson and Rhoades, above n 12, 5.
107 Ibid ch 3.
108 Office of the Public Guardian (Qld), *Submission 173*.
109 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 18.
110 Pamela Kinnear and Adam Graycar, 'Abuse of Older People: Crime or Family Dynamics' (Trends & Issues in Criminal Justice 113, Australian Institute of Criminology, 1999) 6; Kaspiew, Carson and Rhoades, above n 12, ch 3.

1.86 Professors Thomas Goergen and Marie Beaulieu note that a power imbalance may not be a necessary feature of elder abuse:

> While the very act of abuse can often be regarded as exerting (and misusing) power, there is little reason to assume that abuse can only happen in relationships where the overall distribution of power and influence is in favor of the perpetrator. In family caregiving, structural aspects of the pre-caregiving relationship between spouses can remain relatively stable. The caregiving role may provide the caregiver with opportunities and situational triggers for abuse, but being in a position where one may be affected by abuse does not necessarily mean having less power and influence than the potential abuser. Acts of abuse and neglect may happen between persons where the overall distribution of power is equal or even in favor of the victim. However, differential power balance may still be regarded as a favorable constellation for abuse and neglect.[111]

1.87 A particular manifestation of elder abuse is financial abuse. This may include pressure to sign a range of documents—including, for example, an enduring power of attorney and a will.[112] While such pressure may include the element of control essential to family violence, there are additional aspects that characterise elder abuse. Seniors' Legal and Support Service of the Caxton Legal Centre said that it was their experience that 'a range of forms of abuse may be perpetrated on an older person with the primary aim of predation—in order to access their funds and/or property'.

1.88 The predatory nature of financial abuse forms part of what Protecting Seniors Wealth described as 'the rapidly increasing wealth abuse epidemic called "Inheritance Impatience"',[113] driven, as another put it, by the fact that the older person 'doesn't die soon enough for the abuser'.[114] Examples may be seen in relation to transactions that affect property during the lifetime of the older person—as for example through family agreements and the exercise of powers of attorney.[115] The Australian Association of Gerontology suggested that these kinds of financial abuse reflect that

> Family members may also regard older relatives' assets as belonging to the family rather than the older relatives, since the assets will be coming to them as an inheritance in due course (or so they expect).[116]

Elder abuse as a human rights issue

1.89 Kaspiew, Carson and Rhoades describe elder abuse as 'fundamentally a human rights issue'.[117] In its 2016 report, *Elder Abuse in New South Wales*, the New South Wales Legislative Council set out as its first recommendation that the approach to elder

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111 Thomas Goergen and Marie Beaulieu, 'Critical Concepts in Elder Abuse Research' (2013) 25(08) *International Psychogeriatrics* 1217, 1225.

112 See, eg, Alzheimer's Australia, *Submission 80*.

113 Protecting Seniors Wealth, *Submission 111*.

114 Name Withheld, *Submission 133*.

115 See Chapters 5 and 8.

116 Australian Association of Gerontology, 'Submission to Legislative Council Inquiry into Elder Abuse in New South Wales', November 2015, 7. See also Older Women's Network NSW, *Submission 136*.

117 Kaspiew, Carson and Rhoades, above n 12, 1.

abuse should include 'a rights based framework that empowers older people and upholds their autonomy, dignity and right to self-determination'.[118]

1.90 Professor Wendy Lacey urged that human rights should be the 'normative framework' for adult protection.[119] Many stakeholders similarly emphasised that elder abuse should be seen as a matter of human rights. The Law Council of Australia, for example, said that 'it is vital that all legal responses are based on a rights based approach in which the will and preference of the older person is given primacy'.[120]

1.91 Existing human rights instruments, including the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, protect the rights of older persons equally with other persons.[121] The *Universal Declaration of Human Rights* specifically protects the right to security in old age.[122] Some instruments, such as the *Convention on the Rights of Persons with Disabilities* (CRPD) may be particularly relevant to older persons, given that the rates of disability increase with age.[123]

1.92 There is no Convention specifically relating to the rights of older persons. However, the Open Ended Working Group on Ageing is currently considering whether there should be new human rights instruments relating to older persons.[124] A number of non-binding international instruments, including the *United Nations Principles for Older Persons*[125] and the *Madrid International Plan of Action on Ageing*,[126] relate to the human rights of older persons.

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118 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 1.

119 Lacey, above n 96, 113.

120 Law Council of Australia, *Submission 61*.

121 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1), 26; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2(2), 3; Office of the High Commission for Human Rights, *Normative Standards in International Human Rights Law in Relation to Older Persons: Analytical Outcome Paper* (August 2012) 8, 11–12.

122 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 25(1).

123 The CRPD states that 'State Parties undertake to adopt measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life': *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008). Other conventions that may apply include: *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). For a discussion of age and disability, see Australian Institute of Health and Welfare, *Australia's Welfare 2011, Cat No AUS 412* (2011) 11–12.

124 United Nations General Assembly Open-Ended Working Group on Ageing, *Report of the Open-Ended Working Group on Ageing*, UN Doc A/AC.278/2015/2 (29 July 2015) 7.

125 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) annex 1.

126 Second World Assembly on Ageing, *Political Declaration and Madrid International Plan of Action on Ageing*, Madrid, Spain (8–12 April 2002).

1.93 The Office of the Public Advocate (Vic) emphasised that best practice legal responses to elder abuse are those which ensure that their adult protection laws and practices are consistent with human rights obligations, especially the CRPD.[127] Moreover, a lack of appropriate action, as Leading Age Service Australia submitted, 'detracts from a person's rights and impacts on their dignity'.[128] The Australian Association of Social Workers said that seeing elder abuse as a human rights issue requires 'a comprehensive set of strategies, and the cooperation of multiple individuals and groups':

> Preventative strategies informed by human rights principles need to be the foundation of the response to elder abuse in the private and the public lives of older people, whether it be in the spheres of health, finance, education, care and support services, or recreation.[129]

1.94 People with Disability Australia (PWDA) drew attention to the range of human rights instruments that may be relevant to the rights of older people, particularly older people with disability. It noted that, while the *Convention on the Rights of Persons with Disabilities* is the principal instrument, 'it is not the only document relating to people with disability, or to older people':

> An intersectional response requires consideration of all human rights instruments to which Australia is a party, as well as those to which we are not. Particularly relevant in discussions of elder violence are the UN Principles for Older Persons, for instance. This document could be used to guide the ways in which elder violence is prevented, identified and addressed, ensuring that the rights of older people are at the forefront of any approaches.[130]

1.95 The Older Persons Legal Services Network suggested that a rights-based approach should be underpinned by the understanding that there is no 'normal older person': 'old age is a social and societal construct which continues to shift and evolve'.[131]

1.96 Developing responses to elder abuse through a rights-based lens is not entirely straightforward, however. As Lacey points out,

> The challenge for lawyers, advocates and policymakers is that the human rights of older persons have not yet been well defined in international human rights law, and governments (national, regional and local) are presently developing law and policy in the absence of a specific treaty with binding obligations to respect and protect the rights of older people. … [t]he only instruments specifically concerned with older persons reflect non-binding, soft law. … While the UN Principles [for Older Persons] are implicitly human rights-based, they are also written in aspirational terms and speak to others (that is carers and policymakers) rather than older persons. Further, the UN Principles do not speak of 'rights' at all, although they are framed around five

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127 Office of the Public Advocate (Vic), *Submission 95*.

128 Leading Age Services Australia, *Submission 104*.

129 Australian Association of Social Workers, *Submission 153*. The AASW noted that social workers are 'integral to services that cater for the health and wellbeing of older Australians in all settings across the aged care continuum'.

130 People with Disability Australia, *Submission 167*.

131 National Older Persons Legal Services Network, *Submission 180*.

> core themes reflective of a human rights-based approach: independence, participation, care, self-fulfilment and dignity.[132]

1.97 The rights-based framework is evident in the Terms of Reference. In giving the ALRC this Inquiry, the Attorney-General had regard to three matters:

- that all Australians have rights, which do not diminish with age, to live dignified, self-determined lives, free from exploitation, violence and abuse;
- that laws and legal frameworks should provide appropriate protections and safeguards for older Australians, while minimising interference with the rights and preferences of the person; and
- relevant international obligations relating to the rights of older people under United Nations human rights conventions.

Framing principles

1.98 The objective expressed in the Terms of Reference is to identify best practice laws and legal frameworks that: promote and support older people to participate equally in their community and access services and advice; protect against misuse or advantage taken of formal and informal supporter or representative roles; and to provide specific protections. To meet this objective, and to express a rights-based framework, the ALRC considers that the proposals contained in this Discussion Paper should meet the following framing principles: dignity and autonomy; and protection and safeguarding.

Dignity and autonomy

1.99 The right to enjoy a dignified, self-determined life is an expression of autonomy. The *UN Principles for Older Persons* state this principle as requiring that:

> Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
>
> Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status and be valued independently of their economic contribution.[133]

1.100 Dignity is a key principle in a number of international human rights instruments.[134] In Australia, the National Disability Strategy prioritised the concept of dignity in its principles.[135] Similarly, the Productivity Commission identified human

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132 Lacey, above n 96, 114–115.

133 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [17]–[18].

134 See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 25(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

135 Australian Government, *National Disability Strategy 2010–2020*, 22.

dignity as 'an inherent right' of persons with disability and suggested that dignity as a human being is linked to self-determination, decision-making and choice.[136]

1.101 The *UN Principles for Older Persons* also expressly include dignity as a principle in the context of older persons 'in any shelter, care or treatment facility', combined with the right to be self-determining: 'full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives'.[137]

1.102 Dignity is a principle which acknowledges diversity. The preamble to the *UN Principles for Older Persons* acknowledges an appreciation of 'the tremendous diversity in the situation of older persons, not only between countries but within countries and between individuals, which requires a variety of policy responses'.[138]

1.103 Autonomy is a significant aspect of a number of the *United Nations Principles for Older Persons* that underlie the ability of persons to make decisions and choices in their lives: particularly the principles of 'independence', 'participation' and 'self-fulfilment'. For example, the principle of self-fulfilment includes that '[o]lder persons should be able to pursue opportunities for the full development of their potential'.[139] Autonomy is also enshrined in the general principles of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), to which Australia was one of the original signatories.[140] It is a key principle of the National Disability Strategy;[141] and is reflected in the objects and principles of the National Disability Insurance Scheme.[142] The ALRC *Equality, Capacity and Disability* Inquiry was informed by autonomy in the sense of 'empowerment', not just 'non-interference',[143] which involves seeing an individual in relation to others, in a 'relational' or 'social' sense,[144] an understanding that connects with respect for the family as the 'natural and fundamental group unit of society' that is entitled to protection by States Parties.[145]

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136 Productivity Commission, *Review of the Disability Discrimination Act 1992 (Cth)* (Report No 30, 2004) 182.

137 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991) [14].

138 *United Nations Principles for Older Persons*, GA Res 46/91, UN GAOR, 46th Session, 74th Plen Mtg, Agenda Item 94(a), UN Doc A/RES/46/91 (16 December 1991).

139 Ibid [15].

140 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

141 Australian Government, *National Disability Strategy 2010–2020*, 22.

142 *National Disability Insurance Scheme Act 2013* (Cth) ss 3–4.

143 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 269–272. See her discussion particularly in ch 1, 'Autonomy: Variations on a Principle', in which she draws on the work of Joseph Raz: eg Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986).

144 John Christman, 'Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves' (2004) 117 *Philosophical Studies* 143, 143.

145 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48, UN GAOR, 3rd Comm, 48th Sess, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993) rule 9.

1.104 Dignity in the sense of the right to enjoy a self-determined life is particularly important in consideration of older persons with impaired or declining cognitive abilities. The importance of a person's right to make decisions that affect their lives was a fundamental framing idea throughout the ALRC's *Equality, Capacity and Disability* Inquiry. It reflects the paradigm shift towards supported decision making embodied in the *UN Convention on the Rights of Persons with Disabilities* and its emphasis on the autonomy and independence of persons with disabilities, so that it is the will and preferences of the person that drives decisions they make or that others make on their behalf, rather than an objective notion of 'best interests'.

Protection and safeguarding

1.105 This Inquiry requires a particular focus on safeguards and protections for the rights of older persons, reflected in the title of the Terms of Reference: 'Protecting the Rights of Older Australians from Abuse'. It is also the clear objective of the Inquiry. Safeguarding against elder abuse requires addressing a range of points of intervention, including those related to risk, reporting, response and redress. It requires appropriate mechanisms of accountability across the federal system.

1.106 Balancing autonomy with providing appropriate protections and safeguards against abuse is a particular challenge in the context of an ageing population—although many protections are entirely compatible with protecting a person's autonomy. The National Ageing Research Institute (NARI) stated that the approach based on empowerment, works for people in a position to advocate for themselves, but it 'doesn't work for people with cognitive difficulties or limited capacity'.[146]

1.107 Concerns about determining appropriate safeguarding responses may be increased in the context of a move towards more self-directed care, where older people are being supported to stay in their own homes for as long as possible.[147] The benefits of a consumer or self-directed model of aged care—including greater independence and more choice, flexibility and control over services and support—have been well articulated in reforms to the aged care and disability sectors.[148] While allowing more room for autonomous choices, it may also expose older people to new risks. Policy choices need to recognise this risk exposure with the aim of future-proofing reforms. New processes of accountability and transparency will be required, as part of the community's responsibility to ensure older people are protected from potential abuse.

1.108 The focus of the protections canvassed in the ALRC's proposals, particularly in the area of aged care, is on the safety of the individual. Some of the proposals have a regulatory aspect. In 2011, the Productivity Commission recommended reforms to streamline the regulatory framework. However, there remains an important role for regulation: as the Productivity Commission noted, 'regulation plays an essential role in how the Government manages the risks to the wellbeing of older Australians and the

146 National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*.
147 Department of Health (Cth), *What Has Been Achieved so Far* <agedcare.health.gov.au>.
148 See, eg, Productivity Commission, *Caring for Older Australians* (Report No 53, 2011).

fiscal risks to taxpayers'.[149] Targeted regulatory oversight will be a key element in ensuring the safety of older people as more older people are not residing in aged care facilities but having services delivered to their homes.

1.109 One aspect of safeguarding responses is accountability. This is particularly relevant in the context of those who are supporting older persons in their decision making, and especially those who are in the position of substitute decision makers. In the *Equality, Capacity and Disability* Report, the ALRC said that another component of accountability was the personal accountability and responsibility for decisions by persons with disability themselves, 'recognising that active participation involves both responsibilities and risks'.[150]

1.110 Respecting the choices that older persons make but also safeguarding them is a challenge that is not necessarily easy to answer; and protective responses may lead to overreach. A particular example given in relation to hospitals was a failure to give effect to advance care plans, 'overriding the person's instructions and wishes', pointing to this as an 'abuse of people's right to determine their own care, including decisions about when to cease types of care'. It was noted that 'this may be due to a breakdown in communication, or may also be due to attitudes that dismiss the rights of older people to self-determination'.[151]

1.111 Another aspect of safeguarding is access to ways for resolving concerns about abuse, including access to forums and means of redress for situations of elder abuse. The Law Council suggested that 'particular emphasis ought to be placed on investigation, protection, reinstatement and remedies'.[152] NARI noted, however, that older people 'will often seek or only accept a harm minimisation approach', hence they may choose not to actively pursue their rights.[153] The Consumer Credit Legal Service (WA) commented similarly that, 'even where the elderly person recognises that they have been abused, they may be ashamed of their inability to prevent that abuse and their perceived inadequacies'.[154]

Terminology

1.112 Throughout this Discussion Paper a number of terms are frequently used. These are summarised here.

Supported and substitute decision making

1.113 Assistance in decision making occurs in many different ways and for people with all levels of decision making ability, usually involving family members, friends or

149 Productivity Commission, *Caring for Older Australians* (Report No 53) 46.
150 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [1.39].
151 Quality Aged Care Action Group Incorporated, *Submission 28*. See also Social Work Department Gold Coast Hospital and Health Service, Queensland Health, *Submission 30*.
152 Law Council of Australia, *Submission 61*.
153 National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*.
154 Consumer Credit Legal Service (WA), *Submission 112*.

other supporters. 'Supported' and 'substitute' decision making reflect different ideas; and a 'supporter' is different from a 'substitute' decision maker.

1.114 The appointment of a person to make decisions on behalf of another, as a substitute, may be made through:

- pre-emptive arrangements—anticipating future loss of legal capacity through appointment of a proxy, for example in enduring powers of attorney (financial/property), enduring guardianships (lifestyle) and advance care directives (health/medical);[155] and
- appointment—where a state or territory court or tribunal appoints a private manager or guardian, or a state-appointed trustee, guardian or advocate to make decisions on an individual's behalf (guardians and administrators).[156]

1.115 There has been a move to prefer the language and practice of supported rather than substitute decision making—described as a 'paradigm shift' in thinking about people with disability.[157] Supported decision making emphasises the ability of a person to make decisions, provided they are supported to the extent necessary to make and communicate their decisions. In the ALRC's *Equality, Capacity and Disability* Report, the ALRC concluded that this preference was best expressed through developing a new lexicon for the roles of supporters and substitutes. The ALRC also considered the standard that should guide the actions of the person appointed to act on behalf of another, and also the accountability mechanisms that were needed particularly for substitute decision makers. The ALRC considered that the crucial issue was how to advance, to the extent possible, supported decision making in a federal system, recognising that the policy pressure is clearly towards establishing and reinforcing frameworks of support in law and legal frameworks. The momentum is also towards building the ability of those who may require support so that they may become more effective and independent decision makers.

'Supporters' and 'representatives'

1.116 To encourage supported decision making at a Commonwealth level, the ALRC recommended a new model (the Commonwealth decision-making model) based on the positions of 'supporter' and 'representative'. These terms are also part of building a new lexicon for supported decision making. The ALRC was also asked to acknowledge the role of family members and carers in supporting people with disability to make decisions and therefore built this recognition into the model in the category of 'supporter'.[158] A supporter is an individual or organisation that provides a person with

155 Sometimes referred to collectively as 'living wills'. See, eg, Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [4.3].

156 In some cases, such as emergency medical decisions, there are statutory hierarchies of those who may authorise certain actions—'generic lists of suitable proxies in the legislation': Terry Carney and David Tait, *The Adult Guardianship Experiment—Tribunals and Popular Justice* (Federation Press, 1997) 4.

157 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 2.

158 Ibid Terms of Reference.

the necessary support to make a decision.[159] A representative's role is to provide full support in decision making,[160] by first seeking to support a person to express their will and preferences in relation to a decision, or where this is not possible, making a decision on that person's behalf based on their will, preferences and rights.[161] The role of both supporters and representatives is to assist persons who need decision-making support to make decisions in relevant areas of Commonwealth law.

1.117 A 'supporter' does not make decisions for a person who may need decision-making support; the decision remains that of the person. Some Commonwealth laws already make provision for support roles that are not decision making ones and the ALRC model would apply to these—such as the designation of a 'correspondence nominee' for Centrelink purposes.[162] Banks may provide facilities for co-signing, allowing designated others to conduct banking along with the account holder.

1.118 A 'representative' does make decisions on behalf of a person and is a 'substitute' decision maker. Examples of substitute decision makers under state and territory law are donees of powers of attorney, guardians and financial administrators. In describing the donor of a power of attorney, this Discussion Paper uses the term 'principal' for self-appointed substitute decision makers.[163]

'Will, preferences and rights' standard

1.119 The ALRC sets out in the Commonwealth Decision-Making Model that the representative must act under a new standard, reflecting the paradigm shift away from 'best interests' models. The standard is embodied in the 'Will, Preferences and Rights Guidelines', which state that, where a representative is appointed to make decisions for a person who requires decision-making support:

> (a) The person's will and preferences must be given effect.
>
> (b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.
>
> (c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in a way least restrictive of those rights.
>
> (d) A representative may override the person's will and preferences only where necessary to prevent harm.[164]

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159 Ibid [4.36]–[4.37].

160 Ibid [4.38].

161 Ibid 94.

162 See, eg, *Aged Care Act 1997* (Cth); *Social Security (Administration) Act 1999* (Cth); *Personally Controlled Electronic Health Records Act 2012* (Cth). See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 6.

163 This is partly to avoid the linguistic confusion that is regularly seen in this context of referring to abuse 'by the power of attorney', rather than referring to abuse *of* the power of attorney by the donee of the power.

164 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3–3.

National Decision-Making Principles

1.120 In the *Equality, Capacity and Disability* Report, the ALRC's Commonwealth Decision-Making Model was framed by the National Decision-Making Principles. The Principles identify four central ideas in all recent law reform work on capacity. These are that:

- everyone has an equal right to make decisions and to have their decisions respected;
- persons who need support should be given access to the support they need in decision-making;
- a person's will and preferences must direct decisions that affect their lives; and
- there must be appropriate and effective safeguards in relation to interventions for persons who may require decision-making support.[165]

1.121 The emphasis is on the autonomy and independence of persons with disability who may require support in making decisions—their will and preferences must drive decisions that they are supported in making, and that others may make on their behalf. The National Decision-Making Principles provide a conceptual overlay, consistent with the CRPD, for a Commonwealth decision-making model that encourages supported decision-making.

1.122 Each Principle was accompanied by a set of guidelines to guide reform of Commonwealth laws and reviews of state and territory laws.

Legal capacity

1.123 A recurrent theme in discussions of elder abuse is the issue of impairment or loss of 'capacity'. As explained in the *Equality, Capacity and Disability* Report, capacity in a general sense refers to decision-making ability, which may cover a wide range of choices in everyday life, such as personal matters, financial and property matters, and health and medical decisions.[166] 'Legal capacity' sets the threshold for individuals to take certain actions that have legal consequences and goes to the validity, in law, of choices and being accountable for the choices made. 'Those who make the choice', Emeritus Professor Terry Carney AO states, 'should be able to provide valid consent, and make decisions for which they can be held accountable. They should, in short, be legally competent.'[167]

165 Ibid rec 3–1.
166 See the discussion of legal capacity in Ibid [2.37]–[2.50].
167 Carney and Tait, above n 156, 3.

1.124 At common law there is a presumption of legal capacity, which is also embodied in some guardianship legislation.[168] In the Commonwealth context, the *National Disability Insurance Scheme Act 2013* (Cth) states:

> People with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.[169]

1.125 Tests of legal capacity—in terms of levels of understanding for particular legal transactions—have been developed through the common law, for example in relation to contracts and wills.[170] Where a lack of the required level of understanding is proved in the particular circumstances, the transaction may be set aside. The focus of such tests is on a transaction and the circumstances surrounding it. They are decision-specific and involve assessments of understanding relevant to the transaction being challenged.

1.126 The recommendations in the *Equality, Capacity and Disability* Report addressed the issue of legal capacity in two principal ways. The first was to move away from the 'presumption of capacity'; the second was to place the emphasis on support needs in decision making. The ALRC considered that it was not appropriate in the context of the CRPD to disqualify or limit the exercise of legal capacity *because of* a particular status, such as disability. As National Disability Services remarked, '[t]he crux of the issue is seen in historic legal frameworks that place constraints on the exercise of legal capacity based solely on disability status'.[171] The approach should therefore be on the support needed to exercise legal agency, rather than an assumption or conclusion that legal agency is lacking because of an impairment of some kind.

1.127 However, there are clearly times when assessments of ability are required. Capacity assessments are the trigger for formal arrangements for decision-making support through, for example, the appointment of guardians and administrators, or the commencement of some enduring powers of attorney. They are also made in a range of health care decisions. In the *Equality, Capacity and Disability* Report, the ALRC recommended that the emphasis of such assessments should be on the support needed to exercise legal agency, rather than an assessment of 'capacity'.[172] It is an approach that is a functional one (focused on the ability to make the particular decision in question); it is not outcomes-based (that is, it does not consider the result or wisdom of the decision), nor status-based (that is, it does not determine that a person has 'lost' capacity because of a condition). A functional approach of this kind 'seeks to maximise

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168 See, eg, *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1; *Guardianship and Administration Act 1990* (WA) s 4(3).

169 *National Disability Insurance Scheme Act 2013* (Cth) s 17A(1). See also *Mental Capacity Act 2005* (UK) s 1, which addresses this explicitly by providing that individuals are assumed to have capacity to make decisions unless otherwise established.

170 Contracts: *Blomley v Ryan* (1954) 99 CLR 362. Wills: *Banks v Goodfellow* (1870) LR 5 QB 549. See also the common law approach to capacity in Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 7.

171 National Disability Services, *Submission 49*. See also PWDA, ACDL and AHR Centre, *Submission 66*.

172 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3-2(2). The approach set out in the *Support Guidelines* is a functional one.

the circumstances in which the right of autonomy is protected';[173] and has been supported in other law reform inquiries.[174]

Getting involved

1.128 This Discussion Paper is intended to continue informed community participation in the Inquiry. With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis.

1.129 There is no specified format for submissions, although the proposals provided in this document are intended to provide guidance for respondents. Submissions may be made in writing, by email or using the online submission form. Submissions made using the online submission form are preferred.

1.130 Generally, submissions will be published on the ALRC website unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

To ensure consideration for use in the Final Report, submissions must reach the ALRC by **27 February 2017**

Submissions using the ALRC's online submission form can be made at: https://www.alrc.gov.au/content/elder-abuse-dp83

173 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 92. In recommending such an approach that was subsequently incorporated in the *Mental Capacity Act 2005* (UK), the Law Commission of England and Wales deliberately rejected status-based assessments: Law Commission, *Mental Incapacity*, Report No 231 (1995) [3.5]–[3.6]. In that inquiry, the Law Commission received a 'ringing endorsement' of the functional approach: [3.6].

174 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27(a); Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Substitute Decision-Making for People Lacking Capacity* (2010) [4.56]. With respect to para (f), compare, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 27(b); Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) rec 7-14(d). See also Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Substitute Decision-Making for People Lacking Capacity* (2010) rec 1.

2. National Plan

Contents

Summary

2.1 The ALRC supports the commitment that a national plan be developed to address elder abuse.[1] It is a capstone proposal and provides the basis for a longer term approach to the protection of older persons from abuse. The plan will provide the opportunity for future planning and policy development in an integrated way. The proposals throughout the Discussion Paper can be seen as strategies in implementation of such a plan. The plan also offers the opportunity to develop strategies to combat elder abuse that extend beyond legal reforms, such as: national awareness campaigns; elder abuse hotlines; training for people working with older people; and future research agendas.

2.2 Perhaps most importantly, there is a need for a prevalence study, to identify, among other things, rates and types of abuse; who commits it and who suffers it. Real progress is difficult without this information.

Why there should be a National Plan

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

1 The ALRC notes the announced Coalition policy that includes a national plan: *The Coalition's Policy to Protect the Rights of Older Australians* <www.liberal.org.au/coalitions-policy-protect-rights-older-australians>.

2.3 National plans to guide reform and action have facilitated long-term strategic and whole-of-government responses to a diverse range of issues.[2] A plan provides a framework for action, identifying priority reform areas, performance indicators and appropriate responsibility and oversight for such reform. The momentum for national approaches in relation to child protection and family violence has led to frameworks and plans developed through the Council of Australian Government (COAG) processes.[3]

2.4 Many issues that arise in a consideration of 'elder abuse' sit across the federal/state jurisdictional lines. National consistency of laws, such as state and territory powers of attorney and guardianship and administration laws is one matter, among many, that could be led through a national plan process.

2.5 In the 2015 report of the Australian Institute of Family Studies, *Elder Abuse: Understanding Issues, Frameworks and Responses*, Rae Kaspiew, Rachel Carson and Helen Rhoades, identify the importance of a national plan in relation to elder abuse, with an appropriate evidence base.

> The WHO emphasised the importance of having comprehensive data-driven national action plans to ensure effective violence prevention. However, it noted that while many of the surveyed countries reported having national action plans for child maltreatment (71%) and intimate partner violence (68%), fewer than half (41%) had addressed elder abuse. The report noted that such plans are an important 'way for countries to articulate how violence impacts the health, economic viability and safety and security of a nation', and provides direction for policy makers about what needs to be done, including the identification of objectives, priorities, assigned responsibilities, a timetable and an evaluation mechanism.[4]

2.6 The development of a National Plan would squarely place elder abuse 'on the national agenda', as the family violence plan has done. As the Welfare Rights Centre (NSW) observed:

> Child abuse and family and domestic violence are now firmly at the centre of public policy debates … Placing elder abuse on the national agenda must also be a priority. Elder abuse is an issue that, finally, has come of age. The ALRC's current inquiry is an important step along this path.[5]

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2 See, eg, National Council to Reduce Violence Against Women, *National Plan to Reduce Violence Against Women and Their Children 2010–2022* (2011). The inquiry that led to the report, Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2011), was one of the strategies for action under the preliminary work undertaken by the National Council: National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009).

3 See, eg, Department of Social Services (Cth), *National Framework for Protecting Australia's Children 2009–2020—Third Three-Year Action Plan, 2015–2018: Driving Change: Intervening Early* (2015); Department of Social Services (Cth), *Third Action Plan 2016–2019 of the National Plan to Reduce Violence against Women and Their Children 2010–2022* (2016).

4 Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016) [8.5].

5 Welfare Rights Centre NSW, *Submission 184*.

2.7 The National Plan would:

- establish a national policy framework to guide government, industry and community policies, initiatives and programs with respect to safeguarding the rights of older persons;
- outline a plan for action by government and the community; and
- establish specific performance indicators and monitoring mechanisms to ensure accountability and establish a basis for measuring progress.

2.8 A National Plan will capture the momentum and consolidate the work that has been undertaken or is currently in train across state and territory governments and research bodies.[6] The development of a National Plan will also provide the opportunity for a national conversation and engagement.

2.9 The National Plan could be developed by a steering committee under the imprimatur of the Law, Crime and Community Safety Council of COAG, expressing the commitment of all governments. Commonwealth, state and territory Attorneys-General have agreed to establish a working group to discuss current activities to combat elder abuse in jurisdictions, consider potential national approaches, and consider the findings of this Inquiry.[7] Such a group could lead the development of a National Plan. The Age Discrimination Commissioner may be well placed to lead a number of strategies and actions of the plan, in consultation with key stakeholder groups.

Components of a National Plan

2.10 The *National Plan to Reduce Violence against Women and their Children 2010–2022* could be used as an instructive model.[8] It sets a 'framework for action' over a 12 year horizon to be implemented through four three-year plans, called 'Action Plans': to bring together 'the efforts of governments across the nation to make a real and sustained reduction in the levels of violence against women'.[9]

2.11 A principal goal of the National Plan to address elder abuse should be promoting the autonomy and agency of older people. Using the Family Violence approach as a guide, the National Plan could be developed to address, among other matters, additional strategies with goals such as:

- promoting respectful intergenerational relationships;

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6 See, eg, the work by organisations such as Australian Institute of Family Studies, the Age Discrimination Commissioner of the Australian Human Rights Commission, Offices of Public Advocates and Public Guardians, the National Ageing Research Institute and state and territory departments responsible for elder abuse strategies.

7 Law, Crime and Community Safety Council, *Communiqué*, 21 October 2016. See also *The Coalition's Policy to Protect the Rights of Older Australians*, above n 1.

8 Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (2011).

9 Ibid foreword.

- making systems work together effectively;
- improving responses to elder abuse; and
- improving the evidence base.

2.12 Such goals are not completely discrete areas. Strategies may well address a number of goals at the same time.

2.13 In developing the National Plan, national consultations should be undertaken to provide opportunities for contributions by individuals and relevant organisations. The consultation and National Plan should take into account the different experiences and needs of older persons, including across gender, sexual orientation, disability, cultural and linguistic diversity; and those who live in regional and remote communities.

2.14 The National Plan should identify a range of strategies and actions towards supporting older persons in exercising their rights and stopping elder abuse.

Promoting respectful intergenerational relationships

2.15 Stakeholders identified a range of attitudinal problems concerning older persons that a strategy of promoting respectful intergenerational relationships might focus on. As the Law Council of Australia observed, 'changing attitudes to behaviour' was critical.[10] 'Ageism' was identified as an underlying issue that contributes to abuse.[11] Common manifestations of ageism include 'stereotyping, prejudice, discrimination, harassment and vilification as well as abuse, exploitation, neglect and violence and it is often intersectional'.[12] UnitingCare Australia, for example, suggested that ageism 'lies at the heart of elder abuse' and that 'effective elder abuse prevention can only be achieved with the support of education and awareness programs that deal with the negative perceptions and assumptions about ageing and older people'.[13]

2.16 Research undertaken by the Age Discrimination Commissioner in 2013 drew attention to the damaging effects of negative stereotypes or misconceptions about older people; and that ageist attitudes were deeply ingrained and evident in all aspects of Australian society.[14] 'We are invisible', said Adam Johnston, referring to the experience of older people with disability.[15]

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10 Law Council of Australia, *Submission 61*.

11 See, eg, National Older Persons Legal Services Network, *Submission 180*; Seniors Rights Victoria, *Submission 171*; UnitingCare Australia, *Submission 162*; Office of the Public Advocate (Qld), *Submission 149*; Aged and Community Services Australia, *Submission 102*; Quality Aged Care Action Group Incorporated, *Submission 28*.

12 National Older Persons Legal Services Network, *Submission 180*. A particular example was the labelling of older people as 'bed blockers' in hospitals and somehow less deserving of hospital resources: Quality Aged Care Action Group Incorporated, *Submission 28*.

13 UnitingCare Australia, *Submission 162*. The Respect for Seniors program was referred to as a program that 'focuses on building respect for older people, valuing their contributions and challenging common assumptions'.

14 Australian Human Rights Commission, *Fact or Fiction? Stereotypes of Older Australians, 2013* (Research Report, 2013).

15 A Johnston, *Submission 45*.

2.17 Addressing stereotypes and enhancing understanding could involve education and training for people working with older people; and broader community education and awareness campaigns to improve knowledge and understanding of the rights of older persons and pathways for support. It would also include strategies for improving understanding of those who provide support for older persons: in particular, what is the extent and limit of their roles.

2.18 The Townsville Legal Community Service noted the prevention programs introduced in states and territories 'aimed at raising awareness, educating those at risk of abuse or offending and offering remedial and support services', but 'wider rollout', 'greater visibility' and improved resourcing were needed.[16]

2.19 Promoting respectful relationships would also require strategies that are directed towards understanding the dynamics and experiences of particular groups, including: older persons from Aboriginal and Torres Strait Islander and culturally and linguistically diverse (CALD) communities; from lesbian, gay, bisexual, transgender and intersex (LGBTI) communities; and people living in regional and remote communities. The Australian Securities and Investments Commission observed that 'Senior Australians are a diverse cohort':

> A large proportion (around 31%) of seniors aged 65+ come from CALD backgrounds. A third (34%) are entering their older years without a spouse, and the proportion living alone is almost double that of the pre-war generation (11% versus 6%).[17]

2.20 The Ethnic Communities' Council of Victoria stressed the importance of culturally informed awareness campaigns:

> ECCV highlights the effectiveness of elder abuse prevention and legal rights awareness campaigns designed for culturally and linguistically diverse people. It is suggested that such campaigns are developed through a co-design process and by working in partnership with culturally and linguistically diverse community members, their organisations and service providers. It may include communicating key messages through ethnic and multicultural media outlets, and would be mindful of culturally appropriate use of language and the need for information to be provided in preferred language of different groups.[18]

2.21 The Townsville Legal Community Service urged that a life-course approach, advocated by the World Health Organization, should be 'a cornerstone of any structural reform agenda'.

> Law reform must be driven by the need to combat ageism in all manifestations: Stereotyping (incompetence, illness, and irrelevance); Prejudice (benevolent or hostile); Discrimination, harassment and vilification; and Abuse, exploitation, neglect and violence.
>
> Benevolent prejudice is among the most entrenched forms of ageism. It is the tendency to pity, seeing older people as friendly but incompetent. It is superficially positive but ultimately reinforces inferiority. It positions older persons as frail, easily

16 Townsville Community Legal Service Inc, *Submission 141*.
17 Australian Securities & Investments Commission, *Submission 143*. (Citations omitted).
18 Ethnic Communities' Council of Victoria Inc, *Submission 52*.

> duped and needing protection rather than vital, active and independent. It keeps older persons in an inferior position. It is embedded in public policy.
>
> The impact of ageism is amplified where it also involves another 'ism'. Much of the research on elder abuse validates that gender and race can exacerbate ageism as is common with intersectional discrimination.[19]

2.22 The Northern Territory Anti-Discrimination Commission identified as crucial, a campaign 'addressing societal attitudes to older people':

> elevating the value we place on older people rather than seeing them as a burden, plus education to raise awareness of the signs of elder abuse and to suggest ways to prevent it including inclusion and support of older people in the day to day life of the community.[20]

Making systems work together effectively

2.23 Consistency was identified as a key element in addressing elder abuse: a consistent national approach, with consistent laws and coordinated responses.

2.24 A need for consistent laws was a dominant theme among stakeholders.[21] As National Seniors observed:

> It makes little sense that the legal frameworks to protect older Australians from abuse differ across the various states and territories. National laws or at the least nationally consistent laws are required to reduce confusion and improve protections for older people.[22]

2.25 The Townsville Community Legal Service suggested that a 'consistent national approach' should combine a number of measures, including:

- a suite of federal laws for matters within the constitutional responsibility of the Commonwealth parliament;
- a guiding national policy framework;
- model and uniform state and territory laws for matters outside Commonwealth constitutional responsibility;
- a national public awareness and education campaign; and
- training to key areas of industry, professions and the community.[23]

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19 Townsville Community Legal Service Inc, *Submission 141*.
20 Northern Territory Anti-Discrimination Commission, *Submission 93*.
21 See, eg, Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Queensland Law Society, *Submission 159*; National LGBTI Health Alliance, *Submission 156*; National Seniors Australia, *Submission 154*; Townsville Community Legal Service Inc, *Submission 141*.
22 National Seniors Australia, *Submission 154*.
23 Townsville Community Legal Service Inc, *Submission 141*.

2.26 'Without a consistent national approach', remarked the Office of Public Guardian (Qld),

> the governing legal framework will remain a combination of inconsistent and disconnected Commonwealth and state or territory law, amounting to a piecemeal approach to the protection of the interests and rights of persons who are vulnerable to abuse, and will likely result in gaps in safeguards.[24]

2.27 Stakeholders drew attention to a range of issues concerning responses to elder abuse affected by a lack of consistency. People with Disability (Australia), for example, advocated that there be a 'clear and nationally consistent definition and response' and 'no wrong door'.[25] The Commissioner for Senior Victorians urged that there should be 'clear reporting pathways and responses to ensure abuse, when identified and reported, is addressed'.[26] The Office of the Public Advocate (Qld) stressed that 'complaints mechanisms are integral to a comprehensive system of safeguards for older people'.[27]

2.28 The Older Women's Network (NSW) said that what was necessary was 'a national framework and protocols enabling interagency and collaborative work between older people, community based agencies and service providers': this would assist 'in ensuring consistent and constructive responses to older people experiencing violence and abuse across Australia'.[28]

Improving the response

2.29 Essential elements in improving the response to elder abuse, in addition to national consistency, are: training of all those who deal with older people to recognise and respond to elder abuse; improved accessibility of services and forums; and better response to perpetrators.

2.30 The advocacy group, TASC, observed, '[d]elivering best practice means ensuring accessibility to our and other legal services and facilitating opportunities for support'.[29] The Legal Services Commission of South Australia said that 'often there was confusion or misunderstanding about where an individual can seek recourse'.[30] The Housing for the Aged Action Group said that older people 'want services that are easy to access and engage with' and that '[f]ew organisations are able to take the time that older people need to work through a legal issue'.[31] For CALD groups, accessing services is difficult because of the 'limited culturally proficient mainstream services

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24 Office of the Public Guardian (Qld), *Submission 173*. See also NSW Trustee and Guardian, *Submission 120*; Law Council of Australia, *Submission 61*.

25 People with Disability Australia, *Submission 167*.

26 Commissioner for Senior Victorians, *Submission 187*.

27 Office of the Public Advocate (Qld), *Submission 149*.

28 Older Women's Network NSW, *Submission 136*. The OWN said there were sound state based frameworks, including, in NSW: Department of Family and Community Services (NSW), *Preventing and Responding to Abuse of Older People: NSW Interagency Policy* (2014). This document guides service responses and provides the framework under which service providers can develop their own policies and guidelines, to ensure protection, support for care recipients.

29 TASC National, *Submission 91*.

30 Legal Services Commission SA, *Submission 128*.

31 Housing for the Aged Action Group, *Submission 21*.

and ethno-specific services with limited capacity that are accessible to provide assistance to seniors who experience elder abuse':

> Many mainstream services are not adequately funded or resourced to provide culturally appropriate or language specific services to culturally and linguistically diverse seniors.[32]

2.31 Particular challenges are presented in improving the response to abuse of older persons in remote Aboriginal and Torres Strait Islander communities. The National Aboriginal and Torres Strait Islander Legal Services stressed the importance of 'culturally safe and joined up services'.[33] Michelle Alexander, for example, observed that

> The biggest difficulty for governments looking at yet more policy and legislative reform related to remote indigenous communities is understanding what it means to incorporate traditional normative systems into western paradigms of community and service administration. Governments and researchers understand at a broad level that local engagement and consultation is imperative but do not understand beyond this how to drive such engagement through traditional decision making structures nor how to envelop these decision making processes to maximize the effectiveness of services in remote communities. In coming to terms with this, governments will need to come to terms with the intrinsic value that lies in indigenous law and culture.[34]

2.32 Improving responses to elder abuse may also include expanding the range of forums and remedies;[35] ensuring accountability of those who abuse older persons; and identifying areas for further improvement.

Improving the evidence base

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

2.33 Policy change to address elder abuse requires a sound evidence base. Kaspiew, Carson and Rhoades observed that, as responses 'are spread across different legal, policy and practice frameworks, the evidence available from these sources offers a piecemeal empirical understanding of elder abuse'.[36] Hence there is 'very limited evidence in Australia that would support an understanding of the prevalence of elder abuse, and there is emerging recognition of the need for systematic research in this area'.[37] National Seniors also emphasised the lack of a clear picture particularly as it relates to specific populations.[38] Older persons 'are not a homogenous group',

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32 Ethnic Communities' Council of Victoria Inc, *Submission 52*.
33 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*. A case study was included supplied by the Central Australian Aboriginal Legal Aid Service.
34 M Alexander, *Submission 64*.
35 The Caxton Legal Centre observed that the Supreme Court is 'arguably the most inaccessible jurisdiction in the country': Caxton Legal Centre, *Submission 174*.
36 Kaspiew, Carson and Rhoades, above n 4, [3.1].
37 Ibid [3].
38 National Seniors Australia, *Submission 154*.

observed the Townsville Legal Community Service Inc.[39] The Northern Territory Anti-Discrimination Commission, for example, said that

> any prevalence studies must include a focus on Aboriginal and Torres Islander people in all settings, urban, rural and remote, as the anecdotal evidence we are aware of is that elder abuse is occurring but takes different forms and has different solutions in specific communities.
>
> Also NT CALD communities which are smaller and more dispersed need to be reflected in research. As do the experience of current older LGBTI community members who are a generation who experienced a world where homosexuality was a criminal offence etc and have very particular place in history and may be particularly vulnerable to be re-traumatised in an aged care setting or when needing to invite providers into their homes.[40]

2.34 Without an appropriate evidence base to guide best-practice models, there is the potential 'that strategies which lack evidence could cause more harm'.[41] As the National Ageing Research Institute (NARI) and the Australian Association of Gerontology explained, most current data about elder abuse comes from phone lines, longitudinal studies (physical abuse of women) and individual research projects, 'which makes it impossible to extrapolate to the wider population'.[42] Additionally, a number of stakeholders suggested that elder abuse is underreported.[43] While data from the helpline provides a constructive starting point,[44] a carefully constructed national prevalence study, designed to provide the appropriate evidence base to inform coordinated responses across the Commonwealth, states and territories, is needed.[45]

2.35 While there is a sense that elder abuse is widespread, just how widespread is unclear. Western Australia Police noted the problem of determining the prevalence of elder abuse due to underreporting. They suggested that some of the reasons include:

> that the victim is dependent on the perpetrator for their daily care and is fearful that reporting may see them placed in a residential care facility, the shame associated with being a victim of elder abuse, fearful of jeopardising relationships with family, and fear of retaliation. There may also be the inability of the older person to access police

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39 Townsville Community Legal Service Inc, *Submission 141*.

40 Northern Territory Anti-Discrimination Commission, *Submission 93*.

41 Cochrane Public Health Group, *Submission 54*.

42 National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*.

43 WA Police, *Submission 190*; L Barratt, *Submission 155*; State Trustees Victoria, *Submission 138*; Macarthur Legal Centre, *Submission 110*.

44 For example, the National Elder Abuse Reports, providing a summary of statistics and key elder abuse agencies form around Australia, prepared by Advocare in Western Australia and Ceallaigh Spike, 'The EAPU Helpline: Results of an Investigation of Five Years of Call Data' (International Association of Gerontology and Geriatrics Asia & Oceania Regional Congress, 2015). While useful, helpline data are not sufficient of themselves to provide the full picture on prevalence: Relationship Australia, *Submission 185*.

45 Gaps in evidence were also noted in People with Disability Australia, *Submission 167*. PWDA observed that this was 'due in part to the exclusionary methodologies of surveys and a failure to disaggregate data by disability', noting, for example, that the Personal Safety Survey, administered by the Australian Bureau of Statistics, is not performed in residential and institutional settings and that the experiences of people who may require some form of communication support are excluded from this survey. PWDA recommended that the ABS modify its research methodology, sampling techniques and research design to ensure that people with disability are comprehensively included in the collection of data.

> services to be able to report crime, and the inability to be able to communicate what has been happening to a police officer due to the abuser being the primary carer, the presence of cognitive impairment, or language and cultural barriers. Due to the lack of awareness, individuals may not be aware that elder abuse is a crime. The presence of these factors will impact on the distortion of prevalence of elder abuse and the ability of policing organisations to adequately respond and implement strategic responses.[46]

2.36 Another stakeholder observed that 'the underreporting of elder abuse is the norm'.[47] Macarthur Legal Centre suggested that significant gaps in reporting occur because of 'the familial nature of much of this abuse', and that '[m]any people may simply not be aware of the support services available'.[48]

2.37 While state-wide studies are valuable, as the Office of the Public Advocate (Qld) observed,

> they are not a substitute for a national prevalence study, particularly if such a study collects data about the characteristics of perpetrators, victim, the specific abusive behaviours and the circumstances in which elder abuse has occurred.[49]

2.38 NARI and the Australian Association of Gerontology pointed to a number of things to be considered in establishing a prevalence study:

- Data collection needs to distinguish between suspected, reported and confirmed abuse and consideration of who is reporting the incident. …
- Elder abuse occurs in a variety of settings (home, community, aged care, hospitals, etc) and each have unique challenges for data collection.
- Lack of awareness around what constitutes elder abuse—some older people may not recognise their situation as abusive, while some professionals may not be able to identify abuse being experienced by their clients.
- Staff from agencies identifying potential abuse can be reluctant to label a situation abusive without further investigation or evidence, which could lead to under reporting.
- How to identify occurrence of neglect and self-neglect.
- How a person's cognition and capacity can affect their ability to identify and act on abuse.
- Diversity of older people and communities (including people in rural and regional areas; people with diverse gender and sexual identities; people from culturally and linguistically diverse backgrounds; Aboriginal and Torres Strait Islander people; people with disabilities)—What is considered abusive behaviour may differ depending on cultural norms of different communities, which can affect knowledge of extent. …

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46 WA Police, *Submission 190*.

47 L Barratt, *Submission 155*. See also People with Disability Australia, *Submission 167*; Consumer Credit Legal Service (WA), *Submission 112*.

48 Macarthur Legal Centre, *Submission 110*.

49 Office of the Public Advocate (Qld), *Submission 149*.

- The consequences of reporting abuse—the inherent power imbalance between individuals and institutions may discourage people from reporting abuse, making it difficult to accurately measure.
- Types of abuse—prevalence is likely to vary between different types of abuse.
- Any attempt to establish prevalence of various types of elder abuse should also try to gather as much information about perpetrators or potential perpetrators as possible.[50]

2.39 Mapping existing sources of data relating to abuse of older people, ensuring that these are consistently collected and collated is also an important part of improving the evidence base.[51]

2.40 Data collection is assisted by a common definition of elder abuse. The WHO description of 'elder abuse' is a common reference point:

> 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.[52]

2.41 As noted in Chapter 1, this description is used across a range of government and non-government bodies and was used in the Australian Institute of Family Studies (AIFS) study. As one stakeholder observed, any definition of elder abuse 'should be comprehensive enough to capture the full range of abuse practices', but it also needed to be 'simple enough for workers and potential reporters to understand'.[53] The Financial Services Institute of Australasia noted that

> A clear, agreed definition of elder abuse is also important in researching the prevalence of elder abuse and from this developing tools and guidance so that service providers build awareness and develop strategies to identify and report suspected cases.[54]

Building on other work

2.42 This Inquiry provides the opportunity to build on the work of others. As the Australian and New Zealand Society for Geriatric Medicine observed, '[w]hilst more research is required, it is equally important to fully utilise the data that is currently collected'.[55] The AIFS report provides a thorough and up-to-date analysis of the existing evidence about elder abuse in Australia.[56] The National Plan will provide a

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50 National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*.

51 Organisations and government departments have 'different data collecting systems and differing criteria as to what is elder abuse': Office of the Public Advocate (SA), *Submission 170*. An 'agreed minimum dataset and a process for sharing of information across States' was identified as crucial to expanding knowledge: Australian and New Zealand Society for Geriatric Medicine, *Submission 51*.

52 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002). See discussion in Chapter 1.

53 NSW Nurses and Midwives' Association, *Submission 29*.

54 Financial Services Institute of Australasia, *Submission 137*.

55 Australian and New Zealand Society for Geriatric Medicine, *Submission 51*.

56 Kaspiew, Carson and Rhoades, above n 4.

framework to bring all this work together and to prioritise a number of the excellent recommendations included in them.

New South Wales Legislative Council Report 2016

2.43 In June 2016 the report, *Elder Abuse in New South Wales*, was concluded by the New South Wales Legislative Council, General Purpose Standing Committee No 2.[57] The first recommendation was for a 'comprehensive, coordinated and ambitious approach to elder abuse'. The elements identified are examples of strategies and outcomes that could be incorporated into a National Plan:

- a rights based framework that empowers older people and upholds their autonomy, dignity and right to self-determination
- a major focus on prevention and community engagement
- legislative reform to better safeguard enduring powers of attorney and to establish a Public Advocate with powers of investigation
- an ambitious training plan to enable service providers to identify and respond appropriately to abuse
- an active commitment to building the evidence base for policy
- an enhanced role for the NSW Elder Abuse Helpline and Resource Unit.[58]

2.44 In addition, the Committee recommended that there be a 'significant new investment of resources in the prevention of elder abuse, including the development and funding of 'a new prevention framework' that provides for 'substantially enhanced primary prevention, community education, awareness and engagement, carer support and life planning initiatives' and 'specific resources for strategies targeting culturally and linguistically diverse and Indigenous communities'.[59]

Senate Community Affairs References Committee Report 2015

2.45 In November 2015, the Senate Standing Committee on Community Affairs published its report on violence, abuse and neglect against people with disability in institutional and residential settings. A number of recommendations in this report express themes that could be reflected in the proposed National Plan, including, for example, recommendations concerning:

- a national system for reporting and investigating;[60]
- national consistency in disability worker training;[61]

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57 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

58 Ibid rec 1.

59 Ibid rec 2.

60 Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, Including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (November 2015) rec 2.

61 Ibid rec 3.

- a disability worker registration scheme;[62]
- a national approach to service deliver7 accreditation programs;[63] and
- national consistency in the administration of guardianship laws.[64]

House of Representatives Report 2007

2.46 In September 2007 the House of Representatives Standing Committee on Legal and Constitutional Affairs published the report, *Older People and the Law*. Its 48 recommendations provide similar and further matters that could inform the development of a National Plan, including matters such as:

- the development of a national awareness campaign dealing with financial abuse of older Australians;[65]
- national initiatives to promote financial literacy particularly among older people;[66]
- uniform legislation on powers of attorney across states and territories;[67]
- a nationally consistent approach to the assessment of capacity;[68]
- a national register of enduring powers of attorney;[69]
- national awareness campaigns on powers of attorney;[70]
- advance health care planning;[71]
- national consistency and coverage of legislation governing advance health care planning;[72]
- nationally consistent legislation on guardianship and administration;[73]
- investigation of legislation regulating family agreements;[74] and
- a resource service and media education campaign for older people.[75]

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62 Ibid rec 4.
63 Ibid rec 5.
64 Ibid rec 12.
65 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) rec 7.
66 Ibid rec 8.
67 Ibid rec 16.
68 Ibid rec 19.
69 Ibid rec 20.
70 Ibid recs 18, 22.
71 Ibid rec 24.
72 Ibid rec 25.
73 Ibid rec 28.
74 Ibid rec 30.
75 Ibid rec 40.

Reports on specific areas

2.47 In addition to the parliamentary reports identified above, there have been state reports focused on particular areas of concern relevant to potential areas of abuse of older persons. These include:

- the April 2016 report of the Office of the Public Advocate (Qld), *Decision-making Support and Queensland's Guardianship System—A Systemic Advocacy Report*;[76]
- the October 2011 report by the Office of the Public Advocate (SA) and the University of South Australia, *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People*;[77]
- the 2011 report on *Guardianship* by the Victorian Law Reform Commission;[78] and
- the current work of the New South Wales Law Reform Commission on the *Guardianship Act 1987* (NSW).[79]

76 Office of the Public Advocate (Qld), *Decision-Making Support and Queensland's Guardianship System* (2016).

77 Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011).

78 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012).

79 Other examples were provided by stakeholders: Seniors Rights Victoria, *Submission 171*; Australian Securities & Investments Commission, *Submission 143*; Capacity Australia, *Submission 134*; NSW Trustee and Guardian, *Submission 120*.

3. Powers of Investigation

Contents

Summary

3.1 There is an investigation gap which may limit the identification of, and response to elder abuse. Stakeholders identified that older people may be reluctant to report instances of elder abuse to police for a number of reasons, including shame and a desire to maintain family relationships. While older people may contact elder abuse helplines or seek support and assistance from advocacy services, these services do not have the power to investigate. To the extent that public advocates and guardians have a power to investigate, they are generally limited, and vary between states and territories.

3.2 The ALRC proposes that the role of state and territory public advocates/guardians be expanded to include a consent-based 'support and assist' investigative function in relation to older people who are being, or at risk of being abused or neglected.

3.3 This proposal exemplifies a rights-based, harm reduction model of investigation that places the older person at the centre of decisions relating to responses to elder abuse.

Investigation gap

3.4 There are a number of avenues of intervention and response available for older persons experiencing abuse:

- police may be called if a crime is suspected, or may exercise a discretionary power to conduct a welfare check;
- ambulance services may be called if there is a medical emergency;
- elder abuse helplines can provide information and referrals to relevant services;
- advocacy services such as Seniors Rights Victoria and the Senior Rights Service in NSW may assist the older person; and
- state and territory public advocates/guardians may investigate instances of elder abuse in limited circumstances, such as by guardians or administrators, or where the older person has impaired decision-making ability.[1]

3.5 However, as WA Police observed, older people may be reluctant to report elder abuse to police.[2] A study by the National Ageing and Research Institute found that participants who had sought assistance from Seniors Rights Victoria reported that some of the negative outcomes of intervening to address elder abuse related to fear for the welfare of the perpetrator, and a loss of the relationship with the perpetrator.[3] These concerns may be heightened when an older person has to report abuse to police.

3.6 Other avenues listed above are also subject to limitations. Elder abuse helplines, established in all states and territories, may only provide information or refer the caller to relevant services. They do not have the ability to investigate whether an older person is being abused. Advocacy services such as Seniors Rights Victoria, Senior Rights Service in NSW and Caxton Legal Centre in Queensland provide legal advice to older persons in relation to elder abuse. However, they are unable to act if they cannot speak with, and get instructions from, the older person themselves. In addition to applying only to a subset of older people, the investigative powers of public advocates/guardians also vary across states and territories, which can be confusing for older persons or concerned bystanders because, depending on the state or territory:

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1 *Guardianship and Administration Act 1986* (Vic) s 16(h); *Guardianship and Administration Act 1990* (WA) s 97; *Guardianship and Administration Act 1993* (SA) s 28; *Guardianship and Administration Act 1995* (Tas) s 17; *Guardianship and Administration Act 2000* (Qld) sch 4; *Public Guardian Act 2014* (Qld) s 19; *Human Rights Commission Act 2005* (ACT) s 27B; *Guardianship of Adults Act 2016* (NT) s 61.

2 WA Police, *Submission 190*. See also Commissioner for Senior Victorians, *Submission 187*; Justice Connect, *Submission 182*; People with Disability Australia, *Submission 167*; Australian Association of Social Workers, *Submission 153*; Legal Aid NSW, *Submission 137*; UNSW Law Society, *Submission 117*; National LGBTI Health Alliance, *Submission 116*; Macarthur Legal Centre, *Submission 110*; Australian Research Network on Law and Ageing, *Submission 90*; Legal Aid ACT, *Submission 58*; P Horsley, *Submission 62*; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [8.1]–[8.2].

3 National Ageing Research Institute and Seniors Rights Victoria, 'The Older Person's Experience: Outcomes of Interventions into Elder Abuse' (June 2016) 23–4.

- there may be no power to investigate;[4]
- the person perpetrating the abuse must be the older person's guardian or administrator; [5]
- the power to investigate extends to circumstances where the person perpetrating the abuse is acting or purporting to act under an enduring power of attorney granted by the older person;[6]
- there is a power to investigate if it would be appropriate to make or change a guardianship or financial administration order in relation to the older person;[7]
- the older person has a physical, mental, psychological or intellectual disability, which gives rise to a need for protection from abuse, exploitation or neglect;[8] or
- the power to investigate extends to circumstances where an older person does not freely and voluntarily make the decision not to seek assistance.[9]

3.7 In different jurisdictions, the power to investigate may be initiated by a direction from a tribunal,[10] by a complaint,[11] or is available on the public advocate or guardian's own motion.[12] This causes additional confusion.

3.8 This creates an investigation gap, which may unnecessarily prolong the abuse suffered by an older person. Other than the limited power of investigation vested in public advocates/guardians, there is no body with the power to investigate where a person does not wish to go to the police. Filling the investigation gap requires, at a minimum, harmonising the powers of investigation of state and territory public advocates and guardians.

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4 In New South Wales the public advocate/guardian has no power to investigate. Other than through consent-based, 'soft referral' schemes, such as the one in place between the NSW Ombudsman and the National Disability Abuse and Neglect Hotline, the only avenue available for the Public Guardian or other suitable body to intervene is through an application to the Guardianship Division of the NSW Civil and Administrative Tribunal seeking a short-term order to investigate the care and circumstances of a person with impaired decision-making: NSW Ombudsman, *Submission 160*.

5 *Guardianship of Adults Act 2016* (NT) s 61.

6 *Guardianship and Administration Act 1995* (Tas) s 17.

7 *Guardianship and Administration Act 1986* (Vic) s 16(h); *Guardianship and Administration Act 1990* (WA) s 97. This power is broader than the powers in the Northern Territory and Tasmania because it includes circumstances where a person is in need of guardianship, and has not appointed an attorney under an enduring power of attorney.

8 *Human Rights Commission Act 2005* (ACT) s 27B.

9 *Public Guardian Act 2014* (Qld) s 19; *Guardianship and Administration Act 2000* (Qld) sch 4.

10 *Guardianship and Administration Act 1993* (SA) s 28.

11 *Guardianship and Administration Act 1986* (Vic) s 16(h); *Guardianship and Administration Act 1990* (WA) s 97; *Guardianship and Administration Act 1995* (Tas) s 17.

12 The Public Guardian (NT) to 'monitor ... the conduct of guardians': *Guardianship of Adults Act 2016* (NT) s 61.

Approaches to filling the investigation gap

3.9 In developing proposals about how best to fill the identified investigation gap, the ALRC has had regard to a number of other jurisdictions, and the recommendations from previous inquiries. These are described briefly below.

3.10 The ACT, Queensland, Scotland, England and Wales, and British Columbia, Canada all present useful guidance. The recommendations of the Victorian Law Reform Commission (VLRC), the Office of the Public Advocate (SA) and the NSW Legislative Council's inquiries also assist in determining how to fill the investigation gap. Key elements of these approaches relate to:

- the scope of the investigative power;
- principles that guide the exercise of such powers;
- the investigative actions and interventions available to the relevant agency; and
- protections for those who make a complaint.

3.11 The Office of the Public Advocate (SA) noted in its inquiry that British Columbia presents a constructive model to fill the investigation gap.[13]

Scope of investigative powers

3.12 In the ACT, Scotland, and in England and Wales, a power to investigate applies if the relevant agency knows or believes that an adult with a disability is at risk of harm.[14] In British Columbia, the power to investigate also applies if an adult is at risk of harm and is unable to seek support and assistance because they are physically restrained. This might arise, for instance, because an adult is in a locked room with no access to a phone or other means of communication.

3.13 In Queensland, the power to investigate extends to circumstances where an adult is unable to seek support or assistance due to duress or pressure. While the Public Guardian may only investigate complaints or allegations that a person with 'impaired capacity for a matter' is being abused, neglected or exploited, the term is broadly defined.[15] In order to have 'capacity' for a matter, a person must be able to freely and voluntarily make a decision about a matter.[16]

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13 Office of the Public Advocate (SA), 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People' (2011) 46.' (*Closing the Gaps Report*)

14 *Human Rights Commission Act 2005* (ACT) s 27B; *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 3; *Care Act 2014* (United Kingdom) s 42; *The Care and Support (Eligibility Criteria) Regulations 2014* cl 2.

15 *Public Guardian Act 2014* (Qld) s 19.

16 *Guardianship and Administration Act 2000* (Qld) sch 4.

3.14 The VLRC recommended a more limited approach. It recommended that the powers of the Office of the Public Advocate (Vic) should be expanded to allow investigations of the abuse, neglect or exploitation of 'people with impaired decision-making ability due to a disability'.[17] This is broader than the existing power, which in practice, is limited to circumstances where a guardianship or financial administration order may be appropriate.[18]

3.15 By contrast, the *Closing the Gaps Report* and the NSW Legislative Council's inquiry into elder abuse both recommended that a power to investigate be extended to include the abuse, neglect or exploitation of 'vulnerable adults'.[19] In the *Closing the Gaps Report*, it was suggested that vulnerability be broadly defined and centred around the concept that an adult is vulnerable if they are unable to look after themselves, or safeguard their own well-being, property, rights or other interests.[20]

Guiding principles

3.16 In Queensland, England and Wales, Scotland and British Columbia guiding principles require the investigating body to have regard to the adult's wishes, and ensure that the adult participates in decisions about investigation, support and assistance. The support and assistance provided should be least restrictive. [21]

Investigative powers

3.17 In Queensland, and in England and Wales, the investigative body has the power to require that a person furnish it with information, produce documents or give evidence in relation to a matter under investigation.[22] In British Columbia, in addition to these powers, the investigative body may apply to the court for an order authorising entry into and inspection of premises in order to speak with the adult allegedly being abused or neglected.[23] The VLRC and the NSW Legislative Council recommended the adoption of the suite of investigative powers available in British Columbia, as well as an additional power to require attendance at a conference to facilitate a conciliated resolution to the matter under investigation.[24]

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17 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 328–329.

18 Ibid [20.17]. *Guardianship and Administration Act 1986* (Vic) s 16(h).

19 Office of the Public Advocate (SA), above n 13, 14. Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [8.79–8.80], rec 11 (*NSW Elder Abuse Inquiry*). (*NSW Elder Abuse Inquiry*)

20 Office of the Public Advocate (SA), above n 13, 99–100.

21 *Adult Guardianship Act 1996* (British Columbia) s 2; *Adult Support and Protection (Scotland) Act 2007* (Scotland) ss 2(b), (d); *Care Act 2014* (United Kingdom) s 1; *Public Guardian Act 2014* (Qld) s 6; *Guardianship and Administration Act 2000* (Qld) sch 1 cl 7.

22 *Public Guardian Act 2014* (Qld) s 22; *Care Act 2014* (United Kingdom) s 45.

23 *Adult Guardianship Act 1996* (British Columbia) s 49.

24 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 330, 332–334; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [8.80].

3.18 In Scotland, the investigative body's powers include a power to enter premises without a court order.[25] Where the investigating officer is a health professional, they have the power to conduct a medical examination with the consent of the adult at risk.[26]

Interventions

3.19 In England and Wales a 'Safeguarding Adults Board' is established to 'help and protect' an adult in relation to whom an investigative power exists.[27] It must include the local authority, the relevant local health area and local police.[28] Following consultation with the local health area and police, the local authority may also include such other persons it considers appropriate.[29]

3.20 The Safeguarding Adults Board may 'do anything which appears to it to be necessary or desirable' to help and protect the adult.[30] Its role is to coordinate and ensure the effectiveness of the actions of its members.[31]

3.21 In British Columbia, the interventions available are largely supportive. The *Adult Guardianship Act 1996* (British Columbia) specifically requires that the adult be included to the greatest extent possible in decisions about support and assistance.[32]

3.22 The investigative body may take no further action, report the case to another agency, including the Public Guardian, refer the adult to available services, or prepare a support and assistance plan specifying the services the adult requires, if for instance, the adult has complex needs that require case management and ongoing coordination.[33] Services specified under the support and assistance plan must not be provided to the adult if they refuse them.

3.23 Where the adult is at risk of harm because of impaired decision-making ability, the investigative body may make an application for an interim order restricting access to the adult for a period of up to 90 days.[34] The investigative body may also make an application to the court for support and assistance orders if the adult does not have the decision-making ability to consent to a support and assistance plan.[35]

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25 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 7.
26 Ibid s 9.
27 *Care Act 2014* (United Kingdom) s 43(2).
28 Ibid sch 2 cl 1(1).
29 Ibid sch 1 cl 1(2).
30 Ibid s 43(4).
31 Ibid s 43(3).
32 *Adult Guardianship Act 1996* (British Columbia) s 52.
33 Ibid s 51(1).
34 Ibid ss 51(1), (3).
35 Ibid s 54.

3.24 This model has been described as a support and assistance model which 'is intended to preserve the dignity and autonomy of adults—even when they are vulnerable and unable to make decisions about abuse and neglect'.[36] It seeks to ensure that adults in need of support and assistance are not infantilised.[37]

3.25 By contrast, Scotland has taken a relatively interventionist approach. The investigative body has the power to apply to the sheriff for assessment, banning and removal orders. Assessment orders permit it to take a person suspected to be an adult at risk from the premises for an interview in private, or for a medical examination conducted by a nominated health professional.[38] Removal orders authorise it to remove the adult at risk from their premises to protect them from harm.[39] Banning orders restrict access to the adult at risk, or require the preservation of moveable property owned or controlled by the person subject to the order.[40]

3.26 Generally, such orders cannot be made if the adult has refused their consent. However, the sheriff may ignore the adult's consent, if the adult was 'unduly pressurised' to refuse consent, and there are no steps which could be undertaken with the adult's consent to address the harm. An example of a circumstance where an adult may be 'unduly pressurised' is where the adult is being abused or neglected by a person they trust, and the adult 'would consent if the adult did not have confidence and trust in that person'.[41]

An investigative function

Proposal 3–1 State and territory public advocates or public guardians should be given the power to investigate elder abuse where they have a reasonable cause to suspect that an older person:

(a) has care and support needs;

(b) is, or is at risk of, being abused or neglected; and

(c) is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

Public advocates or public guardians should be able to exercise this power on receipt of a complaint or referral or on their own motion.

36 Canadian Research Institute for Law and the Family, 'Civil Investigation and Abuse of Vulnerable Adults in Calgary: An Exploratory Study' (September 2010) 29.
37 Ibid.
38 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 11.
39 Ibid s 14.
40 Ibid s 19.
41 Ibid s 35(4).

What should be investigated?

3.27 The ALRC proposes that the power to investigate apply in circumstances where an older person is unable to protect themselves from abuse or neglect because of care and support needs arising from impaired decision-making ability, a physical disability, or due to physical restraint.[42]

3.28 Stakeholders overwhelmingly supported harmonising the powers of investigation of state and territory public advocates/guardians.[43] However, there is disagreement over the appropriate scope of the power to investigate. One approach supported by some stakeholders is to limit the power to investigate to circumstances where there is a reasonable suspicion that an older person may have impaired decision-making ability.[44] In evidence before the NSW Legislative Council, Capacity Australia said that the power must be limited to people with impaired decision-making ability because 'otherwise everyone would be under investigation forever and no-one is interested in that'.[45] Others argued for an extensive power to investigate the abuse or neglect of at-risk older persons or adults generally.[46] Legal Aid NSW, while supportive of an expanded investigative power, cautioned that the scope of the power should be considered closely.[47] A number of stakeholders emphasised the need to respect the rights of the older person to live self-determined, dignified lives.[48]

3.29 A limited power to investigate only in circumstances where an older person may have impaired decision-making ability does not address the investigation gap identified by stakeholders. Such a power would not address situations of abuse or neglect where factors other than impaired decision-making ability limit the extent to which a person can seek support and assistance. An broad power to investigate abuse or neglect where

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42 In determining whether the power to investigate applies with respect to an older person, the focus is on whether they have care and support needs. The existence of impaired decision-making ability, physical disability or physical restraint does not *prima facie* activate the public advocate/guardian's investigative powers.

43 Seniors Rights Victoria, *Submission 171*; Office of the Public Advocate (SA), *Submission 170*; Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; NSW Ombudsman, *Submission 160*; ARAS, *Submission 166*; Queensland Law Society, *Submission 159*; Australian Association of Social Workers, *Submission 153*; ADA Australia, *Submission 150*; State Trustees Victoria, *Submission 138*; Legal Aid NSW, *Submission 137*; Capacity Australia, *Submission 134*; Legal Services Commission SA, *Submission 128*; NSW Trustee and Guardian, *Submission 120*; Macarthur Legal Centre, *Submission 110*; Office of the Public Advocate (Vic), *Submission 95*; Northern Territory Anti-Discrimination Commission, *Submission 93*; Australian Research Network on Law and Ageing, *Submission 90*; Advocare Inc (WA), *Submission 86*; Alzheimer's Australia, *Submission 80*; National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*; Legal Aid ACT, *Submission 58*; Alice's Garage, *Submission 36*; Social Work Department Gold Coast Hospital and Health Service, Queensland Health, *Submission 30*.

44 See, eg, Australian Association of Social Workers, *Submission 153*; Law Council of Australia, *Submission 142*; NSW Trustee and Guardian, *Submission 120*; Advocare Inc (WA), *Submission 86*.

45 Evidence to General Purpose Standing Committee No 2, NSW Legislative Council, Sydney, Friday 18 March 2016, 41 (Nick O'Neill, Professorial Visiting Fellow at the University of New South Wales, Faculty of Law).

46 Office of the Public Advocate (SA), *Submission 170*; Office of the Public Advocate (Vic), *Submission 95*; Australian Research Network on Law and Ageing, *Submission 90*.

47 Legal Aid NSW, *Submission 137*.

48 People with Disability Australia, *Submission 167*; NSW Ombudsman, *Submission 160*; ADA Australia, *Submission 150*; Alice's Garage, *Submission 36*.

an older person (or adult) is at risk may expand the power to investigate too far. While it represents a comprehensive model of protection and support, there are risks that it may impede an older person's right to refuse intervention.

3.30 The ALRC's approach sits between these two positions, and aims to strikes a balance between addressing the investigation gap identified by stakeholders and ensuring that a person's right to refuse or accept support, assistance or protection is respected.

3.31 In its 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*, the ALRC sought to frame concepts and terms relating to disability in a manner which reflects the dignity of people with disabilities. It sought to shift from a 'medical' to a 'social' approach to disability. In doing so, the policy focus is not on a person's impairment, but on the supports required to assist a person to fully and effectively participate in society on an equal basis with others.[49] Framing Proposal 3-1 by reference to 'care and support needs' reflects this approach.

3.32 The ALRC considers that 'care and support needs' should be defined as arising from or relating to:

- a physical or mental impairment or illness; or
- physical restraint.[50]

3.33 These factors focus on situations where an older person is *unable* to seek support and assistance. There are a number of other factors which limit the extent to which elder abuse is reported. These include a lack of awareness of reporting options, or a reluctance to make a report. The ALRC considers that it is preferable to address these issues through community awareness and education campaigns which increase awareness and understanding of elder abuse and an older person's rights. Such initiatives must operate in conjunction with ongoing support for existing state and territory elder abuse helplines.

3.34 The ALRC invites comment on this proposal and, in particular, whether the proposal should be extended beyond the cohort of older persons with care and support needs. The ALRC has limited its proposals to older persons in accordance with the Terms of Reference of this inquiry. However, all adults with care and support needs may find themselves in a position where they are being, or are at risk of being abused or neglected. In implementing this proposal, state and territory governments may wish to consider whether it should apply to all adults with care and support needs.

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49 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [2.22]–[2.27].

50 Physical restraint refers to circumstances where an older person is physically restricted. For instance, it would include a situation where an older person is held in a locked room without access to a phone or other means of communication.

Who should investigate?

3.35 Where a power to investigate abuse exists, it generally rests with the body which acts as the guardian of last resort.[51] In NSW, Queensland, and Tasmania this body is the Public Guardian.[52] In Victoria, Western Australia and Victoria this body is referred to as the Public Advocate.[53] In the ACT, this body is referred to as the Public Trustee and Guardian.[54] However, in the ACT, the investigative power rests with a standalone public advocate.[55] In states and territories where the public advocate/guardian already has a power to investigate, this power should be expanded in line with Proposal 3-1. In NSW, where there is no legislated power to investigate, the Office of the Public Guardian should be vested with the power to investigate.

3.36 Some stakeholders also argued that different bodies should have the power to investigate, depending on the type of abuse. For instance, State Trustees Victoria submitted that there should be a strict demarcation between the investigation of financial and non-financial abuse.[56] Dr Chesterman noted that a number of bodies, such as the Disability Services Commissioner (Vic), Ombudsman (Vic) and Health Services Commissioner(Vic) have powers of investigation which would overlap with the Public Advocate or Guardian's proposed investigative powers.[57] Institutional protocols could be developed to provide guidance on which agency should investigate in circumstances where there are overlaps between multiple agencies. Dr Chesterman preferred this approach to limiting the powers of investigation of the public advocate/guardian.[58]

When should an investigation occur?

3.37 The ALRC proposes that the public advocate/guardian be able to investigate either upon receipt of a complaint or referral or on its own motion. This reflects the approach taken in a number of jurisdictions, including British Columbia,[59] England and Wales,[60] and Scotland.[61] The Victorian Law Reform Commission's recommendations in its report into guardianship also recommended this approach.[62]

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51 Guardianship and financial administration is discussed in ch 6.

52 *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 1995* (Tas); *Public Guardian Act 2014* (Qld).

53 *Guardianship and Administration Act 1986* (Vic); *Guardianship and Administration Act 1990* (WA); *Guardianship and Administration Act 1993* (SA).

54 *Guardianship and Management of Property Act 1991* (ACT).

55 *Human Rights Commission Act 2005* (ACT) s 27B.

56 State Trustees Victoria, *Submission 138*.

57 John Chesterman, 'Responding to Violence, Abuse, Exploitation and Neglect: Improving Our Protection of At-Risk Adults' (2013) 80–1. There may also be an overlap with the investigative powers of the Aged Care Complaints Commissioner and the powers of official visitors proposed in prop 11-11.

58 Ibid 81.

59 *Adult Guardianship Act 1996* (British Columbia) s 47.

60 *Care Act 2014* (United Kingdom) s 42.

61 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 4.

62 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 328–329.

Guiding principles

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

(a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;

(b) the need to protect someone from abuse or neglect must be balanced with respect for the person's right to make their own decisions about their care; and

(c) the will, preferences and rights of the older person must be respected.

3.38 These guiding principles strike a balance between an older person's autonomy and the role of the state in assisting older persons in protecting their rights, and reflect a rights-based approach. The principles acknowledge an older person's right to exercise the dignity of risk, and ensure that the older person is at the centre of any decisions relating to providing support and assistance in responding to elder abuse.

3.39 Stakeholders emphasised the importance of considering the older person's agency. People with Disability Australia, for instance, noted that any investigative power vested in the public advocate/guardian should be framed in a manner that is not 'infantilising, and ... doesn't impede the dignity and rights of older people'.[63]

3.40 Adults 'are entitled to make decisions based on their own needs and values'.[64] It requires collaboration with the older person. Under a rights-based harm reduction approach, 'the person being abused is being offered information and options and then asked "what do you want?"'[65]

Powers of investigation

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

(a) furnish information;

(b) produce documents; or

(c) participate in an interview

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

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63 People with Disability Australia, *Submission 167*.

64 Elizabeth Podnieks, 'Elder Abuse: The Canadian Experience' (2008) 20 *Journal of Elder Abuse & Neglect* 126, 133–4.

65 Ibid 133.

3.41 In order to effectively investigate elder abuse, the public advocate/guardian requires the power to gather information and evidence. This proposal reflects the powers available to a number of statutory agencies with investigative powers including, for example, powers granted to the Public Guardian in Queensland.[66]

3.42 The ALRC proposes that this power only be available with respect to persons other than the older person, to ensure that the older person retains their right to refuse investigation, support or assistance. The ALRC does not propose that the public advocate/guardian be given a power to enter and inspect premises. This contrasts with the British Columbia, and the VLRC's recommendations, where such a power is available following the issue of a warrant. In the ALRC's view, it is appropriate for powers of entry and inspection without consent be restricted to police agencies. This preserves the supportive and consent-based nature of the investigative function. It may also promote greater coordination between agencies in responding to elder abuse.

Outcomes of an investigation

Proposal 3–4 In responding to the suspected abuse or neglect of an older person, public advocates or public guardians may:

(a) refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;

(b) assist the older person or perpetrator in obtaining those services;

(c) prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or

(d) decide to take no further action.

3.43 The ALRC proposes that the outcomes of an investigation be centred around supporting and assisting an older person in addressing elder abuse. The proposed powers of interventions are in addition to existing powers to make an application for an order for guardianship or financial administration. Proposal 3-4 embodies a rights-based approach, under which the older person determines the manner and circumstances in which they receive support and assistance. It is similar to the model adopted in British Columbia.

3.44 Traditionally, adult protection legislation has taken a protectionist approach focused on the 'best interests' of the adult.[67] By contrast, a rights-based approach to intervention focuses on harm reduction. The older person is involved in the decision making, and is given support and assistance.[68] This may include assisting the older

66 *Public Guardian Act 2014* (Qld) s 22.

67 Canadian Centre for Elder Law, '2007 Overview of Adult Protection and Neglect Legislation in Canada' 2, 12.

68 Elizabeth Podnieks, above n 64; Charmaine Spencer, 'Harm Reduction and Abuse in Later Life' (Paper Presented at World Conference on Family Violence, Banff, Canada, 26 October 2005).

person obtain services such as housing, aged care services, household assistance, legal services, or counselling. It may also include assisting alleged perpetrators get access to services such as anger management, gambling counselling or other services that may stop the abuse or neglect.[69]

3.45 While some stakeholders have argued for the introduction of assessment orders, removal orders and banning orders,[70] such orders may not be compatible with a consent-based 'support and assist' model of investigation.

Third party disclosures of elder abuse

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

(a) liable, civilly, criminally or under an administrative process;

(b) found to have departed from standards of professional conduct;

(c) dismissed or threatened in the course of their employment; or

(d) discriminated against with respect to employment or membership in a profession or trade union.

3.46 This is not a proposal for mandatory reporting. It encourages a 'no wrong door' approach to reporting elder abuse by ensuring that a concerned bystander is not dissuaded from or disadvantaged by reporting elder abuse to the public advocate or public guardian. The proposed protections are similar to those provided for in the *Public Guardian Act 2014* (Qld) and the *Adult Guardianship Act 1996* (British Columbia).

3.47 Stakeholders suggested that health professionals, banks, and aged care workers are concerned about disclosing suspicions of elder abuse for fear of breaching confidentiality and privacy laws.[71] As discussed in Chapter 12, reporting suspicions of abuse to bodies such as the public advocate or guardian may not be covered by existing exceptions to the use and disclosure of sensitive information under Commonwealth, state and territory privacy laws. However, there is a general exception where disclosure is required or authorised by or under an Australian law or a court/tribunal order.[72] This proposal would mean that a disclosure made in good faith, and based on a reasonable

69 Canadian Research Institute for Law and the Family, above n 36, 4.

70 See, eg, Justice Connect, *Submission 182*; Office of the Public Advocate (SA), *Submission 170*; Office of the Public Advocate (Vic), *Submission 95*.

71 See, eg, Seniors Rights Service, *Submission 169*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; Legal Aid NSW, *Submission 137*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; Protecting Seniors Wealth, *Submission 111*; Australian Bankers' Association, *Submission 107*.

72 *Privacy Act 1988* (Cth) sch 1 cl 6.2(b). This exception is also available under relevant state and territory privacy laws.

suspicion would fall under the general exception, and a person would not breach existing confidentiality and privacy laws. State and territory governments may wish to consider the approach taken in the *Public Guardian Act 2014* (Qld), which states:

> [w]ithout limiting subsections (3) and (4) [which discuss civil and criminal liability and breaches of codes of conduct and accepted standards of professional conduct]—
> ...
>
> (b) if the person would otherwise be required to maintain confidentiality about the information under an Act, oath or rule of law or practice, the person—
>
> (i) does not contravene the Act, oath or rule of law or practice by giving the information; and
>
> (ii) is not liable to disciplinary action for giving the information.

3.48 A number of stakeholders also raised fears of reprisals from employers for reporting concerns about abuse in residential aged care facilities and other supported accommodation.[73] Proposal 3-5 addresses these concerns.

Collaboration and coordination

3.49 A lack of collaboration and the absence of a lead agency to coordinate the provision of services has been identified as a key limitation of existing elder abuse strategies and responses.[74] The ALRC considers that public advocates/guardians are well-placed to play a crisis case management and coordination role. As part of their investigation, the public advocate/guardian can assist an older person in determining what services and ongoing monitoring may be required to support the older person in addressing elder abuse. This would require extensive information sharing and coordination between government agencies and service providers. State and territory governments will need to ensure that the public advocate/guardian can disclose information to other agencies and service providers for the purposes of collaboration and coordination. Additionally, the ALRC acknowledges that the success of such collaboration and coordination may require significant additional resources for the public advocate/guardian.

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73 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; NSW Nurses and Midwives' Association, *Submission 29*. Similar concerns may also exist for staff working in agencies providing support and services in the home.

74 See, eg, John Chesterman, 'Taking Control: Putting Older People at the Centre of Elder Abuse Response Strategies' (2016) 69(1) *Australian Social Work* 115, 119–20. See, also National Legal Aid, *Submission 192*; Commissioner for Senior Victorians, *Submission 187*; Office of the Public Advocate (SA), *Submission 170*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; NSW Ombudsman, *Submission 160*; Queensland Law Society, *Submission 159*; Australian Association of Social Workers, *Submission 153*; United Voice, *Submission 145*; Legal Services Commission SA, *Submission 128*; S Goegan, *Submission 115*; Alzheimer's Australia, *Submission 80*; E Cotterell, *Submission 77*; Law Council of Australia, *Submission 61*.

4. Criminal Justice Responses

Contents

Summary

4.1 The Terms of Reference require the ALRC to consider existing Commonwealth laws and frameworks that seek to safeguard and protect older persons, and the interaction and relationship of these laws with state and territory laws, including criminal laws and criminal justice responses.

4.2 Responsibility for criminal laws and frameworks relevant to elder abuse falls to Australian states and territories. Criminal practice and procedure, intervention order legislation, court practice and procedure, policing, prosecution and victim support, and sentencing legislation and practice are also predominantly addressed at state and territory level.

4.3 In this chapter the ALRC discusses the key issues identified by stakeholders in respect of the criminal law and related processes and frameworks. These issues relate to the creation of specific offences for ‘elder abuse’, ‘elder neglect’ and ‘misuse of powers of attorney’; and police training.

Offences

Specific offence of ‘elder abuse’

4.4 Some overseas jurisdictions, including a number of North American states, have enacted specific criminal offences for the abuse of older persons. These offences broadly encompass behaviour that causes or permits an older person to suffer, be injured, or be placed in a situation in which their health is endangered.[1]

1 Cal [Pen] Code § 368-368.5; Mo Rev Stat § 565.182 (2013); Fla Stat § 825 (2012).

4.5 Generally speaking, Australian state and territory laws do not provide specific offences against older persons. However a range of types of conduct, which might be described as 'elder abuse', are covered in all jurisdictions under offence provisions relating to personal violence and property offences. These include assault, sexual offences, kidnap and detain offences, and property and financial offences.[2] The Law Council of Australia noted that 'elder abuse' is rarely prosecuted under existing provisions.[3]

4.6 Some jurisdictions have offences for neglect,[4] although these are rarely utilised in respect of older people. There are also comprehensive family violence frameworks in all jurisdictions that provide for quasi-criminal, protective responses to abuse of older people in domestic settings.

4.7 Some stakeholders supported new criminal offences that would proscribe certain types of conduct when perpetrated against an older person.[5] It was suggested that specific elder abuse offences would act as a deterrent;[6] recognise the increased vulnerability of older persons;[7] and serve an educative function and increase awareness of the issue.[8]

4.8 Other stakeholders rejected these arguments.[9] They expressed the view that the existing criminal law provided appropriate offences to respond to the types of conduct that might be understood to constitute 'elder abuse', particularly where there is no identified gap in coverage,[10] and opposed the introduction of 'elder abuse' offences.[11] Those opposing new offences argued that creating 'elder abuse' offences risked 'treating older people as a different category of citizen'[12] and was 'discriminatory'.[13] It was also submitted that 'elder abuse is first and foremost a social problem that requires more education and exposure, which could occur through ongoing media strategies'.[14]

4.9 There will be and have been circumstances where the criminal law is appropriately engaged to respond to the most grave scenarios involving abuse of an older person. The dynamics of elder abuse, which often involve familial or close

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2 A number of stakeholders referred to specific offences relating to financial abuse, and in particular abuse of powers of attorney. This is discussed below.
3 Law Council of Australia, *Submission 61*.
4 See below for discussion of neglect offences.
5 R Lewis, *Submission 99*; Office of the Public Advocate (Vic), *Submission 95*; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 7.
6 ADA Australia, *Submission 150*; Gadens Lawyers (Melbourne), *Submission 82*.
7 R Lewis, Submission 100.
8 See, eg, WA Police, *Submission 190*; People with Disability Australia, *Submission 167*.
9 See, eg, Seniors Rights Service, *Submission 169*; Older Women's Network NSW, *Submission 136*; UNSW Law Society, *Submission 19*.
10 National Legal Aid, *Submission 192*.
11 See, eg, Office of the Public Advocate (Qld), *Submission 149*; Older Women's Network NSW, *Submission 136*; Legal Services Commission SA, *Submission 128*; Legal Aid ACT, *Submission 58*; UNSW Law Society, *Submission 19*.
12 Legal Aid ACT, Submission 58.
13 Law Society of NSW, in Law Council of Australia, *Submission 61*.
14 Advocare Inc (WA), *Submission 86*.

relationships, can deter people from making a complaint to police.[15] In the event that they do make a complaint, there are increasingly stronger safeguards that operate to protect and respond to those reports, largely in the context of the family violence framework.

4.10 In the ALRC's view, creating new criminal offences in circumstances where the type of conduct proscribed is already captured by other offences is unnecessary and risks duplicating existing offences.

4.11 Many states and territories recognise age and disability, and take the victim's characteristics into account when sentencing offenders.[16] There are also some jurisdictions which have aggravated forms of offences that provide for a heavier penalty when the victim is an older person, or relies on a remedial device.[17]

4.12 Other reasons proffered by proponents of new offences, including that they would serve to educate and raise awareness of elder abuse; act as a deterrent; recognise the 'special vulnerability' of older victims of abuse; and address the challenge of meeting the criminal threshold of proof, are able to be addressed in other ways. For example, the proposed National Plan (Proposal 2-1) would incorporate broad education and awareness campaigns, as well as training for those engaging with older persons; and through existing provisions that recognise the vulnerability of older victims during sentencing for offences.

4.13 That there are few prosecutions reflects the high evidentiary threshold applicable under criminal law and the challenges it presents to all victims of crime, including older people. The grave consequences that flow from the criminal prosecution of a person warrant the need for such a high bar and there are, in most jurisdictions, a suite of mechanisms designed to assist vulnerable people who find themselves engaged in the criminal justice system. These mechanisms tend to apply to victims with intellectual or cognitive impairment (including children), or to special classes of victims (such as victims of sexual assault).

4.14 The need for specificity in framing criminal offences presents a difficulty in seeking to create a new 'elder abuse' offence. The Office of the Public Advocate in Queensland commented, for example, that

> [t]here is little value in developing a specific criminal offence of elder abuse. With the wide range of behaviours that might constitute elder abuse, the development of a definition that would effectively encompass all of those behaviours and the thresholds for criminality would be extremely difficult. In any event, there are already adequately tried and tested legal offences available to effectively prosecute a wide range of criminal behaviours that might constitute elder abuse.[18]

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15 See, eg, WA Police, *Submission 190*; Legal Aid NSW, *Submission 137*.

16 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l); *Penalties and Sentences Act 1992* (Qld) s 9(3)(c); *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(f)(j). See also *Sentencing Act 1991* (Vic) s 5(2)(da) for consideration of 'personal circumstances of the victim'.

17 See, eg, *Criminal Code Act 1899* (Qld) s 340(1)(g)–(h).

18 Office of the Public Advocate (Qld), *Submission 149*.

4.15 The ALRC notes that there are specific offences that apply to certain categories of victim, namely children and people with cognitive impairment. The distinguishing feature is that, in respect of both groups, diminished cognitive ability of the victim increases their vulnerability. To suggest that a victim who does not fall into these classes is vulnerable because of their age risks being ageist and discriminatory.

Offences for misusing powers of attorney

4.16 In all Australian jurisdictions there are offences that broadly relate to fraud, deceptive conduct/obtain benefit by deception, stealing and other property–related offences. In certain circumstances, some of these may be applicable to cases of financial abuse of older people, including in respect of abuse of powers of attorney. Victoria and Queensland laws currently provide for a range of offences specifically relating to powers of attorney.[19] The ALRC is unaware of any prosecution under these provisions.

4.17 A number of stakeholders, including the Law Institute of Victoria[20] and the Victorian Public Advocate,[21] welcomed the new criminal offences relating to abuse of powers of attorney in that jurisdiction, and supported the creation of similar provisions in other states and territories.

4.18 The Victorian offence provisions reflect the recommendations of the Victorian Parliament Law Reform Committee.[22] The NSW Legislative Council subsequently recommended that NSW legislation be amended to be consistent with Victoria's *Powers of Attorney Act 2014.*[23]

4.19 The Victorian Parliamentary Committee recognised that existing offences may already cover the type of conduct which would be the focus of new offences, but considered new offences would serve an important educative function.[24] Other stakeholders noted that existing broader criminal provisions were appropriate, and that 'including additional offences only complicates an already complex system'.[25]

4.20 The ALRC is not persuaded that there is a clearly identified gap in the type of conduct to be proscribed. Where they exist, offences for misusing powers of attorney have been established based on the argument that existing, broader offences are not being utilised, as opposed to the fact that they do not encompass the relevant conduct. Creating new offences risks duplicating existing offences, and risks increasing complexity, without any assurance of increased prosecution of the conduct.

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19 *Powers of Attorney Act 2014* (Vic) ss 135, 136; *Powers of Attorney Act 1998* (Qld) ss 26, 61. Queensland legislation also provides for similar offences in respect of financial administrators—*Guardianship and Administration Act 2000* (Qld).

20 Law Institute of Victoria referred to in Law Council of Australia, *Submission 61*.

21 Office of the Public Advocate (Vic), *Submission 95*.

22 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) rec 61.

23 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 7, 6.101.

24 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 209.

25 Law Council of Australia, *Submission 61*.

4.21 Criminal law, by its nature, will always require a high evidentiary threshold to be met to sustain a prosecution. Financial offences, in particular, are often difficult and complex to prosecute, and will continue to be so irrespective of the existence of new specific provisions relating to powers of attorney. Moreover, a criminal prosecution does not always offer appropriate redress to the victim and in instances of familial financial elder abuse, this is likely to be even more so. In that regard, the proposal to expand the jurisdiction of tribunals to award compensation to those aggrieved by financial abuse is arguably more appropriate in responding to victim needs (Proposal 5-5).

4.22 The other functions served by the creation of new offences, including increased awareness of abuse, and the responsibilities of attorneys, can be delivered through other mechanisms, including through the proposals that frontload safeguards into enduring documents (including Proposals 5-4, 5-8 to 5-13, 6-1, 6-2), and education strategies developed under the National Plan (Proposal 2-1).

4.23 The ALRC does not propose the repeal of any existing offences, nor the introduction of specific abuse of powers of attorney offences in those jurisdictions that do not have them.

Neglect offences

4.24 A number of Australian jurisdictions have 'neglect' offences which may apply to older people. These are generally framed as 'fail to provide necessaries or necessities of life,'[26] including adequate food, clothing, shelter and medical care.[27] The offences are serious, attracting penalties that include terms of maximum imprisonment ranging from 3 to 5 years.

4.25 Stakeholders suggested that 'fail to provide necessities' offences are rarely prosecuted. Legal Aid NSW, for example, reported that there had been only one conviction since 2012 in NSW, which related to a young victim.[28] The ALRC is aware of media reports relating to a recent NSW case in which a couple were convicted after pleading guilty to 'failing to provide necessities of life' to the 80 year old father of one of the offenders. It is understood one of the offenders was sentenced to a four-month intensive correction order.[29] National Seniors reported that, in Queensland, there had 'been no convictions of a person for failing to provide necessaries of life to an older person'.[30]

4.26 In broad terms, these offences have a number of elements that must be established, including the existence of a legal duty to provide necessities of life, and failure to provide those necessities, and a high threshold of harm caused by the failure.

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26 *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1899* (Qld) ss 285, 324; *Criminal Code Act Compilation Act 1913* (WA) s 262; *Criminal Code Act 1924* (Tas) s 144, (NT) s 149. See also *Criminal Law Consolidation Act 1935* (SA) s 14 for a 'criminal neglect' offence.

27 Legal Aid NSW, *Submission 140*; *Guardianship and Administration Act (1993)* (SA) 1993 s 76.

28 Legal Aid NSW, *Submission 140*.

29 ABC News (Australian Broadcasting Corporation) *Couple Who Starved 80yo Man Sentenced to Four Month Intensive Correction Order* (11 April 2016).

30 National Seniors Australia, *Submission 154*.

4.27 There are a range of reasons why prosecuting such matters may be difficult in respect of neglect of older persons, including that, in some instances, a legal duty may not exist (for example, where a person is not a legal carer); that the harm threshold is not met or, where it is met, establishing causation between the failure to provide necessities of life and the harm caused in circumstances where the victim is likely to be frail and weak as a result of their age.

4.28 These considerations explain why these offences are more readily utilised in relation to children, who are almost invariably under the legal care of a parent or guardian when the omission causing harm occurs, and establishing a causal link between the omission to provide and the harm is less likely to be attributable to other factors.

4.29 The Australian Research Network on Law and Ageing (ARNLA) highlighted the duty element as presenting a particular challenge in prosecuting neglect offences in relation to older persons:

> There is little evidence in the case law of the duty sections being invoked in relation to prosecutions concerning the death/injury of older persons as a result of carer/familial abuse.[31]

4.30 ARNLA noted the 'rich ethical discourse surrounding the issues which arise in connection with imposing criminal liability for omissions ... as opposed to those more commonly criminalised situations where the accused acts and inflicts harm'.[32]

4.31 A number of stakeholders were supportive of neglect offences, with the common theme being that persons who fail to provide for older people—usually family members—ought to be subject to criminal penalty. For example, Rodney Lewis suggested that a new offence of 'negligent abuse of an elder' be introduced, with the following elements:

> (i) Assumption by an adult of the care of an elder (whether or not related by blood or marriage) whether voluntarily or for some advantage or reward;
>
> (ii) The care required may be general care or for some particular health or disability;
>
> (iii) The duty of care has been wilfully and deliberately or recklessly or negligently without caring about the consequences, underperformed.
>
> (iv) The person in care has suffered pain or injury as a result of the lack of care or failure to provide sufficient care.[33]

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31 Australian Research Network on Law and Ageing, *Submission 90*.

32 Ibid.

33 R Lewis, *Submission 99*. Lewis' proposal describes a 'vulnerable elder' (the person has a 'physical, mental, psychological or psychiatric disability' which impacts them in particular ways, with offences incorporating an age threshold requiring the victim be 65 years of age); proposes a number of defences; and penalties of two years imprisonment and fines.

4.32 There was some support among stakeholders to this inquiry for a model of this type.[34] Other options included creating an offence of 'neglect of an older person' akin to the 'neglect of children and young persons' offence in NSW.[35]

4.33 A number of stakeholders submitted that existing neglect provisions were adequate.[36] ARNLA, for example, said that

> [i]t is certainly possible for a prosecution to be based upon the duty to provide the necessaries of life ... to an older person but under both the Codes and the common law, this would require a situation where the person has assumed the care of the older person and the older person is demonstrated to be incapable of removing him/herself from that care. Most of the case law with respect to this duty has been associated with the failure to care for children, and it may well be harder for older persons to 'fit' within the scope of this duty, particularly if they retain mental and/or physical capacity.[37]

4.34 The Older Women's Network suggested that increased community and professional education about elder abuse and criminal behaviour would enhance responses to the issue.[38] Legal Aid ACT noted that there were potential undesirable consequences of 'fail to provide necessities of life offences', including that they might act as a deterrent to people taking on carer roles.[39]

4.35 Rather than proposing new offences, the ALRC considers that:

- the law has the capacity to respond to neglect cases;
- creating a new offence to apply only to 'elder' persons is inappropriate, discriminatory and paternalistic; and
- creating a new offence may deter people from taking on carer roles.

4.36 The ALRC acknowledges stakeholder concerns regarding the neglect of older people, and in particular the community anger in respect of neglect cases resulting in the death of older people who are not properly provided for.[40]

4.37 The criminal law does, however, have the capacity to respond to these cases. For example, there is at common law a recognition that criminal negligence (including neglect or omission) resulting in death can be established provided a court is satisfied that the accused had a duty of care which gave rise to a legal duty to act, and that the

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34 Seniors Rights Service, *Submission 169*; Office of the Public Advocate (Vic), *Submission 95*.

35 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 228.

36 Legal Aid NSW, *Submission 140*; Older Women's Network NSW, *Submission 136*; Legal Aid ACT, *Submission 58*.

37 Australian Research Network on Law and Ageing, *Submission 90*. Citations omitted.

38 Older Women's Network NSW, *Submission 136*.

39 Legal Aid ACT, *Submission 58*.

40 See, eg, Cynthia Thoreson matter, cited in: Justice Connect, *Submission 182*; Townsville Community Legal Service Inc, *Submission 141*. See also Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36 *Sydney Law Review* 99.

defendant's omission to act was not to the standard of a reasonable person in the same situation.[41]

4.38 There is some evidence that, while rare, the 'fail to provide necessities' offence can be utilised in respect of older persons, although the ALRC acknowledges media reports that the defendants each entered a plea of guilty in the case referred to above. The ALRC is not aware of any other matter where the provision has been tested in court in relation to an older victim.

4.39 The ALRC has policy concerns about introducing offences for specific classes of people identified on the basis of age. To create 'elder neglect' provisions in a way that is akin to those applicable in respect of 'child neglect' may be overly paternalistic.

4.40 The ALRC acknowledges that many people voluntarily assume carer roles and that most make an invaluable contribution to those they care for, and to society more broadly. There will be cases that warrant a criminal justice response. In some instances the carer may not have the 'necessary skills, capacity or knowledge to address the needs of the person being cared for, or the resources to access education, support and training in support of their caring role'.[42] It would be preferable to support carers in these circumstances, rather than resort to prosecution, save for the most grievous instances.

Police training

4.41 The Issues Paper acknowledged that, in recent years, police responses to family violence have greatly improved. It noted that some police agencies have specialist liaison officers or specialist vulnerable person units that can assist when the police are interacting with older persons who might be victims of crime. It also suggested that there may be some reluctance among police to 'investigate crimes such as fraud when the victim has dementia'.[43]

4.42 A significant number of stakeholders were supportive of increased police training as a mechanism to enhance the criminal justice system response to elder abuse.[44] Some suggested that this could be best achieved through the training and deployment of specialist officers or specialist units,[45] while others supported broader education campaigns to raise awareness of 'elder abuse'.[46]

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41 The common law test for negligent manslaughter by omission is well established. See, eg, *R v Lavender* (2005) 222 CLR 67; *R v Miller* (1983) 2 AC 161; *R v Instan* (1893) 1 QB 450; *R v Stone & Dobinson* (1977) QB 354; *R v Taktak* (1988) 14 NSWLR 226; *R v Russell* [1933] VLR 59.

42 Carers Australia, *Submission 157*.

43 Australian Law Reform Commission, *Elder Abuse*, Issues Paper No 47 (2016) 191.

44 See, eg, National Seniors Australia, *Submission 154*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Macarthur Legal Centre, *Submission 110*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

45 See, eg, Office of the Public Advocate (SA), *Submission 170*; Seniors Rights Service, *Submission 169*; Older Women's Network NSW, *Submission 136*; Legal Services Commission SA, *Submission 128*; S Kurrle, *Submission 121*; Legal Aid ACT, *Submission 58*; Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

46 N Smith, *Submission 127*.

4.43 Key concerns raised by stakeholders included that police did not always respond appropriately to 'low level' abuse, including neglect or financial abuse; and that ageist perceptions of older persons could affect police dealings, including that older people would not make reliable or competent witnesses.

4.44 The ALRC recognises that police in all states and territories are trained to respond to wide range of incidents. This includes training on identifying whether a criminal offence has been committed, and whether there is evidence to support an investigation. Police are also familiar with laws relating to protection or intervention orders, which can offer safeguards that can be, and are, initiated by police in appropriate circumstances including in respect of older persons suffering from elder abuse.

4.45 The ALRC notes that police receive comprehensive and ongoing training in respect of family violence, which is the context for a majority of abuse against older persons.[47]

4.46 While some forms of 'elder abuse' are criminal in nature, there are some forms of conduct that would fail to meet the criminal threshold of harm, and/or the evidentiary thresholds required to commence and/or sustain a prosecution. The ALRC has heard that where it is not appropriate or possible for police to take action (for example, where an incident is not clearly criminal or where a victim is unable to make a statement), police need to be supported by the availability of appropriate and accessible referral pathways. The issue appears to be one more of availability (or lack thereof) and appropriateness of referral services that can support people where concerns responded to by police do not meet the requisite standard for criminal justice response.

4.47 The proposed National Plan, as well as other proposals (including those relating to a new investigative role for the public advocate—Proposal 3-1) will assist in bridging this gap.

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47 The ALRC has previously recommended that family violence legislation recognise the particular impact of family violence on older persons: Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) rec 7–2.

5. Enduring Powers of Attorney and Enduring Guardianship

Contents

Summary

5.1 Enduring powers of attorney and enduring guardianship (together 'enduring documents') are important tools that allow older people to choose the person (or persons) who will make decisions on their behalf should they lose decision-making ability in the future. Enduring documents may also protect an older person who has lost decision-making ability from being exploited and abused by others.

5.2 However, enduring documents may facilitate abuse by the very person appointed by the older person to protect them. Evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney.[1] Enduring documents are more commonly abused than non-enduring powers of attorney because a principal (the donor of the power) with diminished decision-making ability may not be able to effectively monitor the activities of their attorney and take action before significant loss is incurred.[2]

5.3 In order to address the abuse of older persons, the following proposals are made to reform enduring powers of attorney and enduring guardianship:

- the establishment of a national online registration scheme for enduring documents;
- the provision of significant safeguards in a national legal framework for enduring documents; and
- the replacement of current forms of enduring documentation with a single 'representatives agreement.'

5.4 These proposals preserve the important role that enduring appointments have for older people seeking to protect against a loss of decision-making ability in the future, while reducing the potential for those appointments to be misused.

5.5 This chapter is focused on enduring powers and does not apply to non-enduring powers of attorney.

Development of enduring powers

Historical origins

5.6 Powers of attorney have been used for centuries. The power of attorney gives legal power to one person, the attorney, to deal with financial and property matters on behalf of the person making the power, the principal (or donor). The relationship created by the power of attorney is one of agency, with the attorney having power as agent for the principal.[3] Agency is a fiduciary relationship in equity.[4] Under the common law, a power of attorney terminates automatically when a principal loses legal capacity.[5] This is because the principal-agent relationship is a personal one and the agent has no authority to do anything the principal could not lawfully do for themselves. As the principal has lost capacity and is unable to make legal decisions, those same decisions cannot be made any longer by the attorney.

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1 National Ageing Research Institute and Seniors Rights Victoria, *Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria* (2015) 5.

2 S Ellison et al, *The Legal Needs of Older People in NSW* (Law and Justice Foundation NSW, 2004) ch 9.

3 Dyson Heydon and Mark Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011) ch 11.

4 Peter Devonshire, 'Account of Profits for Breach of Fiduciary Duty' (2010) 32 *Sydney Law Review* 389, 390.

5 Dyson Heydon and Mark Leeming, above n 3, ch 24.

5.7 This created concern for many people who wished to make a power of attorney specifically to allow an appropriate person to manage their affairs for them if they lost capacity in their later years. In response, the states and territories enacted legislation in the 1970s and 1980s to establish 'enduring' powers of attorney—powers of attorney that continue (or endure) notwithstanding that a principal has lost decision-making ability.[6]

5.8 An enduring power of attorney allows a person to appoint a trusted person (or persons) to act on their behalf should they lose capacity, upholding important principles of choice and control.[7] Having an enduring attorney can avoid the need for a tribunal appointed substitute decision maker. An enduring attorney may also protect against abuse in circumstances where an older person with diminished decision-making ability is unable to protect themselves against fraud and abuse.

5.9 In relation to non-financial matters, the common law did not provide an equivalent to the power of attorney or enduring power of attorney. For example, it was not possible at common law for a person with capacity to appoint another person to make personal or lifestyle decisions for them—such as consenting to medical treatment or deciding that they should live in a secure environment—when they have lost the ability to make such decisions for themselves. To address this, the concept of 'enduring guardianship' was first introduced in Australia by the *Guardianship and Administration Act 1993* (SA).[8] Similar arrangements were subsequently enacted in all other states and territories.

Current law

5.10 The legislation for enduring documents in each state and territory is now broadly consistent and in each state and territory there is a process for mutual recognition of interstate enduring documents.[9] Nevertheless, there are significant differences in the form of documentation. Queensland and Victoria provide for a combined financial and personal enduring document.[10] NSW has separate documents for enduring powers of attorney and enduring guardianship.[11] South Australia has adopted advance care directives legislation which allows a person to appoint a substitute decision maker (equivalent to an enduring guardian),[12] while maintaining a separate process of enduring powers of attorney for financial matters.[13]

5.11 Beyond questions of form, there are important differences in the legal test of capacity or decision-making ability and differences concerning who has the authority to assess and certify capacity or decision-making ability. Historically, the obligations

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6 Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press Law Books) ch 10.
7 Legal Aid ACT, *Submission 58*.
8 O'Neill and Peisah, above n 6, ch 9.
9 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) ch 3.
10 *Powers of Attorney Act 1998* (Qld); *Powers of Attorney Act 2014* (Vic).
11 *Guardianship Act 1987* (NSW); *Powers of Attorney Act 2003* (NSW).
12 *Advance Care Directives Act 2013* (SA).
13 *Powers of Attorney and Agency Act 1984* (SA).

on the attorney, and the standard by which they were to act, were not set out in legislation. Instead the obligations were defined by common law and equitable fiduciary duties—particularly duties of loyalty and duties of due care and diligence.[14] Guardians are typically required to act in the 'best interests' of the principal.[15] More recently, states such as Queensland and Victoria have passed legislation that set out principles to guide decision making by attorneys.[16] Those principles seek to uphold the fundamental rights of the principal.[17] This approach is not applied consistently across the states and territories.

5.12 The ALRC's report, *Equality, Capacity and Disability*, recommended a shift from the 'best interests' standard to one based on the 'will preferences and rights' of the person, reflecting the paradigm shift toward supported decision making in the *Convention on the Rights of Persons with Disabilities* (CRPD).[18] The implementation of this approach in state and territory guardianship laws will lead to a change in the way in which individuals with diminished decision-making ability are supported to make decisions.

Current law – registration of enduring documents

5.13 Currently, Tasmania is the only jurisdiction in which it is compulsory to register enduring documents—both powers of attorney and enduring guardianship.[19] When conducting transactions in land there is a requirement in all states, except for Victoria, to register an enduring power of attorney document with the respective state and territory body responsible for land titles.[20] In certain jurisdictions there is also an option to register an enduring power of attorney.[21] Accordingly, outside of Tasmania, there is no general requirement for registration of enduring documents.

Registration of enduring documents

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

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14 O'Neill and Peisah, above n 6.

15 Justine O'Neill, 'Decision-Making in Guardianship Contexts: From Substitution to Support' (2015) 24 *Human Rights Defender* 31.

16 *Powers of Attorney Act 1998* (Qld) Schedule 1; *Powers of Attorney Act 2014* (Vic) s 21. See also *Advance Care Directives Act 2013* (SA) ss 9-10.

17 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) xliv.

18 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

19 *Powers of Attorney Act 2000* (Tas) ss 4, 11; *Guardian and Administration Act 1995* (Tas) s 32.

20 See, eg, *Conveyancing Act 1919* (NSW) pt 23 div 1; *Real Property Act 1900* (NSW) s 36; *Land Title Act 2000* (NT) s 148; *Powers of Attorney Act 1980* (NT) s 8; *Real Property Act 1886* (SA) s 155. The legislation in WA refers to registration in the permissive but appears to be required by the relevant land titles office see *Transfer of Land Act 1893* (WA) s 143.

21 *Land Titles Act 1925* (ACT) s 130; *Powers of Attorney Act 1980* (NT) s 7; *Land Title Act 1994* (Qld) s 133.

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

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

5.14 While enduring appointments are a beneficial tool in advanced planning for a possible loss of decision-making ability, they do create risks of financial abuse—the most common form of elder abuse.[22] In its 2016 report on *Elder Abuse in New South Wales*, the Legislative Council, General Purpose Standing Committee No. 2 (NSW Parliamentary Committee) noted that:

> It is perplexing that such powerful documents are not registered anywhere; that there is no formal record of those that have been activated and those revoked. A register would rightly enable solicitors, banks and others to check the authenticity of an instrument or to track one down and would also send the signal that these are documents to be taken seriously. It thus seems clear that mandatory registration would deliver greater safeguards against financial abuse.[23]

5.15 Accordingly, the ALRC proposes an online register of enduring documents as well as court and tribunal orders for the appointments of guardians and financial administrators and/or managers.[24]

5.16 The online registration scheme should be user-friendly and low cost.[25] Privacy is also a key issue and access to information on the register should be restricted.[26]

5.17 The register should include enduring documents that have been made but are not yet active because the principal has decision-making ability. In addition, the register should include enduring documents that are 'live', that is, active because they commence on signing or because it has been appropriately confirmed that the principal no longer has decision-making ability in relation to a particular type of decision (e.g financial matters). The identification of both made and live documents offers an opportunity to review decisions as to loss of decision-making ability.

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22 National Ageing Research Institute and Seniors Rights Victoria, above n 1, 5. See also Seniors Rights Victoria, *Submission 171*.

23 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) 101.

24 This chapter focuses on the online registration of enduring documents. Court and tribunal orders for the appointment of guardians, financial administrators and managers are discussed in Chapter 6.

25 Costs associated with the register are discussed below.

26 More information on who can access the register and privacy protections is set out below.

5.18 The register would extend to guardianship and financial management orders made by a court or tribunal. It is not proposed that registration would impact the validity of court or tribunal orders.

5.19 'Advance care directives' should not need to be placed on the new register, because it is already possible to add 'advance care directives' to an electronic health record—the online recording and storage of individual medical records called 'My Health Record'.[27]

5.20 The proposal is limited to enduring powers of attorney and not applied more broadly to non-enduring powers of attorney. The distinction between the two is drawn, first, because of the link between enduring documents and planning for later life. Typically, planning for the later stage of life includes planning for the potential loss of decision-making ability and protecting oneself from abuse. This has been explained as follows:

> A particularly attractive strategy for attempting to ameliorate the impact of loss of capacity is promotion of pre-emptive or anticipatory recorded decisions, such as advanced health directives and, more broadly, enduring powers of attorney. Through these legal tools, a person who still has legal capacity (the principal) can record his or her wishes for management of their healthcare, welfare and finances and appoint a decision-maker to act on his or her behalf in accordance with those wishes in the event of loss of that decision-making capacity, either as a result of short-term trauma, or longer-term cognitive impairment such as dementia.[28]

5.21 Non-enduring powers of attorney are used more widely, and there is no specific link with older persons. For example, a general power of attorney may be signed when a person goes overseas for an extended holiday, in case documents need to be signed while they are away.

5.22 Secondly, there appears to be less evidence of general powers of attorney being abused.[29] The key safeguard available in respect of general powers of attorney is the ability of the principal to revoke the power at anytime. With an enduring document, a principal with diminished decision-making ability may not be able to effectively monitor the activities of their attorney and take action before significant loss is incurred. Accordingly, there is significantly greater risk of loss and the losses may be larger.

5.23 While much of the focus of stakeholders was on financial abuse facilitated through an enduring power of attorney, stakeholders also discussed abuse of enduring document by enduring guardians. There was also evidence that third parties sometimes

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27 Advance care directives are decisions made and recorded by a person in advance of medical treatment or intervention. Advance care directives typically provide specific information relating to a person's wishes, values, and any treatments they do not wish to receive. For registration of advance care directives see *My Health Records Act 2012* (Cth) and *My Health Records Amendment (Advance Care Planning Information and Professional Representatives) Rule 2016* (Cth).

28 Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355, 357.

29 Ellison et al, above n 2, ch 9.

simply did not know of the existence of an enduring guardianship arrangement, which led to the older person's choice of representative not being respected.[30] For these reasons, it is proposed that enduring guardianship appointments should also be registered.

5.24 The successful implementation of a register will require effective transitional arrangements to ensure that existing instruments remain valid for a prescribed period, with an option for them to be added to the register. Awareness raising and education around the need for existing documents to be registered will be required during the transition period.

Enduring documents may be abused

5.25 The idea of a register for enduring documents is not new. In recent years there have been a number of reviews by state and territory bodies that have recommended the establishment of a register of enduring documents to protect against misuse.[31] For example, in 2016 the NSW Parliamentary Committee noted that:

> These instruments (enduring documents) fundamentally rely upon an attorney honouring the significant trust placed in them by the principal. It is therefore critical to the integrity of the enduring power of attorney system that the law does all it can to safeguard that trust …[32]

5.26 Ms Breusch explained to the NSW Parliamentary Committee that:

> it is too easy for an attorney to become a rogue attorney and not have any checks made until things have gone a long way wrong … The idea is that it [a register] would allow an easy check to see who has been appointed but it would [also] allow someone to record a revocation. At the moment a revocation just takes place by individuals, the previously appointed attorney, in writing saying that their power has been revoked. If we do not know their address there is no certainty that person receives it which means that is also complicated.[33]

5.27 In *Equality, Capacity and Disability*, the ALRC recommended that the Australian and state and territory governments develop methods of information sharing about substitute decision-maker appointments including enduring attorneys and

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30 NSW Nurses and Midwives' Association, *Submission 29*.

31 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007); Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010); Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012); Communities Disability Services and Domestic and Family Violence Prevention Committee, Parliament of Queensland, *Inquiry into the Adequacy of Existing Financial Protections for Queensland's Seniors* (August 2015); and Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016)

32 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

33 Evidence to Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, 18 March 2016, 16, (Ms Breusch, University of Newcastle Legal Centre).

guardians. In particular, the ALRC noted that information sharing could take the form of an online register of appointments.[34]

5.28 The ALRC also received a broad range of submissions to this Inquiry supporting the establishment of a register.[35] Those submissions are replete with examples of abuse of enduring documents.[36] There are three factors that appear to support abuse:

- principals with diminished decision-making ability have limited ability to monitor the activities of their attorney;
- family members are most commonly appointed as attorneys and this relationship of trust makes it less likely the principal and third parties will question the actions of attorneys; and
- there is generally a limited understanding in the community of the powers and duties of the attorney.[37]

A register would reduce abuse

5.29 Registration would assist in ensuring that enduring documents are operative only in circumstances genuinely authorised by an older person, upholding choice and control. The establishment of a register would:

- ensure that only one enduring document can be registered at any one time;
- enable the easy identification of documents that are live (that is active because they commence on signing or because it has been appropriately confirmed that the principal no longer has relevant decision-making ability); and
- provide clarity as to the precise roles and powers of the attorney.

5.30 The Eastern Community Legal Centre submitted that a register 'will help minimise the extent to which these documents are misused, forged or amended without consent or knowledge of the older person and their families. It will also be helpful in cases where the original document has been lost or destroyed.'[38]

5.31 This view was been supported by academics who have noted that:

> Registration has become popular as a way of ensuring the effectiveness of enduring powers of attorney as a vehicle for recording a principal's wishes. A common issue

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34 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 123–124.

35 See, eg, Justice Connect, *Submission 182*; Financial Services Institute of Australasia, *Submission 137*; Office of the Public Advocate (Vic), *Submission 95*; TASC National, *Submission 91*; Alzheimer's Australia, *Submission 80*; Social Work Department Gold Coast Hospital and Health Service, Queensland Health, *Submission 30*; Social Work Department Redland Hospital Queensland Health, *Submission 10*; Australian Bankers' Association, *Submission 84*. See also the Law Institute of Victoria comments in Law Council of Australia, *Submission 61*.

36 See, eg, Hume Riverina CLS, *Submission 186*; Eastern Community Legal Centre, *Submission 177*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; Mid North Coast Community Legal Centre, *Submission 161*; University of Newcastle Legal Centre, *Submission 44*.

37 Ellison et al, above n 2, 310–311.

38 Eastern Community Legal Centre, *Submission 177*.

> arising is confusion in determining whether a valid enduring power of attorney exists and, if so, who the appointees are and what are the wishes of the principal the instrument reflects.[39]

5.32 In relation to providing specific protection against abuse, a register would prevent:

- an attorney attempting to rely on an enduring document that has been revoked; and
- an individual attempting to arrange a subsequent enduring document in circumstances where there is a question as to the decision-making ability of the principal.[40]

5.33 Seniors Rights Victoria submitted that:

> an attorney could potentially purport to rely on the original document to exercise powers that have since been revoked. In the absence of the revocation document, a certified copy of a POA document could still be purported to be evidence of a valid POA although it is a clear abuse of power.[41]

5.34 Another potential value of registration was highlighted by a number of submitters, including Legal Aid (ACT)—'[c]ompulsory registration of powers of attorneys may assist in preventing elder abuse, as it may alert attorneys to a further level of oversight required in complying with their duties and responsibilities.'[42]

5.35 In addition, a register may have broader benefits than simply protecting an older person from abuse. The Eastern Community Legal Centre noted that:

> Registration would allow authorities such as hospitals, banks, lawyers and aged care facilities to verify documents that are presented to them.
>
> A consequence of the private nature of such instruments is that upon presentation of the instrument to a third party such as a bank or aged care facility, the third party has no way of confirming that the instrument is valid and has not been subsequently revoked.[43]

5.36 Registration would assist banks and other financial institutions, organisations, companies and service providers to establish the authenticity and currency of enduring instruments more easily. This may protect against financial abuse and also facilitate transactions where difficulty in confirming the authenticity of an enduring document has delayed property transactions unnecessarily. As the University of Newcastle Legal Centre observed:

> it would be in the interests of those being asked to rely upon the authenticity of appointing documents, if there was the ability to confirm the authenticity of the document (in particular any institution or individual being asked to release an asset on

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39 Ryan, Arnold and Bonython, above n 28, 358.
40 Advocare Inc (WA), *Submission 86*.
41 Seniors Rights Victoria, *Submission 171*.
42 Legal Aid ACT, *Submission 58*.
43 Eastern Community Legal Centre, *Submission 177*.

> the basis of a power of attorney document, would likely be keen to gain confirmation that the document they are presented with is genuine).[44]

5.37 The financial services industry was strongly in favour of a register of enduring powers of attorney.[45] The Australian Bankers' Association (ABA), which has long advocated for a register, submitted that:

> our member banks have noted an increased use of formal arrangements and the number of substitute decision making instruments being presented by third parties. This includes power of attorney appointments and appointments of financial managers by the relevant State Civil and Administrative Tribunal. The industry is concerned that the ageing population in Australia will mean that the use of formal arrangements is only likely to become more prevalent.[46]

5.38 The ABA also said that the registration of enduring documents and their revocation would allow financial institutions and others to 'more easily establish the authenticity and currency of the instrument.'[47]

5.39 A register would also assist hospitals and health care professionals to identify quickly whether a patient had appointed a substitute decision maker and then contact that person.

5.40 The ALRC also proposes that guardianship and financial administration orders should be added to the national online register. Currently, when a guardian or administrator moves interstate they must apply to the tribunal in their new state for the order of appointment in their old state to be recognised.[48] In NSW, for example, only the appointed guardian or financial manager can apply for recognition of the appointment.[49] In consultations, the ALRC heard of situations where a person is taken interstate by family members, 'beyond the reach' of a guardianship order. In this set of circumstances, the family is unlikely to register the pre-existing order, and may apply for a new order without reference to the current standing appointment. The national online register should prevent a person from making any new applications in a new jurisdiction.

International perspectives

5.41 The law of England and Wales provides that enduring documents must be registered under the *Mental Capacity Act 2005* (UK).[50] Scotland also introduced compulsory registration of enduring documents in the *Adults with Incapacity (Scotland) Act 2000* (Scotland). In Ireland, enduring documents must be registered before they can be activated—that is, at the time of the loss of decision-making ability

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44 University of Newcastle Legal Centre, *Submission 44*.

45 Association of Financial Advisers, *Submission 175*; Financial Services Institute of Australasia, *Submission 137*; Financial Services Council, *Submission 35*.

46 Australian Bankers' Association, *Submission 107*.

47 Ibid.

48 See, eg, *Guardianship and Administration Act 1990* (WA) ss 44A, 83D. However, South Australia has a process for automatic mutual recognition of interstate orders which does not require an application to a tribunal see *Guardianship and Administration Act 1993* (SA) s 34.

49 *Guardianship Act 1987* (NSW) ss 48A-48B.

50 *Mental Capacity Act 2005* (UK) c 9.

and not at the time they are made.[51] In each of these jurisdictions there is evidence that registration has assisted in confirming:

- the existence of an enduring document;
- the identity of the attorney; and
- that it has been appropriately verified that the principal has lost decision-making ability and that the attorney therefore has authority to make decisions for the principal.[52]

5.42 In these respects, there is evidence that this has reduced the instances of enduring documents being used to facilitate fraud against older persons.[53] The English and Scottish models, that require registration once an enduring document is made, are preferable as such an approach provides two opportunities to check the validity of the instrument: at the time of making and at the time that powers come into force.

5.43 Evidence from the UK also suggests that awareness raising, particularly around the value of putting in place enduring documents as part of advanced planning for possible loss of decision-making ability, is integral to the success of a registration scheme. In addition, keeping costs low and ensuring that forms are short and easy to complete are important in increasing people's ability and willingness to register enduring documents.[54]

Arguments against a register

Efficacy of a register in reducing elder abuse

5.44 While there have been a number of reviews supporting a register of enduring documents, there have also been a number of bodies that have recommended against its establishment.[55]

5.45 For example, in 2010, the Queensland Law Reform Commission did not recommend establishing a compulsory registration scheme noting that:

> there are likely to be limitations on the extent to which a registration system can ensure the essential validity of a registered instrument. In particular, a registration system cannot necessarily detect fraud or abuse. ... The Commission has therefore

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51 *Assisted Decision-Making (Capacity) Act 2015* (Ireland), s 72.

52 Ministry of Justice (UK), *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Mental Capacity Act 2005* (TSO, 2010) 11. However, the House of Lords Select Committee noted significant problems with the implementation of the *Mental Capacity Act 2005* (UK) particularly the extent to which the community was aware of lasting powers of attorneys—see House of Lords Select Committee on the Mental Capacity Act 2005, Parliament of the United Kingdom, *Mental Capacity Act 2005: Post-Legislative Scrutiny* (2014).

53 See, eg, Rajdeep Routh, Catriona Mcneill and Graham A Jackson, 'Use of Power of Attorney in Scotland' (2016) 61(3) *Scottish Medical Journal* 119, 123.

54 House of Lords Select Committee on the Mental Capacity Act 2005, Parliament of the United Kingdom, above n 52, 70–71.

55 See, eg, Advance Directives Review Committee (SA), *Planning ahead: your health, your money, your life. Second Report of the Review of South Australia's Advance Directives* (2008); Land and Property Management Authority (NSW), *Review of The Powers of Attorney Act 2003* (October 2009).

> concluded that the burdens of a mandatory registration system would likely outweigh its benefits.[56]

5.46 Similarly, in this Inquiry, the Law Society of NSW strongly opposed a register for a number of reasons, including questions as to its efficacy in preventing financial abuse of older persons:

> While a register may have the benefits envisaged in identifying persons holding powers of attorney, the Law Society of NSW is not persuaded that this, in itself, would operate in any practical or effective way to prevent, or affect, the incidence of elder abuse.[57]

5.47 The ALRC recognises that a register will not entirely prevent financial abuse by attorneys acting under an enduring document, but considers that more easily identifying and confirming who has power under a valid enduring document may assist in reducing abuse where there is a question as to who is the attorney or guardian.

Chilling effect

5.48 A second argument against a register was explained by Capacity Australia as a 'chilling effect'. Capacity Australia suggested that a register would discourage use of enduring documents leading to 'an increase in the inappropriate misuse of elderly persons' money' and more court and tribunal financial management orders being made.[58]

5.49 Capacity Australia recognised that enduring documents are an important tool in protecting those with diminished decision-making ability from abuse, but expressed concern that any reduction in the use of enduring documents could put more people at risk, as a significant proportion of abuse occurs in the absence of enduring documents.

5.50 The potential issue of a 'chilling effect' could be addressed by ensuring that the register is easy to use and that it is a simple and quick process to register, revoke and change status on the register. It should be possible for solicitors and other suitably qualified professionals to manage the registration process on behalf of a principal and their attorney.[59]

Cost

5.51 The cost of registering an instrument may also deter some people from entering these arrangements. State Trustees Victoria submitted that 'there would probably need to be community acceptance that such an agency would have to charge a fee for registration to ensure the agency [managing the register] was appropriately resourced.'[60]

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56 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010).

57 See Law Council of Australia, *Submission 61*.

58 Capacity Australia, *Submission 134*.

59 For many older Australians, particularly from CALD backgrounds, online only systems can be challenging see, eg, Jo Wainer et al, 'Diversity and Financial Elder Abuse in Victoria' (Protecting Elders' Assets Study, Monash University, 2011). Accordingly, the implementation of an online register of enduring document will need alternative pathways for those who are unable to use the internet.

60 State Trustees Victoria, *Submission 138*. See also Law Council of Australia, *Submission 61*.

5.52 In those states where a power of attorney must be registered with the land titles office if it is to be used as part of land transactions, the fees are relatively high.[61] The fees in Tasmania, where registration is compulsory, are of a similar amount.[62] In most states and territories, the processes for registration requires manual submission and processing of the enduring document. Lower cost models for registration should be considered.

5.53 One such model is the Personal Property Securities Register (PPSR), which was introduced in 2012. The PPSR is a national online register which replaced Commonwealth, state and territory government registers for security interests in personal property, including those for bills of sales, liens, chattel mortgages and security interests in motor vehicles as well as the Australian Securities and Investment Commission's (ASIC) Register of Company Charges. The PPSR is an easy to use online register and has relatively low fees while operating on a full cost recovery basis.[63] The cost of searching the register for individuals is $3.40, the cost of registering a security interest depends on the type of interest and its duration, but can be as low as $6.80 and up to $119.00.[64] There is no charge for removing a security interest.[65]

5.54 ADA Australia suggested that enduring documents could be added to *My Health Records*, which currently provides for online storage of medical records and, from 2016, 'advance care directives'. In order to encourage use of the online storage of medical records, the scheme is currently free. There may be similar public policy imperatives that support free registration of enduring documents.[66]

5.55 In any event, the hardware and software from the My Health Records system may provide useful models for a register of online enduring documents particularly in relation to safety and privacy standards. Notwithstanding this, the ALRC considers that enduring documents should be kept separate from medical records and advance care directives, as enduring documents will be available to a broader range of organisations including banks and financial institutions.

5.56 Cost is an important issue and the implementation of the register should proceed on a low cost basis so as not to discourage the use of enduring documents.

Privacy

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

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61 For example, the cost to register in NSW is $136.30. See Land and Property Information (NSW), *LPI Circular - Land and Property Information Fee Changes from 1 July 2016* (June 2016).

62 The cost to register in Tasmania is $138.46. See Land Tasmania, *Brief Fee Schedule 2016* (1 July 2016).

63 See Australian Financial Security Authority, *Personal Property Securities Register* <https://www.ppsr.gov.au/>.

64 Australian Financial Security Authority, *Fees for Using the PPSR* <www.ppsr.gov.au/fees>.

65 Ibid.

66 ADA Australia, *Submission 150*.

5.57 The uploading of enduring documents onto a register raises privacy concerns. Currently decisions about enduring appointments and assessments of decision-making ability are not publicly recorded. State Trustees Victoria suggests that 'creating a public register of such [enduring] documents presents significant privacy and confidentiality issues. For example, it will become a matter of public record that a particular individual lacks capacity to manage their own affairs.'[67]

5.58 The principal should be able to decide which individuals (as opposed to organisations) may access the register with respect to their enduring document (eg specified family members). More broadly, a level of privacy can be maintained by restricting access to the register to authorised people and organisations. The ALRC is interested in hearing from stakeholders regarding who should have access to the register. For example, searching the register could be restricted to authorised people and organisations such as: Courts and Tribunals; the Aged Care Assessment Services (ACAS); the Royal District Nursing Service; Police; Ambulance; banks and other financial institutions; State Trustees; hospitals; Medicare; Centrelink; insurance companies; aged care facilities; medical practitioners and legal practitioners.

National register

5.59 Given that enduring documents are made under state and territory laws there is an issue as to whether the register should be a single national register or separate state and territory registers. There was strong support in submissions that, if there were to be a register, it should be a single national register. The Australian Association of Social Workers stated that '[w]e support the idea of a national register. Such a register would require national consistency and transferability, and should include national accessibility.'[68] This was supported by ADA Australia who submitted that a register 'needs to be national, not state-based, and searchable by services that operate remotely and after hours (such as health services).'[69]

5.60 The NSW Parliamentary Committee noted that a mandatory national register would also provide an incentive for the states and territories to move towards uniformity in legislative regimes for enduring documents. The NSW Parliamentary Committee noted that:

> the complex issue of a mandatory national register of enduring powers of attorney instruments is best considered as part of the Australian Law Reform Commission's inquiry into protecting the rights of older Australians from abuse, and following that, by COAG.[70]

Safeguards

5.61 The ALRC's *Equality, Capacity and Disability Report*, recommended that the appointment and conduct of substitute decision makers be subject to appropriate and

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67 State Trustees Victoria, *Submission 138.*
68 Australian Association of Social Workers, *Submission 153*.
69 ADA Australia, *Submission 150*.
70 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

effective safeguards.[71] A national register is an important safeguard against abuse. In addition, the ALRC has considered the range of safeguards that have been introduced recently across the states and territories. The following proposals seek, at a minimum, to 'level up' the protections against abuse that exist in state and territory legislation so that the strongest protections exist in all states and territories. This will ensure national consistency in safeguards. Also explored are the potential additional safeguards that could be afforded by a national register.

Random checks

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

5.62 As set out in Chapter 3, in each state or territory there is generally a body whose role is to promote and protect the rights and interests of people with disabilities known as either the public guardian or the public advocate.[72] The public advocate/guardian's powers could be extended beyond following up complaints regarding the actions of an enduring attorney or guardian and extend to proactively monitoring the actions of those with enduring powers through random checking.

5.63 Currently, there is no way for the public advocate/guardian to easily identify whether an enduring document has been made as they are typically stored in a solicitor's office with a client's will or in a person's filing cabinet at home. One of the advantages of a register of enduring documents is that it would provide information as to the existence of all enduring documents made, as well as those that are in operation because the principal has lost decision-making ability. The creation of a national register has the potential to enable greater oversight of the use of enduring documents, which may safeguard against abuse.

5.64 One potential form of oversight is random checking by the public advocate of an attorney's financial management of their principal's affairs. This has potential to be a deterrent against abuse and may also identify financial anomalies earlier, reducing the losses suffered by a principal. It nevertheless has privacy implications as it will allow greater public scrutiny of a principal's financial affairs and their management by the attorney.

5.65 Alternatives considered included requiring attorneys to report annually on their expenditure of their principal's funds. The ALRC considers that annual reporting would be burdensome and may discourage individuals from agreeing to act as an attorney.

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71 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 114.

72 For more information see Chapter 3.

5.66 Some submissions suggested random checking would be an effective safeguard against abuse.[73] The ALRC is keen to hear from stakeholders specifically on whether the public advocate/guardian should be given the power to randomly check on an attorney's financial management of their principal's affairs and whether the protective benefit from such a power would be sufficient to outweigh the potential impost on the attorney.

Enhanced witnessing

Proposal 5–4 Enduring documents should be witnessed by two independent witnesses, one of whom must be either a:

(a) legal practitioner;

(b) medical practitioner;

(c) justice of the peace;

(d) registrar of the Local/Magistrates Court; or

(e) police officer holding the rank of sergeant or above.

Each witness should certify that:

(a) the principal appeared to freely and voluntarily sign in their presence;

(b) the principal appeared to understand the nature of the document; and

(c) the enduring attorney or enduring guardian appeared to freely and voluntarily sign in their presence.

5.67 Enhanced witnessing has been an important reform in state and territory legislation. It assists in ensuring that enduring documents are made and operative only in circumstances genuinely authorised by an older person, upholding choice and control.

5.68 Enhanced witnessing responds to an identified problem raised by Community Legal Centres, elder abuse hotlines and other welfare groups. They have highlighted cases of older people being pressured into signing these instruments. In other cases, the instruments may have been signed by older people with reduced decision-making ability.[74]

5.69 With some minor exceptions, under state and territory laws at least one witness must either be eligible to witness statutory declarations or the more restricted standard of being eligible to witness affidavits.[75] Generally, a relatively wide group of

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73 See, eg, Office of the Public Advocate (Vic), *Submission 95*.

74 Social Work Department Redland Hospital Queensland Health, *Submission 10*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Alzheimer's Australia, *Submission 80*.

75 For example, compare the more restrictive approach in Victoria with that in Western Australia. See *Powers of Attorney Act 2014* (Vic); *Guardianship and Administration Act 1990* (WA).

individuals can sign statutory declarations, including public servants and post office staff.[76] Statutory declarations are also unilateral and don't involve duties arising in another person. Affidavits typically can only be signed by lawyers, JPs, public notaries, registrars, and clerks of a court.[77] A more stringent list of prescribed witnesses enhances the protection around enduring documents. The ALRC proposes to include medical practitioners because of their expertise in assessing decision-making ability. This is consistent with the approach in Victoria.[78]

5.70 The second part of the proposed enhanced witnessing requirement is the increased role of witnesses. Under the proposal, witnesses are not just confirming that they watched the principal and attorney/guardian sign the enduring document, they are also certifying that they were satisfied that the principal and attorney/guardian freely and voluntarily signed in their presence, and at the time the principal signed the enduring document, the principal appeared to have decision-making ability in relation to the making of an enduring document. These are important protections that seek to avoid an enduring arrangement being put in place under duress or in circumstances where the principal lacked decision-making ability. This proposal is consistent with more recent reforms across the states and territories.[79]

5.71 An additional important protection is specific legislative exclusions of certain individuals from witnessing an enduring document. For example, in Queensland, a witness must not be:

- the person signing the document for the principal;
- an attorney of the principal;
- a relation of the principal or a relation of an attorney of the principal;
- a paid carer or health provider of the principal (if the power is a personal or non-financial power); or
- a beneficiary under the principal's will.[80]

5.72 These restrictions are important in protecting against undue influence and should be adopted as part of the enhanced witnessing requirements.

5.73 The key disadvantage of enhanced witnessing requirements is that they may dissuade individuals from entering into such arrangements. This is a problem because enduring documents, despite being a source of abuse of older persons, are also an important protection.

5.74 The disincentive effect of enhanced witnessing requirements may be addressed in part by increasing community awareness of the role of JPs and their availability to witness the signing of enduring documents.

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76 See, eg, *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) Schedule 2.
77 Ibid s 9.
78 *Powers of Attorney Act 2014* (Vic) s 35.
79 Ibid s 36.
80 *Powers of Attorney Act 1998* (Qld) s 31.

5.75 The ALRC is of the view that the advantage of enhanced witnessing to the integrity of the enduring document outweighs any potential disincentive that it may create. Enduring documents are important documents which give attorneys/guardians enormous powers, and appropriately stringent witnessing requirements are a necessary and important protection against misuse.

Compensation

Proposal 5–5 State and territory tribunals should be vested with the power to order that enduring attorneys and enduring guardians or court and tribunal appointed guardians and financial administrators pay compensation where the loss was caused by that person's failure to comply with their obligations under the relevant Act.

5.76 This proposal covers misuse of powers by enduring attorneys/guardians as well as guardians and financial administrators appointed by a court or tribunal.[81]

5.77 In many instances of financial abuse (or abuse by a guardian which causes loss), there are limited options for an older person to seek redress, and few consequences for the representative who has misused their power.

5.78 An abused person may want their money or assets returned, but may not:

- want police involvement, preferring to retain relationships and not see the person prosecuted; and/or
- be willing or able to afford to commence a civil action in the Supreme Court.

5.79 In respect of enduring appointments, state and territory tribunals are typically responsible for supervising enduring arrangements, with the power to revoke or amend those arrangements on the application of an interested party.[82] This proposal would extend that power to enable the tribunal to order an enduring attorney/guardian to pay compensation where they have breached their obligations under an enduring document causing the principal loss. A number of jurisdictions have statutory compensation regimes, including South Australia and Queensland. [83]

5.80 This proposal builds on the Victorian model that provides a mechanism for redress in a non-cost jurisdiction—the Human Rights Division of the Victorian Civil and Administrative Tribunal (VCAT).[84] Applications for compensation to VCAT can be made by the person, any attorney or the executor, the public advocate, a family member, or any other person with a special interest in the affairs of the principal.[85]

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81 Guardians and financial administrators appointed by a court or tribunal are discussed in Chapter 6.

82 See, eg, *Powers of Attorney Act 1998* (Qld) ss 109A, 110. However, in SA, for example, the powers of the tribunal are narrower reflecting an expanded role of the Public Advocate to resolve disputes involving substitute decision makers—see *Advance Care Directives Act 2013* (SA) pt 7.

83 *Powers of Attorney and Agency Act 1984* (SA) s 7; *Powers of Attorney Act 1998* (Qld) s 106.

84 *Powers of Attorney Act 2014* (Vic) s 77.

85 *Powers of Attorney Act 2014* (Vic) s 78.

There is no financial cap on the amount that can be compensated. Nevertheless, VCAT can refer an application for compensation to the Supreme Court,[86] and it has been suggested that this may occur where the estate is particularly large or complex.[87] The Act provides a defence of acting honestly and reasonably.[88]

5.81 In respect of guardians and financial administrators appointed by a court or tribunal, Queensland Civil and Administrative Tribunal (QCAT) has the power to order compensation where a guardian or administrator causes loss to the person due to failure to comply with the Act.[89]

5.82 Expanding this jurisdiction to other states and territories was supported by a number of stakeholders.[90]

5.83 State Trustees Victoria went further to recommend that tribunals be empowered to resolve all matters relating to financial elder abuse—including those perpetrated by administrators, guardians or those who perpetrate the abuse without financial authority through coercion or fraud.[91]

5.84 The ALRC supports expanding the jurisdiction of tribunals to order compensation where loss has been caused to the person by the representative decision-maker (an enduring attorney, financial administrator, or guardian) in contravention of the relevant statute. The Victorian Act provides a useful model, which could be expanded to include tribunal appointed guardians and financial administrators.

5.85 Vesting the tribunal with the power to order compensation, where a representative decision maker has acted outside their powers to cause loss, would serve two purposes. It would provide a practical way to redress loss for older persons unable or unwilling to take criminal action or action in the Supreme Court. Tribunals aim to facilitate the just, quick and economical resolution of proceedings. Having the power to make compensation orders for loss caused by representatives fits well within this remit.

5.86 It would also operate as a deterrent to misusing funds.

5.87 This proposal does not remove a person's right to seek an equitable remedy through the superior courts. As is the case in Victoria, the proposal creates an alternative statutory scheme designed to operate independently from the equitable jurisdiction of the Supreme Court.

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86 Ibid s 80.

87 Elefteria Konstantinou, 'Attorneys: Financial Misconduct and Asset Retrieval: Compensation for a Principal under the *Powers of Attorney Act 2014*. Which Jurisdiction? Supreme Court or Victorian Civil & Administrative Tribunal?' [2016] *Greens List Breakfast Briefing* 4.

88 *Powers of Attorney Act 2014* (Vic) s 74.

89 *Guardianship and Administration Act 2000* (Qld) s 59.

90 NSW Trustee and Guardian, *Submission 120* in reference to attorney legislation. Seniors Rights Service, *Submission 169*; Mid North Coast Community Legal Centre, *Submission 161*; National Seniors Australia, *Submission 154*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*.

91 State Trustees Victoria, *Submission 138*.

Restrictions on conflict transactions

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

(a) the principal foresaw the particular type of conflict and gave express authorisation in the enduring power of attorney document; or

(b) a tribunal has authorised the transaction before it is entered into.

5.88 Transactions where there is, or there is perceived to be, a conflict between the personal interests of an attorney and the interests of the principal have been identified as a key source of financial abuse.[92]

5.89 These arrangements may occur in situations where the principal and attorney used to be in a family business together and a number of assets of the business are owned by the principal and leased by the attorney. They can also involve the use of 'family assets' such as holiday homes.

5.90 Starting with a prohibition on conflict transactions means that when making an enduring document a principal must consider, having regard to their finances and their relationship with the attorney, whether conflicts are likely and in what areas. Having identified potential conflicts the principal has the choice whether to authorise the attorney to act in those areas. This ensures that the principal retains choice and control.

5.91 Once an enduring power of attorney is in effect, an explicit statutory prohibition on conflict transactions requires an attorney to identify potential conflicts of interests and sends a powerful signal that they must either avoid or seek approval for transactions where there are, or may be, conflicts of interests.

5.92 Prior authorisation by a principal or tribunal can also protect the attorney from subsequent accusations that a particular transaction turned out to be particularly advantageous to the attorney at the expense of the principal.

5.93 This proposal is modelled on specific prohibitions on conflict transactions in state and territory legislation such as Victoria and Queensland.[93] The specific drafting of the conflict prohibition would need to take into account gifts and donations made by an attorney on behalf of the principal. Preferably decisions regarding the type and nature of gifts and donations would be guided by the principal's wishes as expressed in the enduring power of attorney.

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92 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 175.

93 *Powers of Attorney Act 1998* (Qld) s 73; *Powers of Attorney Act 2014* (Vic) s 64.

Ineligible person

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

(a) is an undischarged bankrupt;

(b) is prohibited from acting as a director under the *Corporations Act 2001* (Cth);

(c) has been convicted of an offence involving fraud or dishonesty; or

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

5.94 This proposal builds on specific exclusions introduced in state and territory legislation for enduring documents.[94]

5.95 Excluding inappropriate persons from acting as enduring attorneys is an important protection against abuse. Evidence suggests that, where individuals who have a history of dishonesty and fraud offences are appointed under an enduring document, there is a greater risk of abuse.[95] The ALRC considers that, while not allowing a principal to appoint a person who has convictions for fraud and dishonesty offences necessarily reduces choice, the appropriate balance between choice and protection requires a full exclusion of those people from being an attorney.

Prohibited decisions

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

(a) making or revoking the principal's will;

(b) making or revoking an enduring document on behalf of the principal;

(c) voting in elections on behalf of the principal;

(d) consenting to adoption of a child by the principal;

(e) consenting to marriage or divorce of the principal; or

(f) consenting to the principal entering into a sexual relationship.

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

95 Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney: Final Report* (August 2010) 142.

5.96 The proposal sets out in legislation those decisions which cannot be exercised by a representative because those decisions can only be exercised personally and cannot be delegated to an attorney/guardian. The list builds on extensive case law regarding powers of attorney and agents. Lists of this type have been introduced in many state and territory jurisdictions. Stakeholders have stated that having a straight forward statutory list of prohibited decisions can assist in understanding the limits of the roles of an attorney/guardian.[96] A list that can only be distilled from the common law or individual pieces of legislation does not provide a simple and straightforward explanation. Addition prohibitions on attorneys are proposed in Chapter 9 with respect to superannuation binding death benefit nominations.

5.97 It would also be useful to set out in statute the specific powers of an attorney/guardian where there is some ambiguity under the common law. Clarity improves understanding which may mitigate against the risk of abuse.

Record keeping

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

5.98 An explicit requirement to keep records and keep property separate is designed to protect the principal and the attorney. By keeping good records and not co-mingling property, the representative is upholding the distinction between their personal affairs and their role as an enduring attorney of the principal.

5.99 Good record keeping demonstrates the way in which the attorney has fulfilled their duties and can protect the representative in circumstances where accusations are made that the representative has failed in their duties.

5.100 The explicit requirement to keep records and property separate is also educative as it reinforces the nature of the fiduciary role of the representative as the manager of the principal's affairs and the importance of doing so diligently and effectively.

5.101 Record keeping requirements are typically included in state and territory legislation.[97]

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96 Claire McNamara, 'How the POA Act Works: Some Key Features of the Reform' (Presentation at Australian Guardianship and Administration Council (AGAC) 2016 National Conference, Reflecting Will and Preference in Decision Making, 17-18 October 2016).

97 See, eg, *Guardianship and Administration Act 1990* (WA) s 107; *Powers of Attorney Act 2000* (Tas) s 32AD.

Representatives agreements

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

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

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

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

5.102 Enduring documents are important tools that respect autonomy and dignity as they allow individuals to appoint another individual to act on their behalf now and in the future if they lose decision-making ability, rather than relying on individuals and organisations appointed by the state. Nevertheless, enduring documents are not well understood by those who have appointed an attorney or guardian, those who have been so appointed and, more broadly, in the community.[98] Significant numbers of submissions include instances of elder abuse which were at least, in part, contributed to because of a misunderstanding of the enduring document.[99]

5.103 Through a model agreement, supported by nationally consistent legal frameworks, the proposal is designed to bring clarity to the nature of the relationship created by an enduring document, the powers and responsibilities it contains, and the safeguards in place to protect the principal. An important part of the proposal is using terminology that is more easily understood, and more reflective of, the nature of the powers and responsibilities set out in the enduring document. Building understanding of the role of the representative, their powers, and the limits of those powers are important protections against elder abuse (see Chapter 1).

5.104 An important benefit of adopting a single model agreement is that it will ensure consistency across Australia in the form and content of enduring documents, including terminology and assessments of capacity or decision-making ability. This would resolve current issues with enforcement and transferability across the states and

98 Advance Directives Review Committee, *Planning Ahead: Your Health, Your Money, Your Life. First Report of the Review of South Australia's Advance Directives.* (2008).

99 See, eg, Older Women's Network NSW, *Submission 136*; The Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; Legal Aid ACT, *Submission 58.*

territories.[100] National consistency will particularly assist communities along state and territory borders and families where the attorney and principal live in different jurisdictions.[101]

5.105 The proposal is that the model agreement should be a short, simple and easily 'navigatable' agreement that can be downloaded and edited. Importantly, the model agreement should give principals choice as to who they want to be their representatives, for what decision, and give the principal the option to exclude certain matters and powers. Choice is an important ingredient in giving the principal control over the nature and the extent of their relationship with the representative.

5.106 The proposal develops aspects of the ALRC's *Equality, Capacity and Disability Report* which recommended a Commonwealth decision-making model, and the description of a substitute decision maker as a 'representative'.[102] The proposal seeks to give substance to this in the form of a model document.

5.107 Representatives agreements are intended to support the 'paradigm shift' in attitudes to substituted decision making reflected in the CRPD, which places the principal as the driver of decisions through their will, preferences and rights. This approach seeks to uphold individual autonomy. Under the Commonwealth decision-making model, enduring documents are currently one example of full support.[103]

5.108 The Commonwealth decision-making model is primarily about supported decision making and the ALRC recognises that there are important forms of supportive decision-making mechanisms under Commonwealth and state and territory law, including, for example, correspondence nominee arrangements under Centrelink. While this proposal focuses on a form of substitute decision making, because of the particular instances of abuse that have been afforded by enduring documents, the ALRC continues to recognise the importance of supported decision-making mechanisms and the need, wherever possible, to avoid the appointment of substitute decision makers. This can be achieved by fully implementing the Commonwealth decision-making model recommended by the ALRC in the report *Equality, Capacity and Disability*.

5.109 State and territory laws are already moving away from a 'best interests' test that typically applied in enduring documents (particularly guardianship).[104] A best interests test may subjugate the principal's will and preferences to notions of objectively satisfactory decisions.[105] The proposal builds on those incremental changes at the state

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100 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 70.

101 Hume Riverina CLS, *Submission 186*.

102 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 142.

103 Ibid 116.

104 See, eg, *Powers of Attorney Act 1998* (Qld) sch 1. However, best interests tests are still used, for example: *Powers of Attorney Act 2000* (Tas) s 32(1A)(a).

105 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 49–51.

and territory level to deliver comprehensive reform through a national model agreement—the Representatives Agreement.

5.110 The proposal recognises that single agreements that cover financial, medical and personal decisions have been successful in jurisdictions such as Victoria and Queensland.[106] A single agreement, while permitting the principal to appoint different individuals for different types of decisions, may reduce confusion as to what enduring documents have been signed, clarify the roles of attorneys and guardians, and reduce confusion as to who needs to be contacted with respect to a substitute decision.[107]

5.111 To highlight the active role of the principal, the proposal also seeks to move away from the term 'appointments' and replace it with 'agreements'. The principal is making conscious decisions as to who will be responsible for making decisions on their behalf should they lose decision-making ability, and the terms and conditions under which those responsibilities will be exercised.

Addressing inconsistency

5.112 There was broad support in submissions for harmonising state and territory laws on enduring documents including from welfare organisations, community legal centres and the Australian Bankers Association.[108] The Law Council of Australia explained that it

> supports the harmonisation of powers of attorney and guardianship laws in each State and Territory. At present there is no consistency in State and Territory laws and instruments of powers of attorney and enduring guardianship. Uniformity would reduce the current complexity and overlap in the application of the law in relation to powers of attorney and enduring guardianship.[109]

5.113 Submissions also highlighted that national consistency would particularly assist communities along state and territory borders and families where the representative and principal live in different jurisdictions.[110]

5.114 National consistency would greatly assist in implementing the proposal to establish a national register of enduring documents. While it would technically be possible to have a national register that includes different state and territory documents, this would not have the benefit of simplicity and certainty that would be created by a single agreement type that can be registered.

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106 *Powers of Attorney Act 1998* (Qld); *Powers of Attorney Act 2014* (Vic). But see also *Medical Treatment Act 1988* (Vic).

107 Alzheimer's Australia, *Decision Making in Advance: Reducing Barriers and Improving Access to Advance Directives for People with Dementia* (2006) 16.

108 See, eg, Hume Riverina CLS, *Submission 186*; Seniors Rights Service, *Submission 169*; Australian Bankers' Association, *Submission 107*.

109 Law Council of Australia, *Submission 61*.

110 Hume Riverina CLS, *Submission 186*.

Commonwealth decision-making model

5.115 In *Equality, Capacity and Disability*, the ALRC recommended a new model for decision making to encourage the adoption of supported decision making at a Commonwealth level (the Commonwealth decision-making model).[111] The Commonwealth decision-making model represents a significant shift in approaches to decision making. In *Equality, Capacity and Disability*, the ALRC noted that there was a question of how the ALRC's model would interact with decision-making regimes under state and territory law. This proposal develops aspects of the ALRC's Commonwealth decision-making model and in particular the description of a substitute decision maker as a 'representative'. The proposal seeks to give substance to this in the form of a model document and national legislation to replace all existing enduring documents.

5.116 The application of the Commonwealth decision-making model to enduring documents will lead to consistency in terminology and greater understanding of the nature of the obligation of the representative. The basis for all representative decisions will be the will, preferences and rights of the principal.

5.117 The Commonwealth decision-making model does not start by questioning whether a person has the capacity to make decisions—reflecting a binary view of capacity and decision making. Instead, the model asks what level of support, or what mechanisms are necessary to support people to express their will and preferences. This recognises that the ability of a person who needs decision-making support 'to exercise legal agency is dependent on the integrity, quality and appropriateness of support available'.[112] The Commonwealth decision-making model recognises that there is a spectrum of support required—at one end is full support. Enduring documents are currently one example of full support or substitute decision making.

5.118 In the *Equality, Capacity and Disability Report*, the ALRC recommended a functional approach to assessing capacity or decision-making ability in accordance with the following guidelines:

- All adults must be presumed to have ability to make decisions that affect their lives.
- A person must not be assumed to lack decision-making ability on the basis of having a disability.
- A person's decision-making ability must be considered in the context of available supports.
- A person's decision-making ability is to be assessed, not the outcome of the decision they want to make.

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111 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 63–86.

112 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014). Quoting PWDA, ACDL and AHR Centre, *Submission 66*.

- A person's decision-making ability will depend on the kind of decisions to be made.
- A person's decision-making ability may evolve or fluctuate over time.[113]

5.119 The model Representatives Agreement should implement these guidelines in assessing the decision-making ability of a principal. The Victorian approach to 'capacity' under the *Powers of Attorney Act 2014* (Vic) is broadly consistent with the Commonwealth decision-making model and may be a useful example when implementing the model Representatives Agreement. In addition, the South Australian principles approach in the *Advance Care Directives Act 2013* (SA) may be another useful model.[114]

5.120 The application of the Commonwealth decision-making model to enduring documents is likely to have a number of important outcomes. It would place the principal's will and preferences at the centre of all decisions. It would also provide a consistent approach to assessments of decision-making ability under enduring documents in Australia, contributing to a better understanding of decision-making ability and the right of older Australians to have their will and preferences respected and implemented.

Why 'representatives'?

5.121 The ALRC proposes a move away from the terms attorney and guardian to adopt the term 'representative'. The term 'attorney' has very legalistic connotations reflecting the commercial genesis of power of attorney arrangements (as described above). Guardianship has paternalistic connotations of care and responsibility. Neither accurately reflects the modern relationship between the representative and the principal. These terms deny the continuing importance of the agency and preferences of the principal. The terms may suggest that the substitute decision maker may act independently of the wishes of the principal or that the attorney has some special legal status above and beyond representing the principal.

5.122 The term representative is chosen because it is the one used by the ALRC in the Commonwealth decision-making model. It reflects that the substitute decision maker is in that role 'with the will of the person'. The term is important in signalling that the role is to represent the principal, to give effect to the principal's views, and only in very limited circumstances, when the will and preference of the person cannot be ascertained, make a substitute decision that respects and upholds the rights of the principal. This highlights that the will and preferences of the principal continue notwithstanding a loss of decision-making ability at law. If, for example, a resident in an aged care facility wants to go out for a coffee once a week – that is her preference. It is not to be overridden by her representative on the basis of financial prudence or austerity.

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113 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 67.

114 *Advance Care Directives Act 2013* (SA) s 10.

5.123 The term representative is also used to distinguish the arrangement from a substitute decision maker appointed by a court or tribunal. An appointed person may represent the principal but they are not the principal's chosen representative. This is an important distinction.

5.124 As discussed in the *Equality, Capacity and Disability Report*, the terminology relating to capacity and decision making is often a contested area, but the development of a new lexicon of terms may help to signal the 'paradigm shift' in attitudes to decision making reflected in the CRPD.[115] The term 'representative' is used in the Commonwealth decision-making model to signal that the role of a representative is to support and represent the will, preferences and rights of the person who requires decision-making support.[116] 'Representative' was preferred over 'nominee' to signal the shift from existing decision-making arrangements in areas of Commonwealth law, including the NDIS and social security, both of which use the term nominee.

Why 'agreement'?

5.125 Using the term 'agreement' signals to third parties that the representative has not been appointed by some higher authority. The representative may only act in accordance with an agreement with the principal. That agreement can be set aside by a tribunal if the representative is acting against the will, preferences and rights of the principal. Many submissions highlighted a reluctance of third parties to question an attorney or guardian when they were *prima facie* acting against the express wishes of the principal. Examples in submissions include attorneys denying the principal funds for basic toiletries, small personal items and simple outings, and the unwillingness of residential aged care staff to question the attorneys' decisions.[117] These submissions highlighted a fundamental misunderstanding in the community of both the role of attorneys and guardians as well as the limits of their powers.

5.126 Using the term 'agreement' rather than 'appointment' may highlight the active role of the principal in the establishment of the arrangement. The representative has not been appointed by court or tribunal. As it is an agreement, the principal is making conscious decisions as to who will be responsible for making decisions on their behalf should they lose decision-making ability, and have chosen the terms and conditions on which those responsibilities will be exercised. The representative has also made an active choice by agreeing to act as the principal's representative, and has agreed to the scope and limits of the powers set out in the Representatives Agreement.

5.127 Importantly, the term 'agreement' is not intended to be a synonym for contract. There is no benefit to be bestowed upon the representative by the principal under the agreement. In fact, the representative has, with a degree of selflessness, agreed to support and represent the principal.

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115 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 68.

116 This formulation is currently used under the *My Health Records Act 2012* (Cth). The term representative is also used in other jurisdictions, eg, *Representation Agreement Act 1996* (British Columbia).

117 Justice Connect, *Submission 182*; Seniors Rights Service, *Submission 169*; Older Women's Network NSW, *Submission 136*.

State and territory reforms

5.128 There may be some resistance to the adoption of a model representative agreement on the basis that there has already been significant reform to enduring documents in a number of jurisdictions. For example, the new laws on powers of attorney in Victoria only came into force in 2015; and South Australia made significant reforms to advance care directives and substitute decision makers which replaced guardian laws in 2013.[118] The ALRC considers that these are excellent reforms.[119] As outlined above, the ALRC supports a number of safeguards introduced by Victoria in 2015. The ALRC also understands that significant and repeated change undermines certainty and understanding—two of the key objectives the ALRC is trying to support through proposing of these reforms.

Notwithstanding these concerns, the ALRC considers that the continued abuse of enduring documents necessitates reform. A national register supported by a single model agreement will assist in building protections against elder abuse for the long term. The ALRC also takes a national perspective and notes that there are state and territories that have not made significant changes in recent years to enduring documents. On balance, the ALRC considers that the long term reform objectives in protecting older persons from abuse outweigh the short term disruption of making these reform proposals in the context of an area of law that has already been recently amended.

118 *Powers of Attorney Act 2014* (Vic); *Advance Care Directives Act 2013* (SA).

119 The *Advance Care Directive Act 2013* (SA)is subject to a 5 year review in 2019, seeSA Health, *Advance Care Directives Policy Directive* (2014).

6. Guardianship and Financial Administration Orders

Contents

Summary

6.1 The proposals in this chapter focus on protecting and safeguarding older persons subject to guardianship or financial administration orders.

6.2 The majority of people subject to guardianship and financial administration orders are older persons with dementia. There are existing safeguards in place to protect persons subject to orders, yet statistics and case studies supplied to the ALRC demonstrate that older persons subject to guardianship or financial administration orders are not sufficiently protected from abuse.

6.3 The ALRC envisages that the proposed National Plan on elder abuse will provide a platform for the Commonwealth to work with states and territories to develop and implement best-practice models, including for guardianship and financial administration. The ALRC proposes a practical program of reform for guardianship and financial administration schemes to enhance safeguards. This includes the proposal that guardians and financial administrators be better educated to act in accordance with the obligations and responsibilities of their appointments. There may also be an opportunity to require the use of surety bonds.

6.4 Reform in this area aims to safeguard and protect older persons, but implementation would necessarily benefit all adults subject to guardianship or financial administration.

Guardianship and financial administration orders

6.5 Laws and legal frameworks for guardianship and financial administration are the responsibility of the states and territories. Every state and territory has a relevant tribunal and a statutory body that constitutes the guardian or administrator of last resort—appointed where the tribunal considers that a person requires a guardian or administrator but there is no other suitable person that is willing or able to fulfil the appointment.[1]

6.6 Guardianship and financial administration, also referred to as 'financial management' orders, are orders of a court or tribunal which confer guardianship or financial administration over a person with diminished decision-making ability, usually for a set period of time.[2] Guardianship orders refer to the transfer of decision making for a person's health and wellbeing from the person to another person or to the public guardian. Guardianship orders are usually limited to decision making in certain areas of a person's life, although they can be plenary to provide for unlimited decision making related to the health and wellbeing of the person.

6.7 An order for the financial administration of a person's property grants power to an administrator to conduct certain types of transactions on behalf of the person. A financial administration order may include the requirement to receive directions from the state trustees.[3] Financial administrators are generally required to submit a financial management plan, keep records of financial transactions, and lodge accounts annually with tribunals or state trustees, depending on the state or territory. Financial administrators can be professional accountants, trustee companies, state trustees or equivalent, or non-professional persons.[4]

6.8 There are various eligibility criteria of which the tribunal needs to be satisfied before a non-professional person is appointed guardian or financial administrator. For example, in NSW, the tribunal must be satisfied that the proposed guardian is compatible with the person; has no undue conflicts; and is willing and able to perform the functions of guardian.[5] There are similar criteria for guardian appointments in other states and territories.[6]

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1 For a discussion of the different guardianship bodies see John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66(1) *Australian Social Work* 26, 27–28.

2 Guardianship orders are usually reviewed by the relevant tribunal at the end of the ordered term. Guardianship and financial management orders can also be made by the Supreme Court. For the purposes of this inquiry, the ALRC focuses on tribunal orders.

3 See, eg, *NSW Trustee and Guardian Act 2009* (NSW) s 66.

4 See, eg, *Guardianship and Administration Act 2000* (Qld) s 14.

5 *Guardianship Act 1987* (NSW) s 17.

6 See, eg, *Guardianship and Administration Act (1986)* (Vic) s 23; *Guardianship and Administration Act 2000* (Qld) s 15.

6.9 Some states require the financial administrator to be a 'suitable person', or to demonstrate sufficient expertise, knowledge or competency before an appointment is made.[7]

6.10 Guardians and financial administrators are generally obliged to act in the 'best interests' of the person, with reference to statutory guiding principles to observe the interests, freedom, participation and family life of the person, and to protect the person from abuse.[8] There are some statutory provisions preventing financial administrators from conducting conflict of interest transactions, or combining or using the estate to their own benefit.[9]

6.11 An appointment may be revoked by the tribunal where:

- the enduring guardian, attorney under power or tribunal-appointed guardian or administrator (appointee) requests a revocation of the appointment;[10]
- the appointee has died;
- it is alleged that at the time of making the enduring instrument the person lacked the legal capacity to do so;[11] or
- it is alleged the appointee is not meeting their obligations under the relevant act.[12]

Abuse of older persons

6.12 In some states and territories the number of new applications for guardianship or financial administration orders has been steadily increasing. In NSW, for example, over 9,000 new applications were finalised in the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) during 2014–2015. The number of new applications received has increased over 23% since 2010–2011.[13]

6.13 The NSW Trustee and Guardian (NSWT&G) advised that, as of 31 December 2015, 11,162 people were subject to direct financial management with the NSWT&G, and 3,913 were subject to the financial management of a private manager.[14]

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7 See, eg, *Guardianship Act 1987* (NSW) s 25M; *Guardianship and Administration Act (1986)* (Vic) s 47; *Guardianship and Administration Act 2000* (Qld) s 15; *Guardianship and Management of Property Act 1991* (ACT) s 10(4)(f).

8 *Guardianship Act 1987* (NSW) ss 4, 21A(2); *NSW Trustee and Guardian Act 2009* (NSW) s 39; *Guardianship and Administration Act (1986)* (Vic) ss 28, 49; *Guardianship and Administration Act 2000* (Qld) sch 1; *Guardianship and Administration Act (1990)* (WA) 1990 ss 51, 70; *Guardianship and Administration Act 1995* (Tas) s 6; *Guardianship of Adults Act 2016* (NT) s 4.

9 See, eg, *Guardianship and Administration Act 2000* (Qld) ss 37, 49, 50.

10 See, eg, Ibid s 27(1).

11 See, eg, *Powers of Attorney Act 2014* (Vic) s 23.

12 See, for eg, *Guardianship Act 1987* (NSW) s 25P.

13 NSW Civil and Administrative Tribunal, *Annual Report 2014–2015* (2015) 40.

14 NSW Trustee and Guardian, *Submission 120*.

6.14 Guardianship and financial administration orders are increasingly being made for older people,[15] with the majority of current orders applying to persons over 65 years with dementia.[16] The NCAT stated in its 2014–2015 Annual Report, that the increased workload of the Division has been 'directly impacted by the ageing of the population'.[17]

6.15 In Issues Paper 47, the ALRC asked for evidence regarding the abuse of older persons by guardians and financial administrators.[18] Stakeholders confirmed that, in their experience, while abuse of older persons had been perpetrated by guardians or financial administrators,[19] it was not in the same numbers as abuse by enduring attorneys.[20] The Office of the Public Advocate (Vic) noted:

> Elder abuse may also be experienced by people subject to a guardianship or administration order of VCAT (or relevant state/territory court or tribunal). While tribunal oversight when making the order makes it less likely, OPA has occasionally been appointed guardian following allegations of elder abuse against a private guardian or has seen a professional administrator appointed after a private administrator failed to present VCAT with adequate records and was suspected of financial mismanagement.[21]

6.16 The NSWT&G advised that, in 2015, it litigated 521 matters on behalf of represented persons. Of these, 65 were identified as containing financial abuse of an older person; and six related to financial abuse by a private financial administrator (9%).[22] The proportion of matters litigated for the financial abuse of an older person was similar in previous years. The NSWT&G advised that there had been

> a few cases where close family members are appointed financial manager and misappropriate the funds of those whom they manage. There have been cases involving misappropriation of a client's funds by a mother, another involving a client's father and others have involved misappropriation by siblings.[23]

6.17 As NSWT&G state, the figures represent only matters that they litigated. There may be innumerable matters that are undetected or not acted on. Even where financial abuse was identified, there may have been valid reasons why litigation did not proceed, including that the client had expressed contrary wishes or funds were not recoverable; the client may not have had the funds to proceed in the Supreme Court; or it may have been difficult to obtain the evidence required to meet the civil standard of proof in the court.

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15 Chesterman, above n 1, 28–29, 34.
16 NSW Civil and Administrative Tribunal, above n 13, 40–41.
17 Ibid 40.
18 Question 32.
19 Seniors Rights Service, *Submission 169*; ADA Australia, *Submission 150* 'Abuse by Administrators and Guardians does occur and it something that we often witness'; State Trustees Victoria, *Submission 138*; NSW Trustee and Guardian, *Submission 120*; Office of the Public Advocate (Vic), *Submission 95*.
20 ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; The Public Trustee of Queensland, *Submission 98*; TASC National, *Submission 91*.
21 Office of the Public Advocate (Vic), *Submission 95*.
22 NSW Trustee and Guardian, *Submission 120*. 23 matters (35%) related to alleged financial abuse by an attorney.
23 NSW Trustee and Guardian, *Submission 120*.

6.18 State Trustees Victoria submitted statistics from a case review conducted in February 2016. Of the 128 cases of financial abuse reviewed, 49% of abusers had no legal authority to act for the victim; 27% held a power of attorney; and 20% had acted under a financial administration order.

6.19 State Trustees Victoria provided an example of an administrator who lent himself $20,000 of his parent's money which was then not repaid, and noted there to be

> plenty of evidence that VCAT appointed administrators are guilty of financial abuses of represented persons. State Trustees has no reason to assume that VCAT appointed guardians are not also equally guilty of offending.[24]

6.20 Stakeholders referred to the case of *Woodward v Woodward* [2015] NSWSC 1793.[25] In this case, the tribunal had appointed one of Mrs Woodward's sons as her financial manager. Acting in this capacity, the son had transferred funds from his mother's account and used the money to repay some debts, buy a car and carry out building works on his home. Mrs Woodward, who was living with her son and reliant on him for care, was said by the son to have given him the large sum of money, even though he was her financial administrator and this was a conflict of interest transaction. After the mother died, the matter was taken to the Supreme Court by the executor of her estate, where the Court observed that the financial manager had been totally 'oblivious to the restrictions on his authority and to his obligation to account'.[26]

6.21 The ALRC has also heard about appointed guardians blocking the access of family members, friends or care-givers to older persons. Access may be denied so that the guardian can keep control over the person and the flow of information, particularly regarding the guardian's conduct. The Law Council of Australia provided the following case study:

> A professional Guardian arranged for the admission of an elderly woman into residential care. The Guardian gave directives to the facility that the woman would not be able to receive visitors, including her relatives and neighbours. The Guardian did not want the woman to know that her house was being sold and to get upset.[27]

Current safeguards

6.22 There are three key practices already in place that operate to protect older persons from abuse by guardians or financial administrators.[28]

6.23 First, tribunals must hold hearings in order to appoint guardians or administrators. Tribunals are required to refuse unwarranted applications, and appoint appropriate persons, companies, or state trustees or guardians, where needed.[29] As

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24 State Trustees Victoria, *Submission 138.*
25 NSW Trustee and Guardian, *Submission 120*; Law Council of Australia, *Submission 61*.
26 *Woodward v Woodward* [2015] NSWSC 1793 (3 December 2015) [12].
27 Law Council of Australia, *Submission 61*.
28 Office of the Public Advocate Victoria, *Submission 95*.
29 See, eg, *Guardianship and Administration Act 2000* (Qld) ch 3; *Guardianship Act 1987* (NSW) pt 3; *Guardianship and Administration Act (1986)* (Vic) 1986 pt 4, 5; *Guardianship and Administration Act (1990)* (WA) 1990 pt 4.

discussed above, certain eligibility criteria must be satisfied before tribunals can confer an appointment and make orders. Orders need not be plenary, and can relate only to particular decision making.[30]

6.24 Legal Aid (ACT) submitted that the process of holding a hearing before any appointment is made, and the 'option of appointing the public advocate and Trustee if no other guardian or manager is available or suitable', means that there are fewer incidences of elder abuse by an appointed guardian or financial administrator.[31]

6.25 Secondly, there are pre-existing oversight mechanisms for guardians and financial administrators. This includes statutory review of orders, required in most states and territories. Legal Aid (ACT) observed that the requirement for regular tribunal reviews of guardianship and financial administration orders acts as a safeguard against abuse.[32]

6.26 Tribunals can review appointments where guardians or administrators have not acted in accordance with the stated principles of the relevant legislation, or did not exercise their powers as directed by the order. Tribunal appointments can be reviewed at the request of the appointed person, the person, the state trustee/guardian, or by a concerned third party.[33] There are also ongoing obligations for financial administrators to report, including the requirement to submit a financial plan and provide annual records to tribunals or state trustees.[34] These requirements provide key safeguards against abuse.

6.27 Thirdly, public guardians/advocates and state trustees produce accessible material in print and online to help people understand their roles and responsibilities, and to make decisions as guardians or administrators. Many state bodies also provide telephone support lines and offer community education.[35]

6.28 Chapter 3 discusses investigation of abuse or neglect by public guardians/advocates, including the conduct of guardians or administrators. This clearly also has a protective function.

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30 Under the safeguarding principle recommended by the ALRC, appointments should be a last resort; limited in scope; proportionate; and apply for the shortest possible time: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) rec 3-4.

31 Legal Aid ACT, *Submission 58*.

32 Ibid.

33 See, eg, *Guardianship Act 1987* (NSW) pt 3, 3A; *Guardianship and Administration Act (1986)* (Vic) 1986 pt 4, 5; *Guardianship and Administration Act 2000* (Qld) ch 3; *Guardianship and Administration Act (1990)* (WA) 1990 pt 5, 6; *Guardianship and Administration Act (1993)* (SA) div 2, 3.

34 See, eg, *Guardianship and Administration Act (1993)* (SA) s 44.

35 For example, in NSW, the Private Guardian Support Unit provides an information line service; In Victoria, the Victorian Civil and Administrative Tribunal provides a phone line for administrators seeking advice and the Office of the Public Advocate has an advice line.

Reducing the risk

6.29 Stakeholders suggested that more could be done to prevent abuse by guardians and financial administrators, with particular emphasis on education and redress.[36] The ALRC views the provision of information to proposed guardians and financial administrators to be a key safeguard against elder abuse, and asks below how best to achieve this.

Enhanced understanding of roles and responsibilities

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

6.30 Understanding the scope and limits of guardian and financial administration appointments is paramount to reducing abuse. Abuse of older persons by guardians or financial administrators can be inadvertent. For example, administrators may be unaware of the requirement to keep assets separate from their own. Informal arrangements in place prior to the commencement of the order may persist, which may involve conduct in breach of the appointment.

6.31 Abuse can also happen where the representative is indifferent or reckless as to their legal responsibilities. There may also be a small cohort of people who deliberately set out to exploit or abuse persons.[37]

6.32 UnitingCare observed that 'better educating persons to whom powers are granted should be a fundamental step towards the prevention of abuse'.[38] The ALRC considers that better understanding is a necessary safeguard against abuse, and proposes that newly-appointed guardians and financial administrators be better informed about the scope of their appointments, the limits of their powers and their obligations under statute. Greater education would complement the requirement for an undertaking in Proposal 6-2.

6.33 The ALRC is interested to hear about the best way to provide such education, and invites submissions on whether training should be compulsory, at the discretion of the tribunal or incorporated into tribunal processes.

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36 See, eg, Seniors Rights Service, *Submission 169*; UnitingCare Australia, *Submission 162*; Townsville Community Legal Service Inc, *Submission 141*; Legal Services Commission SA, *Submission 128*; Law Council of Australia, *Submission 61*.

37 See examples given by NSW Trustee and Guardian, *Submission 120*; Law Council of Australia, *Submission 61*.

38 UnitingCare Australia, *Submission 162*.

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

(a) compulsory training;

(b) training ordered at the discretion of the tribunal;

(c) information given by the tribunal to satisfy itself that the person has the competency required for the appointment; or

(d) other ways?

Compulsory

6.34 Stakeholders strongly supported training all newly-appointed private guardians and financial administrators about their roles, obligations and responsibilities.[39] Training was said to have a two-pronged effect. First, training may help inform those decision makers who are unaware of their obligations.[40] For the small number of people who deliberately set out to exploit or abuse a person, training would reinforce the seriousness of their role and the consequences of any breach.[41]

6.35 The Townsville Community Legal Service suggested a 'school' for attorneys/administrators and guardians—perhaps in the form of an online training forum uniquely adapted to the issues of each jurisdiction and appointment.[42] The Office of the Public Advocate (Vic) suggested that education and training for private guardians and administrators could be provided in Victoria by the Office of the Public Advocate and State Trustees.[43]

6.36 A program of mandatory training for guardians and financial administrators may not be a practical solution. There may be issues of access for people who live in regional areas and for people from culturally and linguistically diverse backgrounds. The ALRC has been advised in consultation that there is little efficacy in forcing people to undergo training. Where training has been provided and attendance has been voluntary, the ALRC has heard that only the people already informed and not in need of training attended.

Discretionary

6.37 In its Guardianship Report, the Victorian Law Reform Commission (VLRC) recommended that the tribunal be able to appoint a guardian or financial administrator,

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39 See, eg, Seniors Rights Service, *Submission 169*; ARAS, *Submission 166*; Townsville Community Legal Service Inc, *Submission 141*; Legal Services Commission SA, *Submission 128*; Australian Bankers' Association, *Submission 107*; The Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate Victoria, *Submission 95*; Advocare Inc (WA), *Submission 86*; Law Council of Australia, *Submission 61*.

40 Office of the Public Advocate (Qld), *Submission 149*; Advocare Inc (WA), *Submission 86*.

41 Office of the Public Advocate (Qld), *Submission 149*.

42 Townsville Community Legal Service Inc, *Submission 141*.

43 Office of the Public Advocate (Vic), *Submission 95*.

subject to the condition that the person undertakes a designated training program, with state trustees and the public guardians appropriately funded to undertake the training.[44] This recommendation aimed to 'promote understanding of the responsibilities and duties of substitute decision makers',[45] and focused on educating only people that the tribunal identified to be in need of further training.

Tribunal processes

6.38 Education could be incorporated into tribunal processes without the need for external training.

6.39 Generally, the tribunal must be satisfied of a person's suitability, competency or ability to act in the appointment.[46] It has been suggested that, as part of that requirement, the tribunal could seek confirmation that the person understands the scope of the role and their obligations under statute. Where the tribunal is not satisfied that the person has the requisite knowledge, it could be incumbent on the tribunal to outline the key obligations and responsibilities of the person's appointment, if it does not already.

Acknowledging obligations

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

6.40 Case studies supplied to the ALRC indicate that the seriousness of guardian or financial administrator appointments can go unrecognised.[47] This may be likely where a care arrangement had been in place prior to the order and the guardian or administrator continues the informal, often familial, arrangement.

6.41 The VLRC recommended that all 'tribunal-appointed substitute decision makers' undertake in writing to act in accordance with their responsibilities and duties.[48] The ALRC agrees that an undertaking should be signed following an appointment of all tribunal-appointed guardians and financial administrators (including those acting for state bodies of last resort). The proposed undertaking would serve to solemnise the appointment and reinforce the obligations of the guardian or administrator. It may also be available for use in any subsequent proceedings concerning failure of a decision maker to comply with their obligations.[49]

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44 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 294.
45 Ibid [18.48].
46 See, eg, *Guardianship Act 1987* (NSW) s 25M; *Guardianship and Administration Act (1986)* (Vic) 1986 s 47; *Guardianship and Administration Act 2000* (Qld) s 15; *Guardianship and Management of Property Act 1991* (ACT) s 10(4)(f).
47 NSW Trustee and Guardian, *Submission 120*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*.
48 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 296.
49 Ibid [18.56].

6.42 This small act could have a large impact on the mindset of people undertaking these appointments.

Providing security

Question 6–2 In what circumstances, if any, should financial administrators be required to purchase surety bonds?

6.43 In Chapter 5, the ALRC proposes to vest tribunals with compensatory powers. This aims to deter people from acting outside of their power, while also providing an avenue for redress when that occurs. State Trustees Victoria, however, observed that

> [o]ne of the more distressing features of State Trustees' investigations into allegations of financial abuse is that often, by the time the issue has been identified, an application made to VCAT, and an administrator appointed, the offender has squandered what was misappropriated and there are no assets to recover.[50]

6.44 The ALRC asks whether the surety bond scheme of the NSWT&G should be adopted nationally, to address situations where compensation orders cannot restore the person to their original state because misused funds have been totally depleted.

6.45 Statutes in NSW and Queensland permit the public trustee to require that security be lodged with state trustees.[51] NSW introduced a surety bond scheme in March 2015. Under the relevant provision, all private financial managers are required to obtain a surety bond over the managed person's estate.[52] The cost of the bond depends on the value of the estate. An estate valued at under $25,000 attracts a one-off fee of $150. Estates valued from $25,001 to $50,000 attract a one-off fee of $350. Where assets of the estate are worth over $50,001, an ongoing annual fee is charged at 0.04% of the value of the estate.[53]

6.46 NSWT&G explained that the bond system was introduced because of the limited protections in place for people whose affairs are managed by a financial manager:

> The current process of civil action to recover losses is long and costly, and may not result in the full recovery of funds. NSW Trustee & Guardian introduced the Surety Bond Scheme to make sure that all privately managed estates are adequately protected.
>
> Cases of mismanagement and fraud are rare, but they do occur. The Surety Bond scheme protects against mismanagement and fraud and can also be applied in circumstances where managers suffer ill-health, or develop dementia and make decisions that lead to material loss.[54]

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50 State Trustees Victoria, *Submission 138.*

51 *NSW Trustee and Guardian Act 2009* (NSW) ss 64, 68; *Guardianship and Administration Act 2000* (Qld) s 19.

52 <www.tag.nsw.gov.au>.

53 NSW Trustee and Guardian, *Surety Bond: Frequently asked questions* (2015) q 4.

54 Ibid q 2.

6.47 The NSW scheme is in its infancy, and there is no available evaluative material. The Public Trustee of Queensland suggested that consideration be given to implementing the surety bond program nationwide.[55] The ALRC is interested in hearing whether this program would be useful in other states and territories. Some considerations include:

- How would this scheme interact with the proposal to extend the jurisdiction of tribunals to make compensation orders (see Proposal 5-5)? In Queensland, for example, the *Guardianship and Administration Act 2000* (Qld) makes provision for the security to be applied in satisfaction of the order for compensation.[56]
- Are there any unintended consequences attached to the scheme? For example:
  - would it act as a deterrent for potential financial administrators to accept the appointment; and
  - would an administrator be more inclined to take funds and assets where the administrator considers that the funds would be recuperated by the person subject to orders?

Ascertaining will and preferences

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

6.48 Tribunal processes safeguard against guardianship or financial administration orders being made against persons where they are unaware of the application. Tribunals endeavour to make sure that a person is aware when an application is made for guardianship or financial administration against them. Tribunals generally advise the person when an application for guardianship or financial management has been made by providing copies of the application to the person's address. Some states will provide persons who are the subject of an urgent hearing with a verbal notice of hearing.[57]

6.49 Tribunals are generally required by statute to consider the views of the person prior to making an order.[58] All tribunals encourage attendance of the person at the hearing, where attendance is possible. Where required, interpreters or other communication aids may be provided to aid the person's participation.

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55 The Public Trustee of Queensland, *Submission 98*.

56 *Guardianship and Administration Act 2000* (Qld) s 59(6).

57 See, eg, NSW Civil and Administrative Tribunal, Guardianship Division, *What to Expect at a Hearing* <www.ncat.nsw.gov.au>.

58 See, eg, *IF v IG* [2004] NSWADTAP 3 (22 January 2004) [26]; *Guardianship Act 1987* (NSW) s 14(2)(a)(i); *Guardianship and Administration Act (1986)* (Vic) 1986 s 22(2)(ab).

6.50 There does not, however, appear to be any requirement for tribunals to speak directly with a person who cannot attend the hearing. The ALRC is concerned that this may amount to the will and preferences of an absent person not being obtained by the tribunal. Particularly, it may be difficult for the tribunal to accurately ascertain the need for guardianship and financial administration, and the scope of any order without first speaking with the person.

6.51 It is the preliminary view of the ALRC that a best-practice model should require the tribunal, where possible, to speak with the person regardless of attendance at the hearing before the tribunal appoints a guardian or financial administrator. The ALRC welcomes submissions on the processes of tribunals in this regard.

7. Banks and Superannuation

Contents

Summary

7.1 Financial abuse is one of the most common types of elder abuse. Banks and other financial institutions may be in a position to detect and prevent some forms of financial abuse of their customers.

7.2 In this chapter, the ALRC proposes that banks take reasonable steps to identify and help prevent such abuse, and that this be prescribed in the *Code of Banking Practice*, with which subscribing banks must comply. Reasonable steps might include providing information about abuse to older customers, setting up systems to identify abuse, training staff and, in some cases, reporting abuse to relevant authorities.

7.3 Superannuation funds may also be the target of elder financial abuse, particularly less regulated self-managed funds. For example, an individual trustee of a self-managed fund who loses decision-making ability may be vulnerable to abuse. This chapter asks whether self-managed superannuation funds (SMSFs) should be subject to greater regulation to prevent elder abuse.

Financial abuse

7.4 Financial elder abuse often involves taking or spending funds held in an older person's bank account. Legal Aid NSW provided a case study of an 83 year old pensioner named Doris, who found she had a large outstanding balance on her credit card:

> Doris was easily confused and her memory was not good. … Doris said she had not received any credit card statements for some time but she knew how much she was putting on her card and made sure she made the payments every month. [Her bank statements showed that] the amount and frequency of transactions on her credit card increased dramatically over a short period. … The statements also showed a marked

> change in the usual pattern of transactions. For example, there were large online purchases and large cash advances, when Doris had never obtained a cash advance on the card before, nor was aware it was possible. … Legal Aid NSW argued that the bank should have seen the 'red flags' and contacted Doris to confirm whether she was aware of this unusual activity on her account. Big Bank agreed to waive the debt.[1]

7.5 The Top End Women's Legal Service wrote of a 50 year old Indigenous woman named Margaret, who suffered significant health problems. Her husband and carer 'assists her to conduct her financial matters, but also uses her key card without permission to purchase items for himself and often retains Margaret's key card'.[2]

7.6 Poor health, remote living and poverty in the community are among the factors that may make some older Indigenous people more vulnerable to financial abuse.[3] The following case study illustrates these issues:

> Queenie is approximately 70 years old. She is Indigenous and resides with family outside a regional centre. Members of her immediate family assist her with day-to-day living and related, including financial, matters.
>
> Queenie is frail, with multiple significant health issues and disabilities. In addition, she has been diagnosed with psychological disorders as a consequence of five decades of domestic violence that included multiple physical assaults causing multiple physical impairments, as well as multiple sexual assaults.
>
> Queenie's family accesses her bank account via her pin number, often without her consent. Queenie feels unable to regain control of her bank account; she does not how to change her pin number, does not have a relationship with her financial institution, speaks limited English, and cannot communicate with her financial institution without assistance.[4]

7.7 The Hervey Bay Seniors Legal and Support Service provided examples of the types of elder abuse that it had observed:

- The older person lives with the abuser and has given them authority to access their bank account, either by giving them the card or through internet banking access. The account is used to pay household expenses and to make cash withdrawals. Often the older person has no knowledge as to the extent of the use of their funds, especially as with internet banking bank, statements are no longer posted through the mail. The use of the funds continues after the older person goes into care and is often only picked up when nursing home fees are not paid.
- The older person has difficulty getting to a bank and gives the abuser access for the purpose of withdrawing funds for them. The abuser withdraws funds for their own use.

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1 Legal Aid NSW, *Submission 140*.

2 Top End Women's Legal Service, *Submission 87*. Another stakeholder told the story of a terminally ill elderly man who had given his partner access to his ATM card and pin number, and when he died, 'his partner cleaned out his ATM account': National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.

3 Top End Women's Legal Service, *Submission 87*.

4 Ibid.

- The older person authorises use of a credit card for a specific purpose but it is then used for other purposes.[5]

7.8 Banks may not be able to detect all financial abuse. For example, while banks may be more likely to notice large and unusual transactions, financial abuse may also be committed by small, common transactions. Furthermore, some methods of detecting financial abuse, even if possible, might be considered too intrusive.

7.9 Customers will continue to need to monitor their accounts and take an active interest in their own finances. Financial literacy is itself a safeguard from abuse, and some stakeholders noted the importance of government initiatives to improve people's financial literacy. Alzheimer's Australia said that to prevent financial abuse, 'older people require targeted, consumer-friendly information to support their financial literacy.'[6] The Financial Services Council said that such initiatives were particularly important for women and people from culturally and linguistically diverse backgrounds.[7] The Top End Women's Legal Service recommended 'increased community financial and legal education to reduce the prevalence of Indigenous elder abuse'.[8]

7.10 Planning for the future will also remain important. For example, some older people may need to consider appointing trusted family or friends to later help them manage their financial affairs and protect them from abuse by others, should they need such help.[9]

Banks responding to elder abuse

Proposal 7–1 The *Code of Banking Practice* should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities.

7.11 Banks are often in a good position to detect financial elder abuse and protect their older customers. National Seniors Australia said that employees of financial institutions 'may be in the best, and sometimes the only, position to recognise financial exploitation as it occurs'.[10] The Australian Bankers' Association (ABA) submitted that banks can 'play an important role in recognising potential financial abuse'.[11]

5 Hervey Bay Seniors Legal and Support Service, *Submission 75*.
6 Alzheimer's Australia, *Submission 80*.
7 Financial Services Council, *Submission 78*.
8 Top End Women's Legal Service, *Submission 87*.
9 Although guardianship powers, powers of attorney and other such arrangements are also sometimes abused, as discussed in Chapters 5 and 6.
10 National Seniors Australia, *Submission 154*.
11 Australian Bankers' Association, *Submission 107*.

7.12 There is an industry guideline on how banks might respond to elder abuse, but it is voluntary and unenforceable. If requirements were instead set out in the *Code of Banking Practice*, as proposed, they would be legally enforceable and therefore likely to be more effective in preventing elder abuse. A similar amendment might also be made to the *Customer Owned Banking Code of Practice*, to better protect customers of many building societies and credit unions.

7.13 Seniors Rights Victoria submitted that there should be standard mandatory protocols for banks in relation to elder abuse, and that the industry guidelines on elder abuse should be made mandatory and incorporated into the *Code of Banking Practice*.[12] National Seniors Australia submitted that the financial services sector should 'use codes of practice to better address the risk of financial elder abuse among older clients'.[13]

7.14 While most other stakeholders did not discuss potential legal mechanisms for requiring or encouraging banks to respond to elder abuse, many said there should be greater training for staff, greater reporting of suspected abuse to authorities, and other obligations on banks to identify and respond to financial abuse.

The Code, guidelines and other regulation

7.15 Banks that adopt the *Code of Banking Practice* are 'considered to be contractually bound by their obligations under the Code'.[14] The ABA, which developed the Code, states that:

> The principles and obligations set out in the Code apply to the majority of banking services delivered to individuals and small businesses across Australia. ... The Code gives individual and small business customers important rights and confirms existing rights.[15]

7.16 The Code does not currently include provisions relating to elder abuse. The Code is now being reviewed, and one question being considered is whether the Code should 'require banks to train their staff in the nature and impact of domestic and family violence, including economic abuse, and in identifying customers who may be experiencing domestic and family violence when making an application for credit'.[16]

7.17 Currently, guidance for banks on elder abuse is set out in the ABA's industry guideline, *Protecting vulnerable customers from potential financial abuse*. The ALRC acknowledges the value of this resource. However, this industry guideline is voluntary and 'does not have legal force or prescribe binding obligations on individual banks'.[17] The ALRC proposes that banks should have binding obligations to protect their older customers from abuse, to the extent that this is reasonable.

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12 Justice Connect and Seniors Rights Victoria, *Submission 120*.
13 National Seniors Australia, *Submission 154*.
14 Australian Bankers' Association, *Code of Banking Practice—FAQs* (2013) 1.
15 Ibid.
16 Progressive Code Issues Register, *Code of Banking Practice*, Independent Review 2016, www.cobpreview.cameronralph.com.au/issues.htm.
17 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013 1. However some of the guideline may reflect pre-existing legal obligations.

7.18 Banks are also regulated in relation to fraud and unauthorised transactions, which may sometimes be elder abuse. For example, the *ePayments Code*, administered by the Australian Securities and Investments Commission, 'regulates electronic payments, including ATM, EFTPOS and credit card transactions, online payments, internet and mobile banking, and BPAY', and includes 'rules for determining who pays for unauthorised transactions'.[18]

Reasonable steps

7.19 Banks and other financial institutions should be required to take reasonable steps to prevent the financial abuse of their customers. A flexible 'reasonable steps' standard may be preferable to prescribing specific steps that banks must take, because with advances in technology, banks might reasonably be expected to do more in the future to identify and respond to potential abuse.[19]

7.20 The ABA guideline, *Protecting vulnerable customers from potential financial abuse*, sets out many steps that banks should take, including:

- staff should be 'trained to identify potential financial abuse as part of their fraud prevention programs';
- where abuse is suspected, staff should consider talking to the customer—and ask 'clear, factual, and non-threatening questions';
- staff should check third party authorisations and documentation—'If a third party presents a withdrawal form or instructions, bank staff should verify the third party's authority by directly contacting the customer or checking associated documentation (ie power of attorney document)';
- staff might seek advice from others in the bank—eg, managers, internal lawyers, fraud, security—and delay transactions until further investigation work is done; and
- staff might also seek advice from the Public Advocate or other relevant agency, but without identifying the customer.[20]

7.21 The guidelines also discuss administration, guardianship and powers of attorney, stating, in part:

> Before an administrator or guardian can be provided with access to, and information on, a customer's accounts or facilities, banks should ask for written proof of their status, such as certified copies of an instrument or order. Once verified, banks should note the appointment or authority on the customer's accounts or facilities. … Banks need to understand the level of access the attorney has over their customer's account

18 Australian Securities and Investments Commission, *ePayments Code*, March 2016, 2.

19 The *Code of Banking Practice* already includes a 'reasonable steps' clause: 'We recognise the needs of older persons and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services.'

20 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013.

> or facility because a power of attorney can be tailored to certain types of decisions or transactions.[21]

7.22 In a 2016 report about financial elder abuse, a US federal regulator, the Consumer Financial Protection Bureau, recommended that banks and credit unions: train staff to recognise and respond to abuse; use fraud detection technologies; offer 'age-friendly' services; and report suspicious activity to authorities, whether or not reporting was mandatory in their state.[22]

7.23 Many stakeholders in this Inquiry stressed the importance of banks responding to elder abuse. Training staff was the most commonly suggested step, with some stakeholders submitting that such training should be mandatory.[23] For example, Alzheimer's Australia said banks and other financial service institutions should have 'measures in place to prevent and address financial abuse of people with dementia, including staff education and training'.[24] National Seniors Australia submitted that relevant codes of practice should require that staff be trained to:

- recognise signs of abuse and recognise the common profile of a vulnerable customer and/or potential abusers;
- understand protocols to deal with suspected abuse; and
- understand enduring powers of attorney and administration orders made by tribunals.[25]

7.24 The Financial Services Institute of Australasia submitted that its members 'broadly support strategies to strengthen educational and ethical standards for financial services professionals to identify and appropriately respond to cases of elder abuse'.[26]

7.25 Capacity Australia said that it had produced training on elder abuse for accountants and financial planners, but is 'struggling with engaging the interest of the industry', and that therefore training should be required.[27]

7.26 Providing information to older customers about financial abuse and discussing with customers how they might protect themselves are other steps banks might take.[28]

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21 Ibid 5.

22 Consumer Financial Protection Bureau (US), *Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation* (2016).

23 Justice Connect, *Submission 182*; Eastern Community Legal Centre, *Submission 177*; People with Disability Australia, *Submission 167*; Legal Aid NSW, *Submission 140*; Consumer Credit Legal Service (WA), *Submission 112*; Office of the Public Advocate (Vic), *Submission 95*; Advocare Inc (WA), *Submission 86*; Law Council of Australia, *Submission 61*; Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.

24 Alzheimer's Australia, *Submission 80*.

25 National Seniors Australia, *Submission 154*.

26 Financial Services Institute of Australasia, *Submission 137*.

27 Capacity Australia, *Submission 134*.

28 'National Seniors recommends that financial service providers be supported to deliver information to clients about the potential risks of elder abuse and the mechanisms that can be put in place to protect against future abuse': National Seniors Australia, *Submission 154*.

Reporting abuse

7.27 Reporting suspected abuse may also be a reasonable step for banks to take in some circumstances. A number of stakeholders submitted that banks should report elder abuse to a relevant authority.[29]

7.28 Before reporting abuse to the police or other authority, banks should consider discussing the suspected abuse with the customer who may be being abused.[30] Where the older person has a guardian, attorney or other substitute decision-maker for financial matters, the bank might also, or instead, contact that person (assuming it is not that person who is suspected of the abuse).

7.29 In Chapter 3, the ALRC proposes that state and territory public advocates and public guardians be given additional powers to investigate elder abuse, particularly when a suspected victim is unable to seek help themselves. The ALRC also proposes that people who report suspected abuse be given immunity from certain legal obligations that might otherwise prevent them from reporting abuse. This should remove an impediment to reporting abuse that banks have identified. The ABA submitted that

> legal obligations including privacy laws and anti-discrimination laws as well as obligations of confidentiality and concerns about possible actions in defamation provide challenges for banks in reporting suspected financial abuse. Although the ABA does not support mandatory reporting, the industry would like to see the establishment of clear reporting guidelines for banks to follow if a bank chooses to report what it believes to be suspected financial abuse as well as a government body to which banks can report suspected financial abuse, and statutory immunity for banks choosing to report suspected financial abuse.[31]

7.30 Some customers might object to banks 'interfering' in their affairs—questioning how they or their family and friends spend their money, suggesting they are being abused, or reporting suspicions to the police or other authorities. Some customers may consider this an invasion of their privacy. Such objections may be even stronger if it is felt that the interference is partly because one is considered old. There is no doubt that banks must act with tact and sound judgment. As the ABA guidelines state:

> Intervening in a customer's financial matters or questioning them without due consideration and sensitivity may embarrass the customer, and possibly damage the bank's relationship with their customer. In cases of suspected financial abuse, it is important to be vigilant and cautious.[32]

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29 See, eg, Seniors Rights Victoria, *Submission 171*; Financial Services Institute of Australasia, *Submission 137*; Consumer Credit Legal Service (WA), *Submission 112*; Australian Bankers' Association, *Submission 107*; The Public Trustee of Queensland, *Submission 98*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*.

30 'Financial service providers need to be supported to be able to educate clients and to be able to identify and report abuse to clients': National Seniors Australia, *Submission 154*.

31 Australian Bankers' Association, *Submission 107*.

32 Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013 2.

7.31 Where the older person or their representative can take steps to prevent the abuse, or to seek help from others, then it should not be necessary for the bank to notify anyone else. Older people should generally be able to decide for themselves how to respond to abuse. The need to respect people's autonomy is, for some, the key reason underpinning their objection to mandatory reporting. State Trustees Victoria submitted that mandatory reporting 'may be seen by the elderly as intrusive and patronising'.[33] The ALRC does not propose that banks be required to report all instances of suspected abuse to authorities, but rather that reporting abuse will sometimes be the appropriate step to take.

Authorising third parties to operate bank accounts

Proposal 7–2 The *Code of Banking Practice* should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

7.32 Retail banks in Australia typically have a standard form that customers may submit to authorise someone else to operate their bank account on their behalf. This is known as an 'Authority to Operate'. Giving a trusted person access to one's bank account will sometimes be convenient or even necessary, particularly for an older person who finds it difficult to use online banking services or visit a bank branch. However, it may also increase the risk of financial abuse. The ALRC proposes that additional protections be introduced to limit this risk, through amendments to the *Code of Banking Practice*.[34]

7.33 'Authority to Operate' forms typically require the signatures of both the bank customer and the person authorised to access the account. There is no requirement for others to witness the signing of the form and often no requirement for the customer to attend the branch to submit the form. There is therefore a risk that the forms will be completed and submitted fraudulently. The older person's signature might be forged, or unreasonable pressure might be placed on the older person to sign themselves. Some customers may not understand the arrangement or its risks, particularly if they have not visited a bank branch or otherwise sought advice. Some may not have the decision-making ability to authorise the person to operate the bank account.

33 State Trustees Victoria, *Submission 138.*
34 Similar changes should also be made to the *Customer Owned Banking Code of Practice.*

7.34 Authority to Operate arrangements have been said to be 'easily obtained', 'not generally required to be witnessed', and may 'easily' be used for financial abuse.[35] In Victoria, they have been said to undermine the protections in the powers of attorney legislation.[36]

7.35 The ALRC proposes that banks introduce additional protections to limit the potential for these arrangements to be abused. These protections should be set out in the *Code of Banking Practice*[37] and might include a requirement that:

- signatures be witnessed by two people, one of whom should be a doctor, lawyer or of another prescribed profession;
- the customer sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.[38]

7.36 Some may object that authorities to operate are commonly used by many bank customers, not just older people. Banks and customers may also object to the additional administrative burden. However, the safeguards proposed by the ALRC are relatively modest; they do not impose a significant administrative burden and seem unlikely to deter customers from using these arrangements.

Superannuation

7.37 A significant portion of the wealth of older people is held in superannuation funds.[39] Abuse of an older person may include the use of deception, threats or violence to coerce the person to contribute, withdraw or transfer superannuation funds for the benefit of the abuser. Abuse could also include making certain investment decisions that may advantage the abuser now or in the future. Other issues relating to possible elder abuse include questions about the ability of a person acting under a power of attorney to deal with superannuation.

7.38 The Australian Prudential Regulation Authority (APRA) is the prudential regulator for the superannuation industry, but it does not regulate self-managed superannuation funds (SMSFs). SMSFs are supervised by the Australian Tax Office. The Superannuation Complaints Tribunal deals with complaints about the decisions and conduct of trustees of superannuation funds (other than SMSFs).

APRA regulated funds

7.39 Stakeholders identified instances of financial abuse of older people through unauthorised access to superannuation funds.[40] However, there appeared to be more

35 Law Council of Australia, *Submission 61* citing the views of the Law Institute of Victoria.
36 Ibid.
37 Such protections might be one of the 'reasonable steps' to prevent abuse, which the ALRC proposes should be included in the *Code of Banking Practice*: see above.
38 For example, compare with governing the making of power of attorney, guardianship and other such instrument: see Ch 5.
39 Australian Bureau of Statistics, *Household Income and Wealth, Australia, 2013-14: Superannuation in Australia, 2003-04 to 2013-14, Cat No 6523.0* (2016).
40 Townsville Community Legal Service Inc, *Submission 141*.

reports of misuse of bank accounts and other financial assets than superannuation funds.[41] This may be partly because APRA regulated funds are subject to significant access controls. This was noted by the Financial Services Council which explained that:

> A rollover (when a person's super fund is transferred to another super fund in their own personal name or to an SMSF where they are a trustee) is subject to stringent checks by the superannuation fund where funds are withdrawn from;
>
> A transfer from a person's super fund to another person's super fund is only allowed in limited situations such as death or divorce, and in these events additional checks and paperwork is required; and
>
> A withdrawal can only be made once a condition of release is met and for most Australians, this means reaching their preservation age, and even in this circumstance, withdrawals can only be transferred to the superannuation trustee's nominated bank account.[42]

7.40 Notwithstanding these access controls, additional protection may be afforded through the ALRC's proposals in relation to powers of attorney in Chapter 5 and banking earlier in this chapter. The link between financial abuse of superannuation and banking was described in the case study provided by the North Australian Aboriginal Legal Service:

> An older Aboriginal man who had accessed his superannuation, had his bank card stolen by his daughter who went on to withdraw a substantial amount of money from his account.[43]

7.41 The Financial Services Council submitted that to prevent abuse of superannuation funds, 'focus should be on reducing misuse of legal instruments such as Powers of Attorney'.[44] The interaction between superannuation and powers of attorney in the context of elder abuse was demonstrated in the following case study provided by Advocare Inc (WA):

> Enid is an elder woman who nominated her daughter Cathy as her Enduring Power of Attorney. Enid has tolerated financial abuse by Cathy for many years as she has no-one else to assist her with things she finds too difficult to do on her own. Cathy is now pressuring Enid to transfer superannuation funds into Cathy's bank account, claiming that Enid will get a better return on investment. Enid was advised not to sign anything but is still vulnerable as she chose not to revoke her EPA.[45]

7.42 Similarly, ASIC stressed the importance of better regulating powers of attorney, as it would be difficult for superannuation fund trustees to determine whether certain actions by an attorney under an enduring document are elder abuse. Some examples include:

> ...instructions to take a portion of a superannuation benefit as a lump sum rather than a pension may as much reflect the importance to the elder fund member of paying down

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41 Seniors Rights Victoria, *Submission 171*.
42 Financial Services Council, *Submission 78*.
43 North Australian Aboriginal Legal Service, *Submission 116*.
44 Financial Services Council, *Submission 78*.
45 Advocare Inc (WA), *Submission 86*.

> debt, or facilitating new accommodation arrangements as action by an abuser to access superannuation money for their own benefit.
>
> ... instructions to continue drawdown of only the statutory minimum amount of an account based pension may reflect the active management of the elder person's longevity risk, rather than maximising the value of a death benefit that may become payable to an abuser.
>
> ... instructions in relation to the part commutation of an elder person's account based pension may as much reflect the need to meet a 'lumpy expense', such as in relation to health care, as action by an abuser to access superannuation money for their own benefit.[46]

7.43 Accordingly it is proposed that, with respect to APRA regulated superannuation funds, the best protections against elder abuse will be achieved by enhanced protections in relation to powers of attorney.

Self-managed Superannuation Funds

Question 7–1 Should the *Superannuation Industry (Supervision) Act 1993* (Cth) be amended to:

(a) require that all self-managed superannuation funds have a corporate trustee;

(b) prescribe certain arrangements for the management of self-managed superannuation funds in the event that a trustee loses capacity;

(c) impose additional compliance obligations on trustees and directors when they are not a member of the fund; and

(d) give the Superannuation Complaints Tribunal jurisdiction to resolve disputes involving self-managed superannuation funds?

Question 7–2 Should there be restrictions as to who may provide advice on, and prepare documentation for, the establishment of self-managed superannuation funds?

7.44 The legal framework for SMSFs was established in 1999.[47] SMSFs have less than five members. Importantly, all fund members are also either individual trustees for the fund or directors of the corporate trustee.[48] As at June 2016, there were 577,236

46 Australian Securities and Investments Commission, *Submission 125*.

47 *Superannuation Legislation Amendment Act (No. 3) 1999*. SMSF were previously known as excluded funds.

48 The only exception is single member funds with individual trustees where there must be two trustees one of whom is the member.

SMSFs in Australia with a total of 1.1 million members.[49] There are currently over $620 Billion in assets managed by SMSFs (about 29% of super assets in Australia).[50]

7.45 Around 70% of SMSFs have two members and 22% are single member funds.[51] The most common structure is a husband and wife super fund. While some SMSFs are established and managed by very wealthy investors, 45% of SMSFs have total balances of less than $500,000.[52] Evidence suggests that there is a high prevalence of SMSFs being used as part of a family business structure, typically with the business premises owned by the SMSF and leased to the family business.[53]

Emerging risk

7.46 The ALRC received a small number of submissions raising concerns regarding financial abuse of older people involving SMSFs.[54] This may reflect the current demographics of those with SMSFs. Only 8.8% of SMSFs have members aged over 75 years of age[55]—the most vulnerable cohort for elder abuse. However, 55% of SMSF members are aged between 55 and 74 years of age.[56] This suggests that, in the coming decades, a greater number of older and more vulnerable individuals will have a SMSF.

7.47 The risk of vulnerability to financial abuse in relation to a SMSF arises in part because the regulatory framework for SMSFs was designed on the premise of self-protection. This model for SMSFs supported reduced government intervention through regulation:

> As members of self managed superannuation funds will able to protect their own interests these funds will be subject to a less onerous prudential regime under the [*Superannuation Industry (Supervision) Act 1993* (Cth)]*SIS Act*.[57]

7.48 The different regulatory framework for SMSFs and the larger industry and retail funds regulated by APRA was explained in the following terms:

> APRA considers they have a responsibility for ensuring trustees [of those larger superannuation funds for which APRA is the responsible regulator] have properly formulated their investment strategies as set out in trustee documentation and that this can be demonstrated through practical implementation. ... The Tax Office's approach is, however, consistent with past Tax Office practice and the Government's original policy intent. This intent specified that whilst SMSFs are a key vehicle in the accumulation of retirement savings, they do not require onerous prudential supervision as members should be able to protect their own interests.[58]

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49 Australian Taxation Office, *Annual SMSF Population Analysis Tables* (2016).
50 Australian Prudential Regulation Authority (APRA), *Statistics: Quarterly Superannuation Performance June 2016* (2016).
51 Australian Taxation Office, above n 49.
52 Ibid.
53 Julie Castillo, 'The SMSFs Trustee-Members' (2012) 40(3) *Australian Business Law Review* 177, 178.
54 Office of the Public Guardian (Qld), *Submission 173*; Financial Services Institute of Australasia, *Submission 137*.
55 Australian Taxation Office, above n 49.
56 Ibid.
57 Explanatory Memorandum, *Superannuation Legislation Amendment Act (No. 3) 1999.*
58 Australian National Audit Office, '*The Australian Taxation Office's Approach to Regulating and Registering Self Managed Superannuation Funds* Report No. 52, 2006-7' (Text, 2007).

7.49 A regulatory framework that relies on self protection may be problematic, as a larger number of SMSFs come under the control of older people who may have diminishing decision-making ability. The risk associated with trustee capacity was noted by Financial Services Institute of Australasia (FINSIA):

> the issues of population ageing and cognitive decline are a 'silent tsunami' for self-managed super funds (SMSFs), exposing investors in this sector to financial abuse, including fraud and inappropriate investment advice.[59]

What happens when a trustee loses capacity?

7.50 As set out above, each member of the SMSF must also be a trustee or a director of the corporate trustee.[60] A key exception to this requirement is that, if a person has lost legal capacity and has appointed an enduring power of attorney, the attorney may become the trustee or director of the corporate trustee.[61]

7.51 Importantly, the law *permits* an attorney to become a trustee or director of the corporate trustee for the purposes of the fund's compliance with superannuation law. The law does not *require* the attorney to become the trustee nor does superannuation law override the particular terms of the trust deed and/or constitution of the corporate trustee.[62] The trust deed and constitution of the corporate trustee must allow for the appointment of the attorney as trustee and the processes set down in the document must be followed. If the attorney becomes a trustee or director they do so in their personal capacity and not in their capacity as attorney.[63] In that role they are bound by the general law of fiduciary duties of trustees or the *Corporations Act 2001* (Cth), and not the state and territory powers of attorney legislation. Those fiduciary duties are similar to those owed by an attorney to their principal, however as outlined in Chapter 5 additional statutory obligations have been imposed on attorneys that would not apply when acting in their personal capacity in relation to SMSFs.

7.52 If the attorney does not take over the management of the SMSF, the fund is likely to become non-compliant, unless the principal's interest in the fund can be paid out, the fund is able to be wound up, or the management transferred to an APRA licensed trustee.

7.53 The Office of Public Guardian (Qld) (OPG) provided a case study that highlights the risk of financial abuse in the context of SMSFs and the particular complexities that arise where a trustee loses decision-making ability. The case study concerned a man in his 80s named 'Peter':

> Among Peter's many financial assets was a self-managed superannuation fund (SMSF), of which Peter had been appointed director of the trustee company of the fund. A couple of years after moving in care, Peter was diagnosed with dementia, at which time Peter's attorneys, appointed under an enduring power of attorney,

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59 Financial Services Institute of Australasia, *Submission 137*.
60 With single member SMSF, the sole member must be either the director of the corporate trustee or one of two individual trustees (see *SIS Act*, s 17A)
61 *Superannuation Industry (Supervision) Act 1993* (Cth) s 17A.
62 Australian Tax Office, *Self-Managed Superannuation Funds Ruling*, SMSFR 2010/2, 21 April 2010 2.
63 Ibid.

> assumed control of Peter's financial affairs. A complaint was made to the OPG that the attorneys were financially mismanaging Peter's funds. Peter was aged in the late 80s at the time of the complaint.
>
> The [OPG] investigated the matter and identified ... that the attorneys were not competent to manage Peter's financial affairs due to the complexity, and their lack of understanding of the laws regulating SMSFs.
>
> The investigation identified that, following Peter's loss of capacity to make decisions, no changes had been made to the SMSF and Peter remained the director of the trustee company. The accountant, who had managed the accounting for Peter's business for years, was transacting on the SMSF after Peter lost capacity. ... The attorneys did not take any action to ensure that the SMSF was compliant after Peter lost capacity, and were allowing the accountant to make decisions in relation to the SMSF when he had no authority to do so.[64]

Super System Review

7.54 In 2009, the Australian Government established a review into the 'governance, efficiency, structure and operation of Australia's superannuation system', known as the Super System Review Panel (the Panel).[65] The Panel identified a number of policy principles that it suggested should guide regulation of SMSFs. The first three principles focused on the importance of SMSFs as a vehicle for self-directed retirement planning:

> Principle 1 — Ultimate responsibility
>
> Principle 2 — Freedom from intervention
>
> Principle 3 — ... but not complete absence of intervention.[66]

7.55 In its Issues Paper the Panel raised a number of issues for discussion with respect to the regulation of SMSFs. In their final report, there were a number of these issues that were not the subject of a recommendation on the basis of the policy principles.[67] Principally, in those cases, the Panel was of the view that SMSF members had chosen to take responsibility for the management of their retirement savings and on that basis should not be subject to further regulatory intervention.

7.56 Notwithstanding the thorough examination of the SMSF sector by the Panel, the ALRC considers that there are a number of specific issues that may be re-examined from the perspective of reducing elder abuse, particularly among those older people who may have impaired decision-making ability. Alzheimer's Australia has submitted that approximately 20% of people over 65 years may develop dementia.[68] Accordingly, what happens when a SMSF trustee loses decision-making ability is of critical concern in managing the risk of elder abuse.

7.57 In particular, the ALRC is interested to hear from stakeholders as to whether it would be appropriate and effective to amend the *Superannuation Industry*

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64 Office of the Public Guardian (Qld), *Submission 173*.
65 Super System Review Panel, *Super System Review Final Report* (2010).
66 Ibid 219.
67 See, eg, Ibid 225.
68 Alzheimer's Australia, *Submission 80*.

(Supervision) Act 1993 (Cth) (*SIS Act*) to set out in legislation the steps that are to be taken when a trustee or director of the corporate trustee has lost legal capacity. These legislative parameters could provide a safety net in the event that the trustee has not themselves put in place an effective succession plan.

Corporate trustee or individual trustees

7.58 The majority of SMSFs have individual trustees rather than a corporate trustee.[69] The Panel noted that it is 'widely accepted by professionals and the ATO that a corporate trustee is superior'.[70] Benefits included:

- perpetual succession—the corporate entity cannot die, so it enables better control in the event of member death or incapacity;
- greater administrative efficiency;
- greater flexibility to pay benefits as lump sums or pensions;
- greater estate planning flexibility; and
- reduced risk of deliberate or accidental intermingling of fund and personal assets, in breach of the covenant in s 52(2)(d) of the *SIS Act*.[71]

7.59 The Panel concluded that it:

> is attracted to the potential benefits provided by the corporate trustee structure and is concerned about the large proportion of new SMSFs choosing not to use a corporate trustee. However, consistent with principle 2 regarding freedom from intervention, the Panel believes that the solution here is a better standard of advice, an aim which is addressed by other recommendations.[72]

7.60 Beyond the noted benefits of a corporate trustee, there are also a number of particular challenges with individual trustees in the context of an older person who is a trustee and member of a SMSF, losing decision-making ability. These situations may facilitate elder financial abuse.

7.61 Where there are individual trustees of a SMSF, a succession event will require a transfer of all property to the new trustee. Assuming the trust deed allows for the succession, there are complex legal questions as to how the transition on loss of legal capacity will be managed, particularly who will sign the transfer of property from the trustee who has lost legal capacity. The outgoing trustee will be unable to sign the transfer as they do not have legal capacity. In addition, their attorney may not sign on their behalf because the principal's role as trustee is personal and not capable of being delegated to their attorney under a power of attorney.[73]

7.62 There may also be unintended consequences in terms of who become individual trustees, particularly in the cases of single member funds which require two individual

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69 Australian Taxation Office, above n 49.
70 Super System Review Panel, above n 65, 223–224.
71 Ibid.
72 Ibid 224.
73 Therese Catanzariti, '"There in Spirit" Powers of Attorney in the SME Context' (13 Wentworth Chambers, 2012) 3.

trustees (in the absence of a corporate trustee). There is also a greater risk of fraud. The transfer of property in the name of individual trustees may enable, in situations where there is a loss of decision making ability, the sale of property and the fraudulent retention of the funds by the trustee.[74]

7.63 Given the greater protection afforded by a corporate trustee, the ALRC is interested to hear from stakeholders whether there should be a change in the law requiring a corporate trustee for new SMSFs.

Improving the documentation for SMSFs

7.64 The Panel noted some of the challenges created by the regulatory regime for SMSFs which requires a fund to be established by private documentation rather than by legislation.[75] Establishment by private documentation results in most individuals being reliant on professional advice for the establishment of their SMSF.[76] Advisers are typically accountants and financial advisers. Lawyers may or may not be engaged to draft the trust deed and the constitution for the corporate trustee.

7.65 It has been suggested by a number of advisers in the SMSF sector that most documentation for the establishment of SMSFs are off-the-shelf products, including standard trust deeds and corporate constitutions.[77] Many of these documents do not properly provide for succession events on loss of capacity by a trustee.[78] This creates a number of problems as outlined above, which heighten an older person's risk of financial abuse. The adequacy and currency of SMSF trust deeds is currently not scrutinised at all, either by the ATO, or the approved auditor.

7.66 Accordingly, the ALRC is interested to hear from stakeholders about how documentation for SMSF could be improved to protect against poor documentation facilitating abuse in the context of loss of decision-making ability. In particular, the ALRC is interested to hear from stakeholders as to whether there should be restrictions on who may provide advice on, and prepare documentation for, the establishment of SMSFs.

Access to the Superannuation Complaints Tribunal

7.67 If a member of an APRA regulated superannuation fund has a dispute with the fund, the member may access the Superannuation Complaints Tribunal (SCT) for dispute resolution.[79] There is no access to the SCT for members of SMSFs. Essentially this is because members are also trustees and therefore a dispute between a member and the fund is essentially circular. In its Issues Paper, the Panel raised the potential of extending the jurisdiction the SCT to SMSFs,[80] but concluded against it. This

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74 Super System Review Panel, '*Phase Three: Structure (Including SMSFs) Issues Paper* ' (14 December 2014) 19.
75 Super System Review Panel, above n 65, 270.
76 Castillo, above n 53, 181.
77 Grant Abbott, *Guide to Self Managed Super Funds* (CCH, 3rd ed, 2006) 83.
78 Ibid 87.
79 *Superannuation (Resolution of Complaints) Act 1993* (Cth)
80 Super System Review Panel, above n 74.

conclusion was based on a view that a large proportion of disputes would relate to individuals who were displeased with a SMSF trustee decision regarding a binding death nomination and otherwise in relation to complex family law disputes.[81]

7.68 Where a SMSF member is no longer a trustee because they have lost decision-making ability, there may be a role for the SCT in providing a low-cost forum for disputes. There may be also a role for the SCT in providing advice to trustees on request, and in approving conflict of interest transactions similar to the role played by state civil and administrative tribunals in relation to enduring powers of attorney. The ALRC is interested in stakeholder views about whether the jurisdiction of the SCT should be extended to SMSFs.

Additional obligations on trustees and directors

7.69 As outlined in Chapter 5, there are now a range of statutory obligations imposed on attorneys under state and territory powers of attorney legislation, in addition to general law fiduciary duties owed to the principal. The ALRC is proposing additional safeguards. However, as noted at paragraph 7.51, when an attorney becomes a director or trustee in relation to a SMSF, they do so in their personal capacity and not in their capacity as attorney. Accordingly, they would not be bound by the additional statutory obligations that have been imposed on attorneys under state and territory powers of attorney legislation.[82]

7.70 The ALRC is interested to hear from stakeholders as to whether these protections are sufficient. For example, SMSFs are commonly used as part of family business structures and there may be situations where a child runs the family business and is also trustee of their parents' SMSF which has an interest in that business. This raises potential for conflicts of interest to arise which may be treated differently under general trust law than the state and territory powers of attorney legislation (eg, under state and territory enduring power of attorney legislation, such as Victoria, entering into a transaction where the attorney has a conflict of interest requires prior approval by the principal or tribunal).

Consistency in language around decision-making ability

Different language is used to describe a lack of decision-making ability across commonwealth legislation. For example, the *SIS Act* uses the term 'legal disability' and the *Corporations Act 2001* (Cth) uses the term 'mental incapacity'. Moreover, decision-making ability (legal capacity) is defined in subtly different ways across the states and territories, as set out above in Chapter 5. Differences in terminology can have practical consequences in terms of whether there is an authority to act. The ALRC reiterates its past recommendation for consistent terminology for decision-making ability.[83]

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81 Super System Review Panel, above n 65.

82 Catanzariti, above n 73. The relevant duties include: *Corporations Act 2001* (Cth) ss 180–182

83 See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

8. Family Agreements

Contents

Summary

8.1 A specific type of financial abuse of older people has been recognised in the context of family agreements. A 'family agreement', also known as an 'assets for care' arrangement, has a number of forms but is typically made between an older person and a family member. The older person transfers title to their property, or proceeds from the sale of their property, or other assets, to a trusted person (or persons) in exchange for the trusted person promising to provide ongoing care, support and housing. These agreements are typically not put in writing. Where they are written, family agreements may be prepared by one of the parties to the agreement, without legal advice, and the agreement generally does not provide for what happens if there is a breakdown of the relationship.

8.2 While such arrangements can fulfil a useful social purpose, there can be serious consequences for the older person if the promise of ongoing care is not fulfilled or the relationship otherwise breaks down. It may be difficult to establish that a contract was intended, and what its terms were. The other party is likely the registered proprietor of the property, and it may be difficult to establish a specific interest in the land. The older person may be left without money or even a place to live, a situation identified by many stakeholders as financial abuse.

8.3 The ALRC proposes that tribunals be given jurisdiction over disputes within families with respect to residential property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal provides a low cost and less formal forum for dispute resolution—in addition to the existing avenues of seeking legal and equitable remedies through the courts.

Challenges posed by family agreements

8.4 The majority of older people either live with their spouse or alone. Nevertheless, ABS statistics show that, in 2011, 8.2% of people aged 65 years and over were living with their children or other relatives (usually a sibling). Only 1.7% were living privately with non–relatives. Of those aged 85 years and over, 12.2% were living with their children or other relatives and 0.9% were living privately with one or more persons who were not a relative. Women across the three age groups of 65–74, 75–84 and 85+, were much more likely than men to live with children or other relatives. Of women aged over 85, 14.8% were living with their children or other relative.[1] The proportion of those older persons living with their children or other relative with a formal or informal family agreement is not known. However, a number of stakeholders argued that the use of family agreements was increasing and the failure of these agreements was also increasing.[2]

8.5 Family agreements can take many forms, but typically involve a transfer of an older person's home or other assets to a trusted family member in exchange for a promise of long term care and support. The proceeds may be used to extend a house or build a 'granny flat'.[3] Alternatively, the trusted family member may use the proceeds from the sale of the older person's home to purchase a new property for everyone to live in together.

8.6 Family agreements are popular in Australia for many reasons including, as Brian Herd suggests:

> - our general aversion to the 'institutional' care of aged care facilities, such as nursing homes and hostels;
> - the lack of such facilities (where they become essential) or, at least, of any more sympathetic and empathetic alternatives;
> - people are living longer and, as a result, living longer with disabilities;
> - our fixation in later life to preserve assets (eg, the icon of the family home) for succeeding generations;
> - our consequent reluctance to dissipate assets (especially the family home) to pay any premium for assisted care, such as an accommodation bond in a hostel; and
> - our predilection for 'impoverishing' ourselves in order to obtain and maintain social security entitlements and to reduce the tax impact of ageing.
>
> Overlaying these mores is our understandable preference to be cared for by family rather than some unconnected, albeit well-intentioned, professional care provider whenever this becomes necessary.[4]

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1 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where Do Australia's Older People Live?, Cat No 2071.0* (2013).

2 Australian Research Network on Law and Ageing, *Submission 90*; Justice Connect, *Submission 182*.

3 The Macquarie Dictionary defines 'granny flat' as 'a self-contained extension to or section of a house, designed either for a relative of the family, as a grandmother, to live in, or to be rented.

4 Brian Herd, 'The Family Agreement: A Collision Between Love and the Law?' (2002) 81 *Australian Law Reform Commission Reform Journal* 23, 25.

8.7 The making of family agreements is, in many cases, highly beneficial for the older person and not inherently a form of elder abuse. Senior Rights Victoria (SRV) have previously expressed concern that making an association between family agreements and elder abuse may discourage older people from getting advice to formalise their agreement, on the basis that only those older people with abusive children need advice.[5]

8.8 A key issue with family agreements is that they are often made orally, without legal advice and without any consideration of what might happen if things go wrong.[6] Consistent with the literature, stakeholders identified significant problems with family agreements, typically where the family relationship has broken down and the older person has been evicted from the property without recompense.[7] The Federation of Ethnic Communities' Councils (FECCA) suggested that older persons from CALD communities may be more likely to suffer from the breakdown of these agreements as inter-generational care is common in some communities.[8]

8.9 When things go wrong, the absence of a clear written agreement, may mean that the arrangement is unenforceable and the older person may find themselves homeless and having lost the proceeds of their family home, which they invested under the family agreement.

8.10 Properly documented family agreements, with all parties to the agreement receiving independent legal advice, may avoid the difficulties faced by older people in enforcing their interests under these agreements. The ALRC commends the work of a broad range of stakeholders including elder abuse hotlines, community legal centres (CLCs) and other welfare groups, who provide encouragement, advice and support to older people to get legal advice and properly document their family agreement. SRV, for example, has produced *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse*, in recognition of the role that lawyers can play in helping prevent the financial abuse of older Australians. The guide includes a checklist of points to consider when drafting an agreement. SRV also includes a sample family agreement on its website which lawyers are permitted to use.[9]

8.11 Notwithstanding this important work, because the arrangements are typically made within families, it is unlikely that all, or even a significant majority of older people, can be encouraged to get independent legal advice and assistance in putting in place an appropriate written agreement. As Herd has noted '[d]ocumenting, in a written agreement, a loving, caring or supportive personal relationship, for example, is probably anathema to many Australians.'[10]

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5 Louise Kyle, 'Out of the Shadows: A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review* 1.

6 Ibid.

7 See, eg, Macarthur Legal Centre, *Submission 110*; Older Women's Network NSW, *Submission 136*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

8 FECCA, *Submission 21*.

9 Louise Kyle, 'Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse' (Seniors Rights Victoria, 2012).

10 Herd, above n 4, 25.

8.12 Hervey Bay Seniors Legal and Support Service explained that there are also many individuals who are likely to be deterred by the perceived cost of legal advice and the preparation of documentation.[11]

Access to justice

8.13 The main form of redress when a family agreement goes wrong is currently by way of civil litigation. As the Law Council stated, where parties are able to access the courts, they are effective in resolving complex cases.[12] Doctrines and remedies, particularly in equity, have developed over many centuries to respond to the varied circumstances in which individuals may suffer loss.

8.14 Nevertheless, pursuing litigation in these cases can be prohibitively costly, unsatisfactorily lengthy, and stressful for the older person. Proof, presumptions and remedies pose significant issues in such cases. The access to justice issues were highlighted by the Australian Research Network on Law and Ageing (ARNLA):

> Recovery of property via equitable action is rarely undertaken. The proceedings must commence in the Supreme Court (or sometimes District). They are expensive, time consuming and stressful, and it is unlikely an older party has either the financial or emotional resources to commence proceedings.[13]

8.15 As the Victorian Law Reform Commission (VLRC) reported, action in the superior courts of the states and territories costs tens of thousands of dollars in legal fees and even if successful only a fraction of those costs are recoverable.[14]

8.16 In many of the examples of family agreements gone wrong, set out in submissions, the older person had lost their principal asset—their family home—and typically had limited other assets.[15] For those unable to afford a lawyer, disputes involving family agreements do not generally fall into the type of matter for which there is public funding.[16] Specifically, Community Law Australia have noted that older people 'being financially abused by their carer or family, will often find it extremely difficult to access free ongoing legal help if they can't afford a lawyer.[17]

8.17 Another important challenge regarding action in the Supreme Court is that such actions are lengthy processes that may take many years to be resolved. Where an older person has lost their home and has limited funds, they need access to a remedy quickly. In addition, older people may be put off, given their advanced years, by the prospect of lengthy and protracted civil litigation.

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11 Hervey Bay Seniors Legal and Support Service, *Submission 75*.
12 Law Council of Australia, *Submission 61*.
13 Australian Research Network on Law and Ageing, *Submission 102*.
14 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).
15 Seniors Rights Victoria, *Submission 171*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.
16 Public funding for legal advice is limited to family law (restricted to matters under the *Family Law Act 1975* (Cth)) and criminal law. Community Law Australia, *Unaffordable and out of Reach: The Problem of Access to the Australian Legal System* (2012) 4.
17 Ibid 3.

8.18 Older people may also be fearful of the social and emotional costs of litigation given the family context of the dispute. Litigation may exacerbate family breakdown, or lead to a loss of access to grandchildren, which may result in the older person being reluctant to take legal action.[18]

8.19 The ALRC received a number of case studies that highlight the access to justice issues faced by older people when family agreements go wrong. The following was provided by Legal Aid ACT:

> Barry, an eighty five year old man transferred his unencumbered home in the ACT to one of his adult children, Angela. Angela had promised to build a granny flat for Barry and take care of him until his death. There was no written agreement, however Barry had been living in his granny flat on Angela's property for approximately 5 years.
>
> Angela remarried and advised Barry that the arrangement could not continue and demanded he leave his home. Barry was devastated by Angela's actions, however was able to go live with another child, Stephanie and did not want to seek any legal recourse against Angela as he was 'too old and it was too hard' and he felt so ashamed about what had happened to him.[19]

Challenges in seeking an equitable remedy

8.20 Property law in Australia is defined by the Torrens system of title, the core principle of which is the indefeasibility of title—once registered, title is conclusive. The objective of this system is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of the current proprietor's title, and satisfy themselves of its validity.[20] While the Torrens system of title protects purchasers from claims by non-registered individuals who assert an interest in the property,[21] the Torrens system maintains the right of plaintiffs to bring personal claims founded in law or equity against the registered proprietor.[22]

8.21 The key problem underpinning many family agreements is that the older person is typically giving up the certainty of registered legal title in one property (usually the family home) in exchange for rights in relation to a new property and/or expectations of care and support. Those rights and expectations are often not explicitly discussed and agreed precisely within the family. The older person's rights with respect to the new property are typically not recorded on the title. As a result, the situation is one where the older person has forgone legal title in one property and may or may not have certain rights in contract or equity in the new property.

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18 Northern Territory Anti-Discrimination Commission, *Submission 93*.
19 Legal Aid ACT, *Submission 58*.
20 Kelvin Low, 'Nature of Torrens Indefeasibility: Understanding the Limits of Personal Equities' (2009) 33 *Melbourne University Law Review* 205.
21 Brendan Edgeworth et al, *Australian Property Law* (LexisNexis Butterworths, 2013) vol 9, ch 5.
22 The so called 'in personam' exception to indefeasibility see Ibid.

8.22 Where a family agreement breaks down, the equitable remedies available to an older party in an 'assets for care' dispute will depend on the nature and circumstances of the original arrangement, what evidence is available to confirm the nature of the arrangements, as well as the circumstances and facts of the breakdown of the agreement. Whether the older party is on the title for the relevant property and whether the family agreement was in any way reduced to writing will be important issues, not just in terms of the evidence of the arrangement, but the precise remedies that may be available. The available equitable actions include:

- resulting trust;
- undue influence;
- unconscionable conduct;
- failed joint ventures; and
- equitable estoppel.

Resulting trust

8.23 If an older person contributes money towards the purchase of a property and this is not reflected on the title, they may be able to claim that the property is held on resulting trust for them in proportion to their contributions. However, where the arrangement is between a parent and their child, the law starts with the presumption that the contribution was a gift: the 'presumption of advancement'.[23] This presumption may be rebutted, but it places the evidentiary burden on the older person to prove that their payment was not a gift but a contribution to the property. Justice Connect observed that the 'application of the presumption of advancement has the effect of imposing an evidentiary burden on older people in circumstances where the arrangements are often informal and undocumented.'[24]

8.24 Accordingly, there may be difficulties for older persons in asserting that their contribution to the purchase of a property was not a gift but was to be held by their child on resulting trust.[25] No resulting trust will apply where the older person simply transfers their home into the name of their child.[26]

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23 Equitable doctrine recognises that contributions between parties with a special relationship, such as parents and their children may be presumed to be a gift (the presumption of advancement): Dyson Heydon, Mark Leeming and Peter Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014).

24 Justice Connect, *Submission 182*.

25 Susan Barkehall-Thomas, 'Parent to Child Transfers: Gift or Resulting Trust?' (2010) 18 *Australian Property Law Journal* 75, 3.

26 In most Australian jurisdictions, this transaction will be treated as a gift and there will be no legal possibility of asserting the existence of a resulting trust. *Conveyancing Act 1919* (NSW) s 44; *Law of Property Act 2000* (NT) s 6; *Property Law Act 1974* (Qld) s 7; *Property Law* Act 1958 (Vic) s 19A; *Property Law Act* 1969 (WA) ss 38–39. See *Smith v Glegg* [2005] 1 Qd R 561. See also *Daher v Doulaveras* [2008] NSWSC 583. Transactions involving voluntary transfers of land can only be set aside on the basis of other equitable doctrines.

Undue influence

8.25 Where an older person has been pressured into a family agreement another relevant equitable doctrine is the doctrine of undue influence.[27] However, this is likely to be of use only where the older person has not benefited from the family agreement and either there was a relationship of dependency when the agreement was made or actual unfair pressure was applied on the older person to agree to the family agreement.

8.26 In the case studies provided by stakeholders, the family agreement was often, at least initially, mutually beneficial and there was no pressure applied on the older person to enter into the family agreement. Instead, problems arose subsequently when relationships broke down or unforseen events changed the dynamics.[28] In these cases the equitable doctrine of undue influence would not apply.

Unconscionable conduct

8.27 Where an older person is denied promised care and support or is excluded from their home, another ground for seeking to uphold the family agreement in equity is on the basis that the older person was in a position of 'special disadvantage' and that the other person knew of this. In such a case, it may be 'unconscionable' for the other person to deny the agreement.[29]

8.28 In many family agreement situations, there is no dependency or special disadvantage at the time the agreement was made.[30] In addition, at the time the agreement breaks down, it may be that neither party contemplated what would happen if things went wrong, rather than any intent by the other family member to deceive or take advantage of the older person. Accordingly, unconscionable conduct may be relevant only in a small number of cases.

Failed joint ventures

8.29 Academics note that the failed joint venture is the most common equitable doctrine relied on in assets for care arrangements.[31] A failed joint venture action is designed to ensure that where both parties have contributed to a property and only one is recorded on the legal title, the latter is not unfairly advantaged at the expense of the former.[32]

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27 Roderick Pitt Meagher, Dyson Heydon and Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) 501 [15-005]. See also Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499, 514.

28 See, eg, Relationships Australia, Victoria, *Submission 125*.

29 Fiona Burns, 'The Equitable Doctrine of Unconscionable Dealing and the Older personly in Australia'(2003) 29 *Monash Law Review* 336, 351-352.

30 Eileen Webb and Teresa Somes, 'What Role for the Law in Regulating Older Persons' Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements in Australia' in *International and Comparative Law on the Rights of Older Persons* (Vandeplas Publishing, 2015) 333, 34.

31 Webb and Somes, above n 30.

32 *Muschinski v Dodds* (1985) 160 CLR 583.

8.30 The primary disadvantage of the failed joint venture doctrine, from the perspective of the older person, is that if successful the available remedy is the imposition of an equitable lien to the value of the contribution rather than compensation for the loss of expectation of care and support.[33] Where the older person is looking to purchase another property after the failure of the assets for care arrangement, the inability to access a proportion of the increased value of the property contributed to may be disadvantageous, particularly where the agreement has broken down after a number of years.

Equitable estoppel

8.31 A claim of estoppel can result in the enforcement of an expectation in equity.[34] This is the most suitable remedy in family agreement cases.

8.32 In order to succeed in an equitable claim, the older person must show that:

- the defendant made a representation, either by conduct or acquiescence, creating the expectation that the older person would gain an interest in property;
- the older person relied on this representation to their detriment; and
- the defendant knew that the older person was relying on the representation.[35]

8.33 Many of the cases highlighted in submissions, give rise to potential claims of estoppel.[36] In many cases, there is a promise—whether explicit or based on acquiescence—that the older person will be able to live in the property for the duration of their life. The older person has made a financial contribution to the property in reliance on that representation, which, if the relationship breaks down and the older person is no longer able to live in the property, is to their detriment. By conduct, it should be possible to establish that the defendant knew of this reliance by the older person. An example of where equitable estoppel may be an appropriate remedy is in the case study example above regarding 'Barry' at paragraph 8.19.

8.34 The available remedy in an equitable estoppel action is likely to be compensation to the full value of the promise forgone, particularly in family agreement arrangements where the breach of promise has significant consequences for the older person.[37]

Summary

8.35 Accordingly, there are a range of potential legal actions available to an older person who has suffered financial loss on the breakdown of a family agreement and their success will depend on the extent to which the facts of their particular situation

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33 Barkehall-Thomas, above n 25, 155.

34 Note some members of the High Court have considered that there is one unified form of estoppel: see *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

35 Barkehall-Thomas, above n 25, 168. *Sullivan v Sullivan* (2006) ANZ ConvR 54, [2]-[3] (Handley JA).

36 Advocare Inc (WA), *Submission 86*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; University of Newcastle Legal Centre, *Submission 44*.

37 Barkehall-Thomas, above n 25, 155.

can meet the required tests in law and equity. The fact that the older person has suffered significant financial loss may not be sufficient. An older person has to weigh up the strength of their case in the context of unwritten agreements and conduct that may be evidence of a range of intentions. This assessment must be made with an understanding of the considerable costs of equity litigation.

Low cost options to resolve disputes

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

8.36 Tribunals should be given jurisdiction over disputes with respect to residential property that is, or has been, the principal place of residence of one or more of the parties to the assets for care arrangement. Access to a tribunal offers a low cost and less formal forum for dispute resolution, in addition to the existing avenues of seeking legal and equitable remedies through the courts. Tribunals are able to resolve disputes in a non-legalistic fashion without regard to formal pleadings and affidavits. This proposal seeks to provide an alternative avenue for dispute resolution and would otherwise not disturb existing legal and equitable doctrines.

8.37 The tribunal, consistent with the approach in Victoria (see below), would consider the general law of property, but would have a broader jurisdiction to award compensation having regard to contributions of both parties made under the 'assets for care' arrangement. In particular, the tribunal would consider the care and support provided by all parties under an 'assets for care' arrangements as well as the financial contribution to the property.

8.38 Where the tribunal is satisfied that a party has suffered loss as a consequence of a breakdown of a family agreement, the tribunal should award compensation that is just and fair having regard to the financial and non-financial contribution of the parties.

8.39 Consistent with the tribunal's role to provide a quick, simple and informal forum for dispute resolution, the proposal is limited to disputes over residential property. The proposal specifically excludes disputes involving family businesses and farms, and focuses on domestic disputes involving residential property under assets for care arrangements. The more commercial arrangements are better suited to formal adjudication through the courts.

8.40 Often a failed family agreement may involve an older person, their child and their child's partner. Where the child and their partner are separated and seeking to resolve a property dispute under the *Family Law Act 1975* (Cth), the older person may seek to protect their interest in the property by joining proceedings under the *Family Law Act 1975* (Cth). This proposal does not seek to interfere with this jurisdiction.

The Victorian approach

8.41 The proposal builds on, in part, amendments to the *Property Law Act* (1958) (Vic) (PLA) in 2006, which gave VCAT a statutory jurisdiction to resolve disputes between co-owners of land and goods. Under the PLA, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.[38] The tribunal's jurisdiction over property disputes between co-owners has an uncapped monetary value.

8.42 Notwithstanding the flexibility to make any order that the tribunal considers 'just and fair,' VCAT does not ignore the general law of property (which is outlined above). As Senior Member Riegler explained:

> Although the Act does not expressly state that the Tribunal's discretion is to be applied in accordance with the general law, I am of the opinion that to simply determine the issues based on what the Tribunal may, from time to time, consider to be just and fair without having regard to the general law is not an outcome that I consider to be just and fair. The public expect decisions of the Tribunal to be consistent, in terms of applying the law to the facts as found. To disregard the general law may lead to inconsistency in the decisions of the Tribunal which may be difficult to justify on any legal basis.[39]

8.43 VCAT has confirmed that the PLA gives it jurisdiction to make orders with respect to equitable, as well as legal, co-owners.[40] The broad statutory mandate gives VCAT considerable flexibility to arrive at a just and fair sale of the land and a division of the proceeds and/or division of land. Justice Connect observed that:

> VCAT can order compensation, reimbursement or adjustments to interests between the co-owners reflecting each co-owner's individual contribution to the property. Contributions may be made through improvements to the property and payment of maintenance costs, rates and mortgage repayments. Conversely, interests may be adjusted to take into account damage caused to the property and the benefit that one co-owner may have had of exclusive possession.[41]

8.44 One of the particular advantages of VCAT having this jurisdiction, is that it gives the parties access to alternative dispute resolution without going through a number of pre-trial steps, which may be required in the Supreme Courts. VCAT may seek to resolve disputes through mediation or compulsory conferences.[42] Compulsory conferences are similar to mediations in that they are pre-trial, confidential, and without prejudice facilitated discussions, designed to assist the parties to resolve their dispute.[43] Unlike mediation, compulsory conferences are only conducted by tribunal members and the role of the tribunal member is to actively assist the parties to reach settlement. As set out in a VCAT Practice Note

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38 *Property Law Act 1958* (Vic) s 228.
39 *Davies v Johnston (Revised*) (Real Property) [2014] VCAT 512 (5 May 2014), [27].
40 *Garnett v Jessop (Real Property)* [2012] VCAT 156 (13 February 2012).
41 Justice Connect, *Submission 182*.
42 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 83, 88.
43 Victorian Civil and Administrative Tribunal, *Practice Note PNVCAT 4 — Alternative Dispute Resolution* (2014) 3.

> at a compulsory conference the Tribunal Member may express an opinion on the parties' prospects in the case, or on relative strengths and weaknesses of a party's case. The Member will exercise this power if the Member considers it to be of assistance in promoting settlement.[44]

8.45 This more interventionist approach is better suited to disputes regarding family agreements, where there is often a significant power imbalance between the parties. SRV stressed the value of the tribunal's ADR processes in proving a forum in which family members are required to sit down and resolve disputes. Their submission highlighted the extent to which these disputes may be resolved through ADR without needing to be adjudicated by the tribunal.[45]

Support for dispute resolution by a tribunal

8.46 CLCs and elder abuse advice services, including those with experience of the Victorian approach, support tribunals having jurisdiction over disputes following the breakdown of family agreements.[46] ARNLA, for example, noted that a 'tribunal may be a preferable forum to hear and determine disputes about family agreements as tribunals are considered to be less expensive, more expedient, and less formal than courts.'[47]

8.47 Similarly, Senior Rights Service suggested that:

> It would be beneficial to have a forum other than the Supreme Court, such as the NSW Civil and Administrative Tribunal, for property orders to be made in relation to family agreements to reduce time, cost, and stress for older people in bringing proceedings against family members.[48]

8.48 SRV highlighted the value of a tribunal process in assisting older people to resolve failed family agreements:

> This jurisdictional change [in Victoria] has provided 'co-owners' with a much greater ability to institute proceedings to resolve disputes though less expensive and onerous processes than previously existed for Supreme Court matters. This has also provided a significant benefit to older people where Assets for Care situations have failed, and they seek to recover their financial contribution to the purchase of a property in conjunction with other family members.[49]

8.49 Justice Connect also noted that tribunal processes offer a number of benefits including that 'the ability to decide equitable interests in property accommodates the informal nature of family arrangements that can give rise to these disputes and recognises the dynamics of elder abuse....'[50]

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44 Ibid 5.
45 Seniors Rights Victoria, *Submission 171*.
46 See, eg, Justice Connect, *Submission 182*; Caxton Legal Centre, *Submission 174*; Australian Association of Social Workers, *Submission 153*; Older Women's Network NSW, *Submission 136*; Australian Research Network on Law and Ageing, *Submission 102*; Hervey Bay Seniors Legal and Support Service, *Submission 75*; Legal Aid ACT, *Submission 58*; University of Newcastle Legal Centre, *Submission 44*.
47 Australian Research Network on Law and Ageing, *Submission 90*.
48 Seniors Rights Service, *Submission 169*.
49 Seniors Rights Victoria, *Submission 171*.
50 Justice Connect, *Submission 182*.

Defining the tribunal's jurisdiction

8.50 Some submissions, which supported tribunals having jurisdiction over failed family agreements, suggested that the tribunal's jurisdiction should be capped at certain monetary value.[51] At this stage, the ALRC is not proposing that the jurisdiction be capped at a certain monetary value, noting that VCAT's jurisdiction is unlimited and there does not seem to be concern amongst submitters from Victoria that this is a problem.

8.51 One of the key limitations of the Victorian model is that it is restricted to co-owners of land in law and equity. However, it may well be that, in a majority of family agreement disputes, the older person has no property interest as co-owner unless established through, for example, equitable estoppel. If they do have an interest in property, that interest may be a life interest, an equitable lien or licence to reside in the property.[52] The ALRC proposes that the tribunal's jurisdiction encompass any type of equitable interest an older person may have in their current or former principal place of residence. The tribunal's jurisdiction should be even broader than property interests and allow the tribunal to consider the respective contributions, financial and non-financial, under the family agreement. This approach is consistent with the recommendation from the Seniors Legal and Support Service Hervey Bay that:

> There be established an easily accessible Tribunal which has the power to deal with all issues arising from the breakdown of family agreements, not just the issues relating to any real property in which the older person has an interest.[53]

8.52 By focusing on contributions, the tribunal would be able to fully consider the care and support provided by the parties to each other. This addresses a principal criticism that the law of equity in relation to family agreements only considers the asset side of 'assets for care' and not the care side. That is, the law of equity as applied to family agreements is focused on financial contributions towards the purchase of property or renovations of property and not on the non-financial contribution of care and support provided.

8.53 Some stakeholders suggested that the presumption of advancement should not apply in the case of older persons and their adult children.[54] Given the breadth of the tribunal's jurisdiction as proposed, the ALRC considers that this change is not necessary. Moreover, the ALRC is concerned that altering equitable doctrines may have broader ramifications outside the context of elder financial abuse.

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51 Caxton Legal Centre, *Submission 174* 11.
52 Kyle, above n 9, 42.
53 Hervey Bay Seniors Legal and Support Service, *Submission 75*.
54 See, eg, Justice Connect, *Submission 182*; Seniors Rights Service, *Submission 169*.

How to define family?

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

8.54 The tribunal's jurisdiction could be defined by the relationship of the parties, that is, a familial relationship. This would enable a tribunal to easily confirm its jurisdiction by ascertaining the nature of the relationship between the parties to the proceedings.

8.55 Defining the jurisdiction of the tribunal on the basis of family relationship may be considered novel, given that this has previously only been done in relation to married couples and, more recently, de-facto relationships under the *Family Law Act 1975* (Cth).

8.56 The approach would exclude from the tribunal's jurisdiction disputes between friends as well as older persons and their carers. However, as outlined above, few older people are living with non-relatives outside of residential aged care. Older people are ten times more likely to be living with a child or family member than a non-family member.[55] Another reason for defining the tribunal's jurisdiction in this way is that it is the very nature of familial relationships, which are grounded in trust, that are more likely to produce informal and unwritten arrangements.

8.57 The key issue is then how widely 'family' should be defined for the purposes of the tribunal's jurisdiction. Individuals living in non-traditional families should not be excluded. The ALRC suggests including de-facto relationships as defined in s 4AA of the *Family Law Act 1975*. This definition includes same sex de-facto relationships. The definition of family should be broad enough to cover situations where one partner in a de-facto relationship passes away and the surviving spouse may wish to enter into a family agreement with their deceased partner's child or niece/nephew. Similar arrangements may be put in place where one spouse has gone into residential aged care.

8.58 The ALRC welcomes submissions on how broadly 'family' should be defined for the purposes of determining the jurisdiction of the tribunals in assets for care arrangements.

55 Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where Do Australia's Older People Live?, Cat No 2071.0* (2013).

9. Wills

Contents

Summary

9.1 Pressuring older people to change their wills and to make superannuation death benefit nominations in ways to benefit those exerting that influence are examples given of financial abuse, both in general guidelines on elder abuse and raised by stakeholders in this Inquiry. This chapter considers how best to prevent and respond to such examples of abuse.

Pressure to change wills and financial abuse

9.2 A number of guidelines about elder abuse in Australia include the use of pressure to make or change a will as an example of financial abuse. For example, the Department of Family & Community Services (NSW) published an interagency policy that included the following definition of financial abuse:

> Financial abuse is the illegal or improper use of an older person's property or finances. This includes misuse of a power of attorney, forcing or coercing an older person to change their will, taking control of a person's finances against their wishes and denying them access to their own money.[1]

1 Department of Family and Community Services (NSW), *Preventing and Responding to Abuse of Older People: NSW Interagency Policy* (2014).

9.3 The Financial Ombudsman Service Australia provided an extensive list of examples of financial abuse of vulnerable older people and included '[g]etting an older person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence'.[2]

9.4 Is this elder abuse? Although there is no deprivation to the older person through a change in their will, if the pressure to change a will occurs within a relationship of trust and causes 'harm or distress' to the older person, such action fits within the WHO description of elder abuse.[3] If descriptions or definitions of elder abuse are narrower, for example defining abuse in terms of 'harm' or 'risk of harm', and not including the element of 'distress', there may be arguments about whether to include pressure to change a will as 'elder abuse'. Whether or not pressure to change a will is identified and tracked within the data collection on elder abuse is a matter that will need to be considered as part of prevalence studies.[4]

9.5 State Trustees Victoria urged that concepts like 'harm' 'should not be viewed narrowly':

> Unauthorised interference with an older person's estate planning arrangements (such as their will), even if there is no direct loss to the older person, is harm to that person's 'legacy', and represents an infringement of their rights. For example, if a child of an older person exercises undue influence in getting the older person to change their will in the child's favour, and the older person dies soon afterwards, the older person may suffer no direct financial or other loss from the child's actions, but the older person's intended legacy will be harmed, as their actual testamentary intentions will not be able to be fulfilled.[5]

9.6 Stakeholders provided a number of examples where controlling conduct exerted over an older person included pressure to change a will. Some were personal stories;[6] others were case studies or examples provided by advocacy groups and other non-government bodies.[7] The Queensland Law Society, for example, provided the following case study that had been supplied to it:

> In 2013 V, in her 70s, was brought to our office by her 'partner' to make a new Will. The partner was adamant that he wanted to be present for the meeting and was very keen to tell the writer what V 'wanted'. After insisting that we could not see V with him present he reluctantly waited in our reception area. Within a very short time frame it became apparent that V would not have the capacity to make a Will, did not know why she had been brought to the appointment, did not know her date of birth, had no idea about her assets and although she could name her family members

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2 Financial Ombudsman Service Australia, *Banking & Finance—Bulletin 56*, (December 2007) 6.

3 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) ch 1.

4 See ch 2, prop 2-2.

5 State Trustees Victoria, *Submission 138.*

6 See, eg, Name Withheld, *Submission 181*; Name Withheld, *Submission 144*; Name Withheld, *Submission 25*. A number of confidential submissions also included changes to wills in the examples of financial abuse.

7 See, eg, Association of Financial Advisers, *Submission 175*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; ARAS, *Submission 166*; University of Newcastle Legal Centre, *Submission 44*.

> (children) had no idea about their ages, relationship status or their children's name and ages. V also kept changing her mind about what it was that she wanted to do (when she could remain focused on the discussion).[8]

9.7 An additional reason for seeking to lock in testamentary benefit through changes to a will may be the possibility of an enlarged estate through unspent funds under 'consumer directed care' arrangements. Aged and Community Services Australia (ACSA) reported concerns of some aged care providers about the 'rising risk of financial abuse for vulnerable older Australians and an unintended consequence of consumer directed care that is now becoming more evident'.

> A risk that will need to be managed is the change from February 2017 requiring unspent funds contributed by older people to be returned back to them or their estate, as it may also provide motivation for some family members to limit home care package spending.
>
> Ensuring that there is a requirement for regular and timely planned reviews of a Home Care Package by the provider, even when a family member or representative is self-managing the package, would allow some level of external oversight to minimise the risk of abuse going unobserved.[9]

The law's response

9.8 The law does not ignore coerced transactions. Transactions which involve undue pressure may be rendered void or voidable through doctrines of equity and probate. With respect to lifetime transactions, the equitable doctrine of undue influence places the emphasis on the person who seeks to gain under particular transactions to demonstrate that they were not the result of undue influence.[10] Probate also has a doctrine of undue influence, but it is different from the equitable doctrine.[11] Probate law also scrutinises closely wills that benefit 'strangers'—those unrelated to the testator.

Undue influence

9.9 The probate law doctrine of undue influence requires more than just pressure, nor is it presumed in any particular relationship. Professor Gino dal Pont and Ken Mackie summarise the probate doctrine in this way:

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8 Queensland Law Society, *Submission 159*.

9 Aged and Community Services Australia, *Submission 102*.

10 For a detailed discussion of the inter vivos doctrine of undue influence, see Anthony Duggan, 'Undue Influence' in *The Principles of Equity* (Thomson Lawbook Co, 2nd ed, 2003) 393. The doctrine in relation to lifetime transactions is noted in ch 8 on family agreements.

11 For a consideration of the topic generally, see: Fiona R Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *University of New South Wales Law Journal* 145; Fiona Burns, 'The Elderly and Undue Influence Inter Vivos' (2003) 23(2) *Legal Studies* 251; Fiona Burns, 'Undue Influence Inter Vivos and the Elderly' (2002) 26(3) *Melbourne University Law Review* 499; Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *Law Quarterly Review* 617; Matthew Tyson, 'An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions' (1997) 5 *Australian Property Law Journal* 38.

> Only actual coercion will invalidate a will. Persuasion, influence or indeed importunity is not sufficient—after all, a testator is ordinarily free to accept or reject persuasion—unless the testator is thereby prevented from exercising a free will.[12]

9.10 In the leading case of *Wingrove v Wingrove*, endorsed by Australian courts, Sir James Hannen P explained in his direction to the jury about the different kinds of coercion, in terms that may be particularly pertinent to older persons:

> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may become so weak and feeble that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage or illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion though not actual violence.[13]

9.11 Undue influence is a difficult matter to establish in the probate context, particularly as the onus of proof lies upon the person who alleges undue influence.[14] In its 2013 report, *Succession Laws*, the Victorian Law Reform Commission (VLRC) observed:

> The main problem with probate undue influence is that it has been too difficult to prove. This may lead to the Court upholding a will that does not in fact reflect the will-maker's true intentions. This is particularly concerning given the ageing population and increasing vulnerability of older people making wills. As the population ages, there may be an increasing number of people who, despite having testamentary capacity, are vulnerable to pressure from relatives, caregivers and others.[15]

9.12 In *Nicholson v Knaggs*, Vickery J made observations about the degree and nature of pressure, particularly as it relates to the 'vulnerability and susceptibility' of the individual.

> The key concept is that of 'influence'. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independence and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle.[16]

9.13 Vickery J also commented about the standard of proof:

> The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise

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12 Gino Del Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.39].

13 *Wingrove v Wingrove* (1885) LR 11 PD 81, 82–3. See Del Pont and Mackie, above n 12, 54 n 151.

14 In 1992 Phillip Hallen reported that in 50 years in New South Wales there had been no successful plea of influence with respect to a will: Phillip Hallen, 'Undue Influence—What Constitutes?' (1992) 66(8) *Australian Law Journal* 538. Since then, there have been a handful of cases: see Victorian Law Reform Commission, *Succession Laws*, Report (2013) 16.

15 Victorian Law Reform Commission, *Succession Laws*, Report (2013) 15.

16 *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [150].

> a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.[17]

9.14 The VLRC suggested that, following *Nicholson v Knaggs*, undue influence may now be easier to prove in Victoria.[18] Dal Pont and Mackie also point to New Zealand authority where the facts did not show 'coercion in the accepted sense of the word', which, together with *Nicholson v Knaggs*, may represent 'the developing trajectory of judicial opinion' and 'herald some (limited) convergence between common law and equitable concepts of undue influence'.[19]

Suspicious circumstances

9.15 The requirement of knowledge and approval of the contents of a will is a separate probate element from establishing that a person had the requisite 'testamentary capacity'. It must be established that the testator knows that the document being signed is their will and that it deals with their property. Where a will benefits someone completely unrelated to the testator, probate calls for greater scrutiny to ensure that the testator had the appropriate knowledge and approval of the contents of the will. Justice Hallen explained that where knowledge and approval of a will is challenged, there is generally a two-stage process:

> The first stage is to ask whether the circumstances are such as to 'excite suspicion' on the part of the court. If so, the burden is on the propounder of the will to establish that the deceased knew and approved the contents of that will. If the circumstances do not 'excite suspicion', then the court presumes knowledge and approval in the case of a will that has been duly executed by the deceased who had testamentary capacity.[20]

9.16 The kinds of matters that 'excite suspicion' include:

> the circumstances surrounding the preparation of the propounded will; whether a beneficiary was instrumental in the preparation of the propounded will; the extent of physical and mental impairment, if any, of the deceased; whether the will in question constitutes a significant change from a prior will; and whether the will, generally, seems to make testamentary sense.[21]

9.17 While circumstances that may be raised to suggest undue influence do not satisfy the probate doctrine of undue influence, they may point to a lack of knowledge and approval. However, as Dal Pont and Mackie state, 'this does not mean that undue influence is to be subsumed into suspicious circumstances; it is a separate issue that, where relevant, must be specifically pleaded'.[22]

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17 Ibid [127].
18 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.67].
19 Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.45]. Citing *Carey v Norton* [1998] 1 NZLR 661.
20 *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275 (17 November 2011) [258].
21 Ibid [259].
22 Gino Dal Pont and Ken Mackie, above n 19, [2.46].

Reform suggestions

Proposal 9–1 The Law Council of Australia, together with state and territory law societies, should review the guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they cover matters such as:

(a) common risk factors associated with undue influence;

(b) the importance of taking detailed instructions from the person alone;

(c) the importance of ensuring that the person understands the nature of the document and knows and approves of its contents, particularly in circumstances where an unrelated person benefits; and

(d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents.

Guidelines for legal practitioners

9.18 The formalities for wills, including the requirement of witnessing, serve a number of purposes, one of which is to protect a testator from being forced to sign a document they do not wish to sign.[23] However, as the VLRC observed,

> increasing concern that older and vulnerable will-makers are being subjected to pressure about their wills has led some judges and commentators to suggest other ways of reducing the risk of undue influence in the will-making process. The key suggestion in this area is to ensure that legal practitioners take greater care when making wills.[24]

9.19 Lawyers have a key role to play in safeguarding against coerced will-making. The VLRC recommended that, to minimise the risk of undue influence, the Law Institute of Victoria, as the professional body of Victorian legal practitioners, should prepare best practice guidelines 'on the detection and prevention of undue influence when preparing a will'.[25]

9.20 With respect to the doctrine of knowledge and approval, the VLRC commented that, while no changes in the law were necessary to 'this well settled area of the law', a constructive contribution would be for the Law Institute of Victoria to include discussion of knowledge and approval and suspicious circumstances in the recommended guidelines on undue influence.[26] Proposal 9–1 is modelled on the VLRC recommendations.

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23 See, eg, Andrew Lang, 'Formality v Intention—Wills in an Australian Supermarket' (1985) 15 *Melbourne University Law Review* 82; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [7.4].

24 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.45].

25 Ibid rec 1. These are reflected in prop 9-1.

26 Ibid [2.95].

Align probate and equitable doctrines

9.21 The VLRC also considered as a reform option the legislative change in British Columbia, which commenced in 2014, to introduce into the probate context the equitable doctrine of undue influence.[27] Stakeholders to the VLRC inquiry were divided in responding to this suggestion: some 'saw advantages in such a change, while others were concerned that the equitable doctrine is not appropriate to the probate context'.[28]

9.22 The VLRC concluded that the British Columbia provision was 'groundbreaking' and could suggest a reform direction for Australia to follow. But the VLRC also pointed to the decision of Vickery J in *Nicholson v Knaggs*, which 'appear to have made undue influence easier to prove', which may mean that legislative change is unnecessary.[29] The final recommendation was that Victoria should review the effect of the British Columbia legislation in practice, to consider whether a similar provision should then be introduced.[30]

9.23 The ALRC considers that the emphasis of the proposed law reforms in this Inquiry should be on the role that lawyers can play in assisting older persons in their estate planning and the instruments to give effect to such plans; and the community education strategies that may be developed and enhanced through the National Plan discussed in Chapter 2.

Amend forfeiture rule

9.24 In succession law, a person who causes the death of another is not permitted to benefit from the person's estate as a result of that killing. Known as the 'forfeiture rule', it is a common law rule of public policy.[31] Two stakeholders suggested amending the forfeiture rule in response to elder abuse. The New South Wales Trustee & Guardian referred to amendments in the United States:

> Several states in the USA have expanded their forfeiture legislation as it applies to an unlawful killing to disqualify persons from inheriting if they have been involved in abuse or financial exploitation of the deceased. Elder abuse is often linked to the abuser's right to inherit; the term inheritance impatience has been coined. The reason for expanding the forfeiture legislation in the USA to financial abuse cases is to help prevent and reduce elder abuse. Family members often stand to inherit from the victim and by recognising elder abuse as a matter of succession law, the aim is to deter elder abuse by those who are likely to gain from the death of an elderly person. The introduction of such measures in Australia are worthy of investigation and evaluation.[32]

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27 *Wills, Estates and Succession Act*, SBC 2009, c 13, s 52.
28 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.76].
29 Ibid [2.81].
30 Ibid rec 2.
31 Details of the rule are set out in Gino Dal Pont and Ken Mackie, above n 19, [7.47]–[7.67]. See also Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014) ch 2.
32 NSW Trustee and Guardian, *Submission 120*. Citing Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' (2006) 8 *Elder Law Review* Article 8. See also P Johnson, *Submission 70*.

9.25 The ALRC considers that the other strategies identified in this Discussion Paper for preventing and responding to elder abuse should be considered and evaluated, before consideration is given to amending the forfeiture rule in the way noted above.

Community education

9.26 The Hume River Community Legal Service (HRCLS) provided an example of community education as a strategy to make older persons less vulnerable to financial abuse. They cited wills workshops conducted especially for Aboriginal clients:

> Over a two day period in the years 2015 and 2016, Gilbert and Tobin (a private law firm) assisted HRCLS on a pro bono basis with the running of a free Wills, Power of Attorney and Guardianship workshop for Aboriginal people in the Albury Wodonga region. On Day 1, Gilbert and Tobin provided education about legal planning and focused on issues particularly relevant to Aboriginal people. In the afternoon of Day 1, lawyers began taking instructions from people attending the workshop. On Day 2, lawyers drafted wills and power of attorney documents, and returned the completed documents for clients to sign and take home. The workshop in 2015 was held at Albury Wodonga Aboriginal Health Service and the workshop in 2016 was held at the Mungabareena Aboriginal Corporation in Wodonga.
>
> This initiative was taken to address the low numbers of Aboriginal people who have wills or power of attorney documents. By delivering a workshop in partnership with the local Aboriginal Health Service, the workshop was culturally appropriate and also well promoted within the local Aboriginal community. As a result of having wills and power of attorney documents in place, elderly people are less likely to be exposed to elder abuse.[33]

9.27 The ALRC commends such initiatives as supportive of older persons in exercising their rights. They provide illustrations of best practice approaches that can inform the education and awareness strategies developed through the National Plan.

Superannuation

9.28 In Chapter 7, the increase in wealth held under superannuation funds is noted. This makes superannuation held by individuals a potential target for financial abuse, where a trusted person seeks to access the older person's superannuation for their own benefit. As the Law Council of Australia observed, '[g]iven the value of many members' death benefits there is an unfortunate incentive to manipulate a member's nomination'.[34]

9.29 Two means are considered: the exercise of influence to have the older person make, or alter, a death benefit nomination in the trusted person's favour; and seeking to make the death benefit nomination under the supposed authority of a power of attorney.

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33 Hume Riverina CLS, *Submission 186*.
34 Law Council of Australia, *Submission 61*.

Death benefit nominations

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

9.30 Superannuation funds commonly make provision for funds held by a member to be paid on the person's death in accordance with a nomination of the member. The *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations) provide mechanisms to allow superannuation fund rules to permit a member of the superannuation fund to complete a binding death benefit nomination of a beneficiary.[35] Such a nomination must:

- be in writing;
- be signed and dated by the member in the presence of two witnesses, each of whom have turned 18 and neither of whom is mentioned in the nomination; and
- contain a declaration signed and dated by the witness stating that the notice was signed by the member.[36]

9.31 A member can nominate a legal personal representative, or a dependant or dependants as their beneficiary.[37] The potential for manipulation of the nomination in a person's favour is therefore limited to this group. The Law Council pointed out that 'the restriction on the persons who are eligible to receive the death benefit will somewhat limit the prospects on that abuse'.[38]

9.32 Nominations are generally only binding for three years, but can be renewed.[39] On or after the member's death, the trustee of the fund must then provide the member's

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35 *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A. A binding death nomination is distinct from a reversionary pension which is an income stream superannuation benefit paid to a superannuation member. Upon the member's death the pension continues to be paid to a nominated reversionary beneficiary.

36 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(6).

37 Superannuation law restricts who is an eligible dependant to receive a death benefit payment to a spouse (including same-sex and de facto), child, or person with whom the member has an interdependency relationship: *Superannuation Industry (Supervision) Act 1993* (Cth) ss 10, 10A. 'Legal personal representative' is defined under the SIS Act to mean 'the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person': s 10(1).

38 Law Council of Australia, *Submission 61*.

39 *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A(7). When a binding nomination lapses the nomination becomes non-binding. In addition to a binding death nomination, some superannuation funds also permit a member to make a non-lapsing binding death nomination. This nomination is made under s 59(1)(a) of the SIS Act. Unlike a binding death nomination, a non-lapsing binding death nomination may only be made if permitted by the trust deed and with the active consent of the trustee which may or may not be granted.

benefits to the person or people mentioned in the notice.[40] Binding death nominations are often made in the context of broader estate planning and, in particular, a desire to ensure the most tax-effective structure for succession and to limit any potential claims on the deceased's estate.

9.33 Because of the relationship between the payment of funds and the member's death, binding death benefit nominations are will-like in character.[41] The Law Council of Australia commented that, given the value of many members' death benefits 'there is an unfortunate incentive to manipulate a member's nomination'.[42] Pressure to make a will may also include pressure to make a binding death benefit nomination, as evident in a case study provided to the Queensland Law Society (QLS), part of which was quoted above. Although the relevant solicitors no longer acted for 'V' they were aware of circumstances concerning her superannuation and pressure by her partner:

> it became apparent through our discussions that V had made a binding death benefit nomination in relation to her superannuation to her 'partner'. Her superannuation, as far as we could tell was her largest asset. V had a copy of the nomination with her (given to her by her partner to bring into our meeting). The nomination had been made within the two weeks prior to our meeting. This concerned me as although the capacity to make a binding death benefit nomination is the ability to enter into a contract, and not the same as making a will, it was doubtful that V had the capacity to understand the nature and effect of that decision. Further it was probable that she was told to sign the nomination by her partner in front of the two witnesses.[43]

9.34 State Trustees Victoria described as 'insidious', 'where a third party manipulates a person into nominating them as a binding death benefit nominee'.

> It is unclear to what extent this happens but it should be considered a potential issue to be managed. Given that the binding death benefit nomination only takes effect after the death of the principal, disproving that the nomination was not valid would be very difficult.[44]

9.35 The Law Council of Australia observed that the validity of the nomination is an issue that regularly arises in relation to death benefit nominations.

> There can be disputes around whether the nomination was validly made, whether the nomination is binding, has lapsed or has ceased to have effect for any other reason. It is rare for validity to be contested on the basis that it was involuntary, although a recent example is *D15-16\112* [2016] SCTA 214 [The allegation was made but not substantiated]. It is unusual for validity to be contested on the basis of lack of mental capacity, although an example is *D14-15\172* [2015] SCTA 31.[45]

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40 This is subject to a trustee of the entity complying with any conditions contained in the regulations, and the member's notice being given in accordance with the regulations. See *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A).

41 See, eg, Croucher and Vines, above n 23, [3.10]–[3.12].

42 Law Council of Australia, *Submission 61*.

43 Queensland Law Society, *Submission 159*.

44 State Trustees Victoria, *Submission 138*.

45 Law Council of Australia, *Submission 61*.

9.36 State Trustees Victoria suggested that this risk of misuse of binding nominations could be minimised by requiring there are witnesses 'to verify that the person appeared to have capacity when the nomination was made'.[46] The QLS also suggested that:

> Given the ease with which binding death benefit nominations can be made and the risk to that asset, it might be worthwhile requiring that prior to any superannuation nomination being made the member obtain a certificate of independent legal advice.[47]

9.37 Given the similarity in effect of binding death benefit nominations and wills it would seem appropriate to align the witnessing requirements with those otherwise applicable to the making of wills.[48] The Law Council commented that while solicitors are often involved with the preparation of wills, this is much less the case in the preparation of nominations. Abuse could be reduced, the Council suggested, 'if a solicitor is involved and the direction of the death benefit is to the estate.[49] In such cases, the guidelines proposed in Proposal 9–1 could also include binding death benefit nominations as well as wills.

Death benefit nominations and substitute decision makers

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

9.38 A further matter of contention in relation to binding death benefit nominations is whether, when a member of a superannuation fund has appointed a state or territory decision maker, that decision maker may be able to nominate a beneficiary on behalf of the member.

9.39 In the 2007 report, *Older People and the Law*, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that the SIS Act be amended 'to enable a substitute decision maker to renew, or if required to do so, to make a binding death benefit nomination',[50] adopting a suggestion made to the Committee by Brian Herd.[51] There were no other submissions referred to on this point.

9.40 The legal position on this issue was considered in the ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws*,[52] where it was pointed out that, as a

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46 State Trustees Victoria, *Submission 138*.

47 Queensland Law Society, *Submission 159*.

48 While this may ensure a greater measure of protection against pressure to make a nomination, a further issue may be the impact of the 'dispensing powers'. See, eg, Croucher and Vines, above n 23, ch 8.

49 Law Council of Australia, *Submission 61*. With respect to capacity issues, the Law Council referred to *D14-15\172* [2015] SCTA 31.

50 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) rec 15.

51 Ibid [2.200]–[2.202].

52 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.55]–[11.65].

matter of law, there does not appear to be any restriction in the SIS Act or SIS Regulations themselves that would prevent a person acting under a power of attorney from completing and signing a binding death benefit nomination.

9.41 In *Determination D07–08\030*, the Superannuation Complaints Tribunal stated that, in principle, an enduring power of attorney would permit an attorney to complete and sign a binding death nomination on behalf of the member. As the Tribunal did not decide the matter on the basis of the binding nomination, however, its comments are not of direct application. Hence, the Law Council of Australia observed that '[w]hether the scope of an attorney's authority extends to making a nomination remains a matter of debate'.[53]

9.42 In the *Equality, Capacity and Disability* Inquiry, the Law Council of Australia pointed to the different practices of funds:

> some funds accept a nomination by a person holding an enduring power of attorney granted by the member, generally without inquiring as to the wishes of the member. Some funds do not accept a nomination by a person holding an enduring power of attorney, with the result that binding nominations cannot be made by these members.[54]

9.43 The Law Council suggested that superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits.[55]

9.44 As explained in the *Equality, Capacity and Disability* Report, the policy issue is a difficult one, given the difference between a nomination, as a lifetime act, and its effect, which is will-like in nature—as it affects property after the death of the member. Given the uncertainty about whether a person holding an enduring power of attorney could exercise a death benefit nomination on behalf of the member, the ALRC asked whether such person should be restricted from nominating a beneficiary on behalf of the person for whom they were acting—assuming that such action was not prevented by the power of attorney itself.[56]

9.45 The Law Council agreed with the ALRC that the main issue concerning binding death benefit nominations is that there is currently no clear policy position on whether a nomination should be considered similar to a will or simply a lifetime instruction in relation to a person's assets. The Council also agreed with the ALRC's analysis that nominations are will-like in nature and they should be treated in policy terms 'similarly to wills'.[57]

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53 Law Council of Australia, *Submission 61*.

54 Quoted in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.60].

55 Ibid [11.60].

56 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) question 11-3.

57 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.63], citing Law Council of Australia *Submission 142*.

9.46 A basic principle of wills formalities is that a person is required to have testamentary capacity when making a will. If a person was regarded as no longer having capacity, any will made by such person would be void.[58] Now, however, under strict conditions, wills can be authorised by the court in all Australian states and territories where a person is regarded as having lost, or never having had, legal capacity.[59] In the succession context it is a relatively new jurisdiction for the court to be able to approve these 'statutory wills'. It is exercised cautiously, given the importance accorded to testamentary freedom as a valued property right.[60]

9.47 Applying this approach to the question of whether a person holding an enduring power of attorney should be able to sign a binding death benefit nomination on behalf of the member, the ALRC concluded that this should not be permitted. As the role of an enduring attorney is one focused on the lifetime transactions and needs of the person, the ALRC concluded that it was not appropriate for such a person to make a binding death benefit nomination that was will-like in effect. The Law Council agreed with this approach and submitted that the SIS Act and SIS Regulations could be amended to make this clear so that a nomination 'generally cannot be made on behalf of a member by a person exercising powers under an EPA'.[61]

9.48 If a member dies then any superannuation balance is paid in accordance with the rules of the fund. That balance may well form part of the member's estate in due course. A person who holds an enduring power of attorney may apply for a statutory will on behalf of the member during the member's lifetime, but that is an entirely different matter from seeking to use the power of attorney to make the death benefit nomination on behalf of the member. The application for a statutory will would be subject to the strict scrutiny of the court.

9.49 In the Terms of Reference for this Inquiry the ALRC was directed to have regard to the recommendations in the *Older People and the Law* report, as well as to those in the ALRC's more recent *Equality, Capacity and Disability* Report. As explained above, the ALRC's consideration of the authority of an enduring attorney with respect to the making of a binding death benefit nomination for a member of a superannuation fund was different from that in the *Older People and the Law* report.

9.50 The ALRC acknowledges that the proposal to prohibit an attorney, acting under an enduring power, from making a binding death nomination does raise policy challenges in the context of the three-year limit on nominations.[62]

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58 See, eg, Croucher and Vines, above n 23, ch 6.

59 *Succession Act 2006* (NSW) ss 18–26; *Succession Act 1981* (Qld) ss 21–28; *Wills Act 1936* (SA) s 7; *Wills Act 2008* (Tas) ss 21–28; *Wills Act 1997* (Vic) ss 21–30; *Wills Act 1970* (WA) s 40; *Wills Act 1968* (ACT) ss 16A–16I; *Wills Act 2000* (NT) ss 19–26.

60 See, eg, Croucher and Vines, above n 23, [6.11]–[6.20].

61 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [11.65], citing Law Council of Australia *Submission 142*.

62 *Superannuation Industry (Supervision) Act 1993* (Cth) s 59(1A); *Superannuation Industry (Supervision) Regulations 1994* (Cth) reg 6.17A.

9.51 For example, a member may make a binding death nomination and then subsequently lose legal capacity. If the attorney does not have the power to renew the binding death nomination when it lapses after three years, on death, the principal's superannuation funds may be distributed:

- in a way that the member had not intended;
- in a manner less ideal for tax purposes when compared with the lapsed binding death nomination; or
- in a manner that results in the funds forming part of the estate of the member which may be subject to certain creditors' claims.[63]

9.52 Another challenge is that a binding death benefit nomination does not have the flexibility to take into account a change in circumstances. A member may make a binding death benefit nomination in favour of their spouse and then subsequently lose legal capacity. The marriage may thereafter break down, but the death benefit nomination will remain in place notwithstanding the change in circumstances.

9.53 The ALRC considers that the SIS Act and SIS Regulations should be amended in line with the conclusions that the ALRC reached in the *Equality, Capacity and Disability* Report. Nevertheless, the ALRC recognises that the implementation of this proposal requires a broader consideration of the consequences of prohibiting a person appointed under an enduring power of attorney from making a binding death benefit nomination on behalf of a member, particularly in terms of a person's estate planning goals. The ALRC seeks input from stakeholders regarding the consequential changes to laws and legal frameworks that would be required if the proposal were implemented.

63 Superannuation funds are protected in part by s 116(2)(d) of the *Bankruptcy Act 1966* (Cth). Keeping the superannuation death benefit out of the estate by paying direct to a beneficiary may increase protections against creditor claims.

10. Social Security

Contents

Summary

10.1 Engaging with social security through Centrelink is a part of life for most older people. In 2012, only 20% of persons over Age Pension age did not receive a pension. This makes Centrelink a primary site for the detection and prevention of elder abuse, especially financial abuse.

10.2 Stakeholders suggested that elder abuse is largely invisible in legal frameworks that determine Centrelink processes and responses. This 'invisibility' may result in a lost opportunity for Centrelink to detect and respond to elder abuse—particularly in areas such as Carer Payment and payment nominees, or in policies governing the entitlements of older persons.

10.3 The proposals in this chapter focus on enhancing elder abuse visibility in these legal frameworks and frontloading safeguards against abuse.

Elder abuse strategy

Proposal 10–1 The Department of Human Services (Cth) should develop an elder abuse strategy to prevent, identify and respond to the abuse of older persons in contact with Centrelink.

10.4 There are numerous laws and legal frameworks pertaining to social security. The ALRC has heard that elder abuse responses are mostly absent from these instruments.[1] To increase visibility, the ALRC proposes that the Department of Human Services develop a discrete elder abuse strategy, specifically requiring Centrelink staff to be alert to the possibility of elder abuse, and to develop appropriate responses when dealing with Age Pension clients.[2]

10.5 Social security legislation includes the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth). Social security laws and legal frameworks are administered by the Department of Human Services through Centrelink. The Department of Social Services produces the *Guide to Social Security Law* to provide guidance to Centrelink decision makers. The Guide is a broad publication that details the processes for a wide variety of social security outputs including study payments, unemployment benefits, Carer Payment, assurances of support and the Age Pension.

10.6 A legal framework has been developed to respond specifically to family violence when family violence intersects with social security. The Department of Human Services published the *Family and Domestic Violence Strategy 2016–19*, which is applicable to Centrelink staff and processes. The strategy focuses on providing information about family and domestic violence, identifying those at risk of family and domestic violence, providing referrals and support, training staff in relation to family and domestic violence, and embedding responses to violence across systems and processes.

10.7 The strategy document defines family and domestic violence as 'conduct that is violent, threatening, coercive or controlling, or intended to cause the family or household member to be fearful'.[3] This can include conduct relevant to elder abuse such as economic (financial) abuse; emotional or psychological abuse; and serious neglect where there is a relationship of dependence.[4] It also includes relationships involving carers.[5] The key aim of the strategy is, however, to identify and respond to women and children in situations of domestic violence.[6]

10.8 Welfare Rights stakeholders have advised that the strategy may not facilitate the development of appropriate policies to prevent, identify and respond to the abuse of older persons. The Welfare Rights Centre (WRC) observed, for example, that despite the reference to carers of older persons, the strategy document 'fails to directly mention or refer to elder abuse'.[7] This approach is reflected in the *Guide to Social Security Law*, in which the National Welfare Rights Network pointed to inadequate coverage of elder

1 See, eg, Welfare Rights Centre NSW, *Submission 184*; National Welfare Rights Network, *Submission 151*; UNSW Law Society, *Submission 117*.
2 See also UNSW Law Society, *Submission 117*.
3 Department of Human Services (Cth), *Family and Domestic Violence Strategy 2016–19* (2016) 3.
4 Ibid.
5 Ibid 4.
6 Ibid 3–4.
7 Welfare Rights Centre NSW, *Submission 184*.

abuse, and suggested that a more 'comprehensive explanation of elder abuse is warranted'.[8]

10.9 The WRC suggested that the ALRC seek submissions on whether the *Family and Domestic Violence Strategy* should include specific reference to elder abuse and appropriate responses, or whether a discrete elder abuse strategy needs to be developed.[9]

10.10 The ALRC supports the development of an elder abuse strategy. A discrete strategy should increase the attention given to the circumstances that can lead to the abuse of older persons and facilitate improved responses in legal frameworks. A strategy that expressly addresses the abuse of older persons would provide a lens through which Government could review processes, laws and legal frameworks to ensure that social security output protects older persons and identifies and responds to older persons experiencing, or at risk of, abuse. The elder abuse strategy would complement and sit within the proposed National Plan, discussed in Chapter 2.

Sites of greatest risk

10.11 For some people who receive government benefits, Centrelink processes and practices are interwoven into their daily lives. As a corollary, social security laws and legal frameworks can intersect with older persons experiencing, or at risk of, abuse. Stakeholders have identified three sites where the risk of this intersection is high:

- the payment nominee scheme;
- Carer Payment; and
- the Aged Pension gifting rules.

Payment nominee scheme

10.12 A person in receipt of social security payments (the 'principal') can appoint another person to assist them to interact with Centrelink or to interact on their behalf. A principal may have a 'payment nominee' and may also appoint a 'correspondence nominee'.[10] The payment and correspondence nominee may be the same person. A correspondence nominee may receive any social security notice on behalf of the principal, and can make enquires and attend appointments with Centrelink on behalf of the principal. A payment nominee receives payments on behalf of the principal. Stakeholders identified the potential for elder abuse in the payment nominee scheme,[11] and some provided examples of misuse.[12]

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8 National Welfare Rights Network, *Submission 151* noting that there is some reference to elder abuse in qualifications for Crisis Payment discussion.

9 Welfare Rights Centre NSW, *Submission 184*.

10 *Social Security (Administration) Act 1999* (Cth) pt 3A.

11 See, eg, Welfare Rights Centre NSW, *Submission 184*; Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Office of the

10.13 Nominees have a duty to act in the best interests of the principal.[13] Payment nominees have fiduciary duties. They are obliged to use payments received on behalf of the principal exclusively for the benefit of the principal, and are required to keep records to this effect.[14] Failing to provide records on request can attract a financial penalty.[15]

10.14 The appointment of a nominee involves submitting an authorisation form to Centrelink. This is a straightforward process that can be done online, submitted in person or via the post. There are sound policy reasons to make nominee appointments easily accessible. Easy access readily facilitates an arrangement that enables people with disability, or people who are experiencing difficulties, to access and interact with Centrelink. The WRC observed that

> one of the key benefits of nominee arrangements is that they can provide and prolong independence. Having a nominee to manage complex Centrelink affairs or to respond to correspondence can in some circumstances delay a move to an aged care facility and allow people to continue to live independently at home.[16]

10.15 However, as noted by the WRC, if payment nominee arrangements are misused, the impact can be extreme—leaving older persons with no money, or at risk of losing their home or accommodation.[17] A case study provided by Seniors Rights Victoria shows the extreme impact of abuse, while also illustrating more broadly the intersection between social security payments and elder abuse:

> A son was operating his father's financial affairs using an enduring power of attorney (EPOA), but also managing his pension under a nominee arrangement. To collect more money he failed to notify Centrelink that his father lived with him, and that he was renting the father's house for considerable profit (retained by the son). Centrelink discovered the situation and raised a $12,000 overpayment against the father. As the son knew he would not be responsible for any debt under Centrelink legislation, he dropped his father off at his sister's house, emaciated and with only the clothes he was wearing. Before the administrator could get involved in the retrieval of the rent money and protecting the remaining assets the son sold his father's house and moved interstate. Both the nominee form and the EPOA were signed by the father well after he was deemed not to have capacity by the family doctor.[18]

10.16 There are also less visible consequences of the misuse of payment nominee appointments. Age and Disability Advocacy Australia (ADA Australia) advised that it receives many complaints regarding payment nominees taking a person's pension. It noted that, while the 'pension is obviously necessary to the older person', often the 'amount taken is often not sufficient to pursue through other legal means'.[19]

Public Advocate (Qld), *Submission 149*; Legal Aid NSW, *Submission 140*; State Trustees Victoria, *Submission 138*; North Australian Aboriginal Legal Service, *Submission 116*.

12 Seniors Rights Victoria, *Submission 171*; Legal Aid NSW, *Submission 140*.

13 *Social Security (Administration) Act 1999* (Cth) s 123O.

14 Ibid s 123L.

15 Ibid s 123L(6).

16 Welfare Rights Centre NSW, *Submission 184*.

17 Ibid.

18 Seniors Rights Victoria, *Submission 171*.

19 ADA Australia, *Submission 150*.

10.17 There are existing safeguards against financial abuse by payment nominees. These were outlined by the ALRC in the report *Family Violence and Commonwealth Laws—Improving Legal Frameworks*,[20] and included:

- the process of appointment—the principal must provide written consent and signatory arrangements;[21]
- oversight of nominee appointments—'particular scrutiny' of the appointment is to be given in certain circumstances;[22]
- processes to ensure the capacity of the principal—including investigation where capacity is uncertain;[23]
- revocation or suspension of nominee appointments following a written request or where the nominee has not provided records;[24]
- processes for allegations of misuse—including referral to a social worker;[25]
- reporting requirements—a nominee is to advise of any matter that affects their ability to act as a nominee;[26]
- the requirement for payment nominees to keep and supply records;[27] and
- the statutory obligations of the nominee to act in the best interests of the principal.[28]

10.18 Payment nominees can receive part or all of the payment.[29] Payment nominees need not receive the entire payment amount on behalf of the principal. It is possible for principals to appoint a payment nominee and retain direct receipt of some funds. Principals are also able to quarantine and direct payments from their pension to rent

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20 Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, Report No 117 (2011) [9.45].

21 *Social Security (Administration) Act 1999* (Cth) s 123D(2).

22 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [8.5.3]. 'Particular scrutiny' must be given to nominee requests where the proposed nominee runs a boarding or room establishment; where there are multiple voluntary nominee appointments for the same nominee; or where the nominee does not live in the same residence or in close proximity to the principal. A delegate can revoke an appointment where the delegate decides that the appointment is not in the best interest of the principal, and can direct payments to another person.

23 Ibid [8.5.1]. Centrelink delegates are to investigate if there is any question as the principal's capability to appoint a nominee. The delegate must also consider the effect of family violence when determining a principal's capacity to consent to the appointment of nominee. In cases where it is determined that the principal is not capable of consenting to the appointment, the delegate may appoint a nominee, where the delegate is satisfied of the need to appoint a nominee, and is satisfied that the nominee will act in the best interest of the principal.

24 *Social Security (Administration) Act 1999* (Cth) s 123E. The Secretary can suspend or revoke appointments following a written request to the Secretary from the nominee; or where the nominee has not complied with a notice to produce records.

25 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [8.5.3]. The delegate may be able to revoke under the above powers if a social worker is not immediately available.

26 *Social Security (Administration) Act 1999* (Cth) s 123K.

27 Ibid s 123L. Where a review is undertaken, nominees must supply records, otherwise a fine may apply.

28 Ibid s 123O(1).

29 Ibid s 123F.

and services through Centrepay,[30] or other direct debit arrangements. Centrelink also provides a free financial counsellor service that can help set up direct payments.

10.19 In some communities an older person may be able to opt into a program of income management. Income management is a measure that quarantines a proportion (usually 70%) of a person's social security payment for prescribed goods such as food, clothing, housing and utilities. Funds can be held for use through an Eftpos card. Income management operates only in particular declared areas, and the majority of those subject to income management reside in the Northern Territory and are Aboriginal.[31] Stakeholders to this inquiry did not support expanding the use of income management as a strategy to address elder abuse.[32]

10.20 Stakeholders have suggested that current safeguards for payment nominee appointments do not adequately address the possibility of forgery or coercion in the appointment, which may be facilitated by the simplicity of the appointment process. For example, the Office of the Public Advocate (Qld) noted that the 'appointment process of nominees involves little to no education or training. Coupled with the limited oversight of the role, it creates an environment ripe for financial exploitation and elder abuse'.[33]

10.21 Legal Aid NSW commented on how simple it is to forge or to trick a person into making the appointment via the online form, and supplied an example of a son who had forged the nominee appointment form to receive the pension of his mother, who had dementia. The son had used the pension for his own benefit.[34]

Carer payments

10.22 There are two relevant social security payments available to non-professional carers, Carer Payment and Carer Allowance. An annual Carer Supplement is also available to recipients of these payments.[35] Stakeholders pointed to a potential intersection between Carer Payment and elder abuse.

10.23 Carer Payment is income and asset tested, including the income and assets of the person receiving care.[36] The amount to be paid is calculated on par with the Age Pension.[37] To qualify for Carer Payment, a carer must personally provide constant and

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30 Centrepay is a Centrelink service which facilitates the direct debit of payments to pay bills, such as electricity or rent. A user can set a target amount, change deduction amounts, and choose the order in which services are paid. There is no cost for using Centrepay: Department of Social Services (Cth), *Commonwealth Financial Counselling* <www.dss.gov.au>.

31 J Rob Bray et al, 'Evaluating New Income Management in the Northern Territory: Final Evaluation Report' (SPRC Report No 25/2014, Social Policy Research Centre, 2014). In December 2013, 90.2% of those subject to income management in the Northern Territory were Aboriginal: Table 4.1.

32 Welfare Rights Centre NSW, *Submission 184*; Seniors Rights Service, *Submission 169*; State Trustees Victoria, *Submission 138*; Older Women's Network NSW, *Submission 136*; North Australian Aboriginal Legal Service, *Submission 116*.

33 Office of the Public Advocate (Qld), *Submission 149*.

34 Legal Aid NSW, *Submission 140*.

35 Up to $600.

36 Department of Human Services (Cth), *Income and Assets Tests for Carer Payment* <www.humanservices.gov.au>; *Social Security Act 1991* (Cth) ss 198A(1), 198D.

37 *Social Security Act 1991* (Cth) s 201.

significant care[38] to one or more adults or children with a disability in the home of the carer or the person receiving care.[39]

10.24 To show that the adult is a person with a disability or severe medical condition in need of a significant level of care, the adult requiring care must achieve a particular score under the 'Adult Disability Assessment Tool' (ADAT). This comprises two questionnaires that together measure the amount of assistance required to undertake 'basic activities of daily living', such as mobility, communication, hygiene, eating and management in a range of cognitive and behavioural activities.[40] One questionnaire is to be completed by the potential paid carer, and the other by a treating health professional, which may be the person's GP, registered nurse, occupational therapist, physiotherapist, a member of an Aged Care Assessment Team or an Aboriginal health worker.[41]

10.25 A person receiving Carer Payment must notify Centrelink of changes in circumstances that may affect their qualification for the payment, including if they are no longer providing the required level of care to the care recipient.[42]

10.26 The National Commission of Audit reported that 220,000 people were in receipt of Carer Payments in 2013.[43] There is no available data on the constitution of the cohort of people receiving care, but, as older people with dementia make up the largest proportion of people under guardianship,[44] it is reasonable to assume that older persons with intermittent or diminished decision-making ability or limited mobility make up a sizable proportion of people eligible for full-time carers.

10.27 Carer Payment can intersect with elder abuse. A person may receive a payment for provision of care to an older person, and fail to provide that care, or provide inadequate care. Considering the level of care required to be given to qualify for the payment, neglect of duties may, in some circumstances, amount to elder abuse. The North Australian Aboriginal Legal Service advised that it was aware of

> allegations about carers, often family members, who are receiving Centrelink carer payments and not providing proper care to older persons (including not providing proper or full meals and not assisting with the cleaning of households). In these situations, the local community or aged care service (if available or in existence) often fills this gap, despite funds being allocated to the individual carer for this purpose.[45]

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38 For definitions see case law cited: Law Book Company, *Laws of Australia*, vol 22 (at 31 October 2016) 22 Insurance and Income Security, '22.3 Social Security' [22.3.1480].

39 *Social Security Act 1991* (Cth) ss 197–198. With some exceptions: ss 198AAA, 198AA, 198AB.

40 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [3.6.9].

41 See forms for Adult Disability Assessment Determination 1999 and Carer Payment and/or Carer Allowance Medical Report for a Person 16 Years or Over: <www.humanservices.gov.au>.

42 Department of Human Services (Cth), *Change of Circumstances While Receiving Carer Payment* <www.humanservices.gov.au>.

43 National Commission of Audit, *The Report of the National Commission of Audit* (2014) Carer Payments [9.10].

44 See ch 6.

45 North Australian Aboriginal Legal Service, *Submission 116*.

10.28 A case study provided by Seniors Rights Victoria illustrated other, less direct, elder abuse issues attached to Carer Payment:

> An older woman had a stroke a number of years ago, and her son moved into her rental accommodation to assist her when she was discharged from hospital. He was unemployed at the time, and then obtained a Carers Payment to assist with her ongoing care needs. The client acknowledged that her son did provide considerable assistance to her at that stage, and facilitated her recovery. However over the course of several years, the son provided less and less assistance, struggled with alcohol problems, and regularly became aggressive towards her. A wall in her home was punched in by her son during an argument between them. The mother's health improved and she became more fearful of her son's unpredictable behaviour. She attended an appointment at Centrelink, to advise of her improved health, and that her son no longer provided any care for her. The Carers Payment to her son was suspended. He confronted her about this, but she declined to discuss the matter with him. At the time of contacting SRV for assistance she reported that her son had become more aggressive, and unexpectedly produced papers for her to sign. She signed these documents under duress as she had again been threatened by him, and had no opportunity to read them. She later realised the documents were to reinstate the Carers Payment.[46]

10.29 The National Aboriginal and Torres Strait Islander Legal Services spoke about how the misuse of Carer Payment can form an element of abuse:

> An elderly woman sought advice from a Brisbane civil lawyer on housing issues. The elderly woman resides with her daughter, who has locked her out of her own house. The daughter continued to claim Centrelink carers' payments, despite her mother no longer residing with her. The elderly woman was effectively homeless and only has the clothes on her back, as all her property is held in the house. She has no way to retrieve the property. A Brisbane civil lawyer referred her to an appropriate legal service.[47]

10.30 The Australian Association of Social Workers raised the possibility that dependency on Carer Payment (and possibly housing) by carers could affect decisions about placing an older person in residential aged care, even where residential care would provide a necessary higher level of care.[48]

10.31 There is a strong policy impetus to encourage and maintain full-time unprofessional carers for older persons who need assistance. Carers provide an important and necessary service, and receive payment in recognition of the fact that their caring duties mean that they are unable to receive income through paid employment.[49] The WRC cautioned that

> [i]t is important that false community perceptions about the incidence of carer abuse are not created, as this can undermine carers and deter carers from offering this invaluable support.[50]

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46 Seniors Rights Victoria, *Submission 171* p 22.
47 National Aboriginal and Torres Strait Islander Legal Services, *Submission 135*.
48 Australian Association of Social Workers, *Submission 153*.
49 Welfare Rights Centre NSW, *Submission 184*.
50 Ibid.

Gifting rules

10.32 The Age Pension is available to Australians who are over 65 years old[51] and who meet certain resident and income/asset requirements.[52] The current maximum payment for the Age Pension is $798 per fortnight.[53]

10.33 The majority of older Australian residents receive steady income through the Age Pension. The National Commission of Audit reported that, in 2012, approximately 80% of all persons over Age Pension age who met the residential requirement received income through government pensions.[54] It estimated that the proportion of eligible people receiving income through the Age Pension will remain steady over the next thirty years.[55] In 2007, the *Pension Review Background Paper* reported that the average length of time that a person received the Age Pension was 11.3 years.[56] The same report noted that the majority of people on the Age Pension had been in receipt of another form of government payment prior to transferring to the Age Pension.[57]

10.34 In social security terms, 'gifting' means to give away assets for less than their market value. Centrelink gifting rules aim to limit the potential for individuals to divest themselves of assets or funds to gain income support, including the Age Pension.

10.35 A single person or couple can make gifts of up to $10,000 per financial year over a period of five years (not exceeding $30,000) without it affecting the amount of government benefits they can receive. Any amount over the allowable amount will be assessed as a 'deprived asset' for five years from the date of the gift, and will still be counted as the person's asset. There are some exceptions, including where a gift creates a 'granny flat interest' for the older person, discussed below.

10.36 Gifting rules apply to any gifts made in the five years before receiving welfare benefits. Centrelink provides examples on their website:

- Selling a rental property to your daughter valued at $380,000 for $200,000 ($180,000 gift)
- Buying your daughter a car for a present
- Donating 10% of income to a church
- Forgiving a loan

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51 National Commission of Audit, above n 43, Age Pension [9.1]. From 2017 the Age Pension age will be increased by half a year every two years and will reach 67 by 2023.

52 *Social Security Act 1991* (Cth) ss 43, 55, 1064.

53 Department of Human Services (Cth), *Age Pension* <www.humanservices.gov.au>. Rounded up.

54 National Commission of Audit, above n 43, Age Pension [9.1]. Fewer than 20% of people aged 65 years receive no pension. The Australian Bureau of Statistics reported that, in 2012, 2,278,215 people received income through the Age Pension, which was an increase of 57,831 people from the same point in time in 2011: Australian Bureau of Statistics, *National Regional Profile, 2008 to 2012, Cat 1379.0.555.001*.

55 National Commission of Audit, above n 43, Age Pension [9.1].

56 Jeff Harmer, *Pension Review Background Paper* (Department of Families, Housing, Community Services and Indigenous Affairs) Table 6.

57 Ibid 41. Notes that of males eligible for the maximum pension in 2006/07, 82.9% came from another income support payment. Of women, 89.6% came from another income support payment, primarily the disability support pension.

- Repaying your son's business loan where guarantor
- Putting money into a family trust which you do not control.[58]

10.37 Legal Aid NSW said that the gifting rule may inadvertently 'capture older persons who have experienced financial abuse'. As an example, Legal Aid NSW supplied a case study of an adult child who had tricked a non-English speaking parent to enter a secured loan contract as the borrower, under the pretence that the child would repay the moneys. The child defaulted, leaving the bank to commence proceedings against the older person's home to discharge the debt. This left the older person at risk of losing their home *and* entitlements under the Age Pension. The older person also had to repay Centrelink the pension amount received from the date of the loan contract. The severity of this outcome was eventually lessened under an application for 'hardship'.[59]

10.38 Seniors Rights Victoria expressed concern at Centrelink's application of the gifting rules in the face of elder abuse:

> As the majority of older Australians are recipients of the Age Pension, it has significant impact on their lives … If a rule or regulation appears to be breached, the penalties are applied immediately, and elder abuse is not an exception that will have any bearing on the process or outcome for the older person.[60]

Granny flat interests

10.39 For the purposes of social security, a 'granny flat interest' represents an agreement for accommodation for life in a private residence. A granny flat interest is created when a person pays for a life interest or right to use certain accommodation for life that will be the person's principal home.[61] The use of the term 'granny flat' does not describe the type of dwelling—it describes the living arrangement. This type of arrangement is commonly understood as an 'assets for care' arrangement or a 'family agreement'.[62]

10.40 Where a person establishes a granny flat interest, the amount transferred or the value of the residential property given away is exempt from the gifting rules, and is not considered income.[63] A granny flat interest will not affect pension entitlements.[64]

10.41 The gifting rules stipulate a number of requirements for Centrelink purposes. A granny flat interest cannot be established where the older person has legal ownership of the property.[65] The older person must stay in the arrangement for at least five years.[66]

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58 Department of Human Services (Cth), *Gifting* <www.humanservices.gov.au>.
59 *Social Security Act 1991* (Cth) s 1222A(a), div 3; Seniors Rights Victoria, *Submission 171*; Legal Aid NSW, *Submission 140*.
60 Senior Rights (Vic), *Submission 171*.
61 *Social Security Act 1991* (Cth) ss 12C(2)–(3).
62 See ch 8.
63 *Social Security Act 1991* (Cth) ss 1118(1)(c)(i)–(iii).
64 Provided that the amount paid is not more than the cost or value of the granny flat interest.
65 Department of Social Services (Cth), *Guide to Social Security Law* (2016) [4.6.4.50].
66 Ibid [4.6.4.70].

10.42 Centrelink will recognise a granny flat interest that is not in writing, although it recommends that a legal document be drawn up by a solicitor that confirms the security of tenure; states any obligations on the parties; and outlines the process for compensation, if required.[67]

10.43 The ALRC has heard about the potential for emotional abuse and financial loss after an older person creates a granny flat interest. Issues arise when the family member does not provide the promised tenancy or care. The family member may not adequately house the older person, may not provide food or access to household appliances, and may even sell the property without recognising the older person's interest, leaving the older person without housing and care.[68] In Chapter 8, the ALRC proposes avenues for redress when family agreements break down.

10.44 Stakeholders have advised the ALRC that the Centrelink criteria for establishing a granny flat interest may have unintended consequences for older persons in abusive situations. A case study was supplied by the Older Persons Advocacy Network:

> Marina is an 80-year old woman from a European background. She came to Australia with her husband in the early 1950s and they prospered. Marina worked in the business and was a driving force behind its success. When her husband died Marina was left reasonably financially secure and owned her own house in an expensive part of Canberra. Marina has a daughter living abroad and a son living in Canberra. Marina has no cognitive impairment and manages her own affairs; however in late 2011 Marina had a bad fall and broke her leg and her arm resulting in long stays in hospital. Marina's son has four daughters who are now getting too old to share bedrooms and was looking to upsize his house and move to a "better" area but needed additional finance to purchase such a property.
>
> Marina's recovery period was going to be long but she started to progress well physically. Being in hospital with the only visitors being her son and occasionally daughter in law and grandchildren she became isolated and started to lose confidence in her ability to live alone. When her son made her an offer to live with them, sell her house and invest in their new property under a granny flat arrangement with Centrelink, it seemed tempting. Marina had been groomed by her son over a long period of time to believe she could not manage living alone any longer. A property was found by her son with a flat attached, Marina was taken from hospital to look at the flat and returned to the hospital all within the space of a few hours. She had no opportunity to discuss a major financial decision or the suitability of the property with an independent person. Based on promises of the support the family would give her and her now complete loss of confidence in her ability to care for herself Marina agreed and invested in the son's new property.
>
> The arrangement was doomed from the start, the promised care and support never eventuated and the flat could not have been more unsuitable. By the time ADACAS [ACT Disability, Aged and Carers Advocacy Service] became involved Marina was locked in to the Centrelink granny flat arrangement for five years and a large sum of money was paid to the son to secure the granny flat interest. Centrelink applies a deprivation rule if the granny flat arrangement is terminated before five years has

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67 Department of Human Services (Cth), *Granny Flat Right or Interest* <www.humanservices.gov.au>.

68 See, eg, Older Women's Network NSW, *Submission 136*; Macarthur Legal Centre, *Submission 110*; Hervey Bay Seniors Legal and Support Service, *Submission 75*.

> elapsed unless the reasons for leaving could not have been foreseen at the time of entering into the agreement. The ADACAS advocate was able to support Marina and help her establish a new independent living arrangement. It could so easily have been a disaster for this client locked into isolation and despair for the last years of her life. This case highlights the hidden nature of financial abuse of older persons.[69]

10.45 This case study underlines a key issue raised by stakeholders: if the person stops living in the home within five years, Centrelink reviews the granny flat interest. If the reason for leaving the arrangement before five years could have been anticipated at the time of making the arrangement, the funds used to establish the abandoned granny flat interest will be considered income retrospectively.[70] For example, gifting rules may apply where a person leaves the arrangement early due to a pre-existing illness, but not where the illness was unexpected.

10.46 The ALRC has been advised that the abuse of an older person which occurs after a granny flat arrangement commenced is likely to be viewed by Centrelink as an 'unforeseen circumstance', so gifting rules should not apply—that is, the exemption to the gifting rules should remain.[71] Caxton Legal Centre pointed out, however, that the five-year requirement could still be inadvertently forcing victims of elder abuse to endure 'intolerable family dynamics'.[72]

Reducing the risk

10.47 An elder abuse strategy should have broad reach into all areas of social security that interact with older persons. The ALRC does not make proposals on the exact content of the strategy proposed at Proposal 10-1. The ALRC has, however, observed that there are knowledge gaps produced by Centrelink processes, and does make particular proposals to address these.

10.48 The ALRC proposes frontloading practical safeguards in areas that intersect with elder abuse. This includes provision for direct and personal contact with older persons about to enter certain arrangements; clear articulation of the roles and responsibilities of people entering into these arrangements; and community education and staff training. These proposals aim to support older persons in protecting their rights in situations that interact with Centrelink and the social security system.

Direct contact principle

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

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69 Older Persons Advocacy Network, *Submission 43*.
70 Department of Human Services (Cth), above n 67.
71 Department of Human Services (Cth), Advice Correspondence (11 November 2016).
72 Caxton Legal Centre, *Submission 174*.

10.49 Many arrangements involving Centrelink that are entered into by older persons arise because the older person has limited, intermittent or diminishing decision-making ability or mobility. This is apparent in payment nominee arrangements when the principal is an older person, and when a carer for an older person qualifies for Carer Payment. The capacity or mobility of an older person may even be a driving factor to enter into a granny flat arrangement. The vulnerability of older persons entering into these arrangements heightens the risk of abuse, and invites a discrete Centrelink response.

10.50 Currently, Centrelink staff are not required to have direct personal contact with an older person entering into the arrangements discussed above. Accordingly, there may be little way for Centrelink to know whether the arrangement accurately reflects the will and preferences of the older person or whether the arrangement will leave the older person at risk of abuse. Stakeholders have suggested that greater involvement by Centrelink staff early in processes involving older persons may expose and prevent at-risk situations.[73]

10.51 Payment nominee arrangements provide a stark example. Payment nominee applications are able to be done online via the 'myGov' website, in person at a Centrelink service centre, or by post or fax. On approval of a payment nominee application, Centrelink sends letters in the mail to the principal and nominee confirming the nominee appointment. This may not be enough to safeguard a principal against coercion or fraud, especially where the payment nominee applicant is also the person's correspondence nominee.[74] Seniors Rights Victoria noted that

> older people can be seriously disadvantaged by the payment nominee system implemented by Centrelink, where elder abuse is at risk of occurring. In circumstances of financial abuse, or emotional or psychological abuse there is a strong likelihood that the authority to a payment nominee may not have been given freely by the older person. It is also likely that there has not been a detailed explanation of the operation or consequences of the authority to the older person. Often an older person will feel compelled to make this arrangement, particularly if they are impacted by health or mobility issues and reliant on the person nominated.[75]

10.52 To protect against coercion or fraud, stakeholders suggested that Centrelink run compulsory background checks on proposed nominees.[76] It was also suggested that Centrelink staff interview proposed principals and nominees so that Centrelink officers may identify any risk factors associated with undue influence.[77] Legal Aid NSW suggested that the principal should be contacted to verify that the nomination is

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73 See, eg, Welfare Rights Centre NSW, *Submission 184*; Seniors Rights Service, *Submission 169*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Legal Aid NSW, *Submission 140*.

74 Legal Aid NSW, *Submission 140*.

75 Seniors Rights Victoria, *Submission 171*.

76 Eastern Community Legal Centre, *Submission 177*; Australian Association of Social Workers, *Submission 153*; UNSW Law Society, *Submission 117*.

77 Welfare Rights Centre NSW, *Submission 184*; Seniors Rights Service, *Submission 169*; National Seniors Australia, *Submission 154*.

genuine and to have explained what the effect of the nominee arrangement is, and to let the person know how to revoke the nomination.[78]

10.53 The ALRC considers that a requirement for direct personal contact strikes an appropriate balance, retaining the accessibility of nominee applications for principals, while putting in place a simple preventative measure against abuse and misuse by nominees. Early and direct telephone or personal contact with principals could help to avoid forgeries or inappropriate nominees.

10.54 A policy in favour of direct personal contact with people over Age Pension age would have wide application. For example, it could also be applied to people who receive care from applicants for Carer Payments. Where care providers qualify for Carer Payment, it would be prudent for Centrelink staff to speak with the person under care to confirm that the person is seeking the arrangement before authorising Carer Payment.[79]

10.55 A direct contact policy could also be applied in the context of the gifting rules. Legal Aid NSW suggested that when Centrelink becomes aware that an aged pensioner has, for example, transferred an interest in their home for little or no value, Centrelink should not immediately suspend payments. Legal Aid NSW suggests that Centrelink should instead deploy a social worker to clarify the circumstances and make an assessment of the person's decision-making ability and whether the transfer was made knowingly. Centrelink could also use this contact to make it known to the person that they can seek Legal Aid.[80]

10.56 Similarly, granny flat arrangements, which require the older person in receipt of Age Pension to advise Centrelink of the arrangement, provide Centrelink staff with an opportunity to have contact with the older person. Direct contact could enable Centrelink to confirm that the person is entering the arrangement willingly; is aware of the criteria required to show a granny flat interest and the exceptions where elder abuse is apparent; and has been advised of the free financial counselling service offered by Centrelink.

10.57 This proposal does not stand alone. The following proposals—to articulate roles and responsibilities and provide education discussed below—would also strengthen protections for principals in nominee arrangements and other older persons interacting with Centrelink.

Enhanced understanding of roles and responsibilities

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

78 Legal Aid NSW, *Submission 140*.
79 Australian Association of Social Workers, *Submission 153*.
80 Legal Aid NSW, *Submission 140*.

10.58 Older persons and third parties to arrangements involving Centrelink may not have a full understanding of their roles and responsibilities under the arrangement. For example, payment nominees may not be aware that they have fiduciary duties; carers may not understand the scope of their role and responsibilities, including their entitlement to respite; and older persons may not understand their rights.

10.59 Arrangements that involve Centrelink can transfer significant powers and responsibilities to parties to the arrangements. Payment nominees may receive all or part of a person's income, and are trusted to use those funds only for the benefit of the principal. Carers in receipt of Carer Payment are responsible for a person's health and wellbeing, and can often be involved in decisions regarding medical care.

10.60 Stakeholders have suggested a number of ways in which the understanding of roles and responsibilities may be improved. For example, it has been suggested that Centrelink should develop clear guidelines and standards for payment nominees and carers, outlining their roles and responsibilities.[81]

10.61 Greater use of Centrelink forms to clearly and accurately inform people of their roles and responsibilities has also been discussed. For example, the current design of the nominee authorisation application form places little emphasis on the responsibilities of the nominee.[82] Information regarding the obligations of a nominee is put two pages before the signed declaration of the nominee. Nominee obligations are directed toward the principal, and at no point does the form state in clear terms to the nominee what their obligations to the principal are. National Seniors suggested that greater use of the nominee application form could be made to inform and deter abuse. It proposed that the form explicitly state the penalty for not producing records (60 penalty points, equating to $10,800); the penalty at law for misuse of funds to the benefit of the nominee; and information about the review process.[83]

10.62 With respect to Carer Payment, ADA Australia suggested the development of an agreed care plan between carers and older persons to be under care.[84] A care plan could be founded on ADAT outcomes,[85] provide a clear statement of what care needs to be provided, and outline respite options for the carer.

10.63 Centrelink could produce tools within their processes to provide greater protections. It has been proposed that Centrelink provide a mandatory pro-forma agreement for those older persons who receive the Age Pension (or other pension) who are seeking a granny flat arrangement. The pro-forma agreement could operate to ensure that older persons are aware of their rights and obligations under a granny flat agreement; provide protections for older persons should relationships break down; and,

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81 Office of the Public Advocate, *Submission 149*; ADA Australia, *Submission 150*.

82 Authorising a Person or Organisation to Enquire or Act on Your Behalf (SS313): <www.humanservices.gov.au>.

83 National Seniors, *Submission 154*.

84 ADA Australia, *Submission 150*.

85 As discussed above.

by making the agreement a mandatory requirement, remove the awkwardness often associated with asking family members to enter into a contractual arrangement.[86]

10.64 Another place where clarity is needed is in the relationship between payment nominees and other appointed fiduciaries. It is not clear in legal frameworks and other material whether, for example, an attorney under powers would have authority over a payment nominee where both had been appointed by the principal and there is a conflict. Stakeholders contend that the preferred approach Centrelink should take is to have nominees replaced with substitute decision makers where appointed because substitute decision makers have more robust statutory obligations.[87] This would also provide continuity of financial management and reduce complexity.[88]

Enhancing awareness of risk

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

10.65 The ALRC views staff training as a key component of the proposed Department of Human Services' elder abuse strategy (Proposal 10-1).

10.66 Stakeholders have told the ALRC that Centrelink frontline staff are not specifically trained to deal with elder abuse. For example, the Eastern Community Legal Centre noted that, in their experience, 'identification of and response to elder abuse by Centrelink is either ad hoc or non-existent'.[89] State Trustees Victoria advised that it has been contacted by social workers from Centrelink concerned about a client, and it is the experience of the Trustees that Centrelink staff do not have access to clear guidelines or procedures in how to respond to elder abuse.[90]

10.67 Staff training would be required to successfully implement the policies outlined above. Stakeholders have observed that staff would need to be trained to 'develop tools and prompts to enable staff to identify signs'[91] and to respond with appropriate referrals.[92] The financial counselling service, Care Inc noted that this is especially required in circumstances where staff are contacted by older persons enquiring about gifting, granny flat arrangements or entry into aged care. Here staff should be trained to pick up any 'red flags', and refer the person to the appropriate social worker or financial counsellor.[93]

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86 Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*.
87 Eastern Community Legal Centre, *Submission 177*; Caxton Legal Centre, *Submission 174*; Senior Rights (Vic), *Submission 171*; Seniors Rights Service, *Submission 169*; Office of the Public Advocate, *Submission 149*.
88 Office of the Public Advocate, *Submission 149*.
89 Caxton Legal Centre, *Submission 174*.
90 State Trustees Victoria, *Submission 138*.
91 Eastern Community Legal Centre, *Submission 177*. See also State Trustees Victoria, *Submission 138*; Advocare Inc (WA), *Submission 86*; Law Council of Australia, *Submission 61*.
92 ARAS, *Submission 166*; National Seniors Australia, *Submission 154*; Carers Australia, *Submission 157*.
93 Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.

10.68 The WRC said there is a need for training of specialist staff—such as the Indigenous Service Officers, Multicultural Service Officers and Community Engagement Officers—to provide support and referrals to older persons. Assessment Officers, who deal with complicated financial arrangements, could be used to identify and refer situations that may involve financial abuse. Financial Information Service Officers could inform and educate older people, families and carers about elder abuse and the steps needed to reduce it.[94]

10.69 Stakeholders also emphasised the need for Centrelink staff to be trained to proactively refer carers to existing carer-support services, maintaining that many carers only find out about the service after many years. Access to supports earlier could help reduce carer stress, and accidental neglect or abuse.[95]

Enhancing financial literacy

10.70 Community education to enhance the financial literacy of older persons forms an important strategy in the proposed National Plan against elder abuse, which focuses on helping older persons in protecting their rights (Proposal 2-1). Enhancing the financial literacy of older persons in agreements that involve Centrelink is critical to safeguarding against financial abuse.[96] Centrelink can play a key role in the financial literacy education of older persons regarding the interaction of personal finances with social security laws and legal frameworks.

10.71 The WRC specifically supported further education for older persons who are considering making gifts through loans or acting as guarantors to increase awareness of their social security obligations and to advise them where to seek help if needed.[97] Seniors Rights Service also suggested that Centrelink should provide an education and awareness campaign regarding the risk factors associated with granny flat arrangements. This would include informing people of the benefits of putting the agreement in writing and seeking independent financial and legal advice.[98]

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94 Welfare Rights Centre NSW, *Submission 184*. See also National Welfare Rights Network, *Submission 151*.

95 Carers Australia, *Submission 157*. Many stakeholders referred to the need to support carers, see, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139.*

96 Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; National Welfare Rights Network, *Submission 151*; Care Inc. Financial Counselling Service & The Consumer Law Centre of the ACT, *Submission 60*.

97 National Welfare Rights Network, *Submission 151*; Legal Aid NSW emphasised the need for Centrelink to advise clients that they may be able to receive Legal Aid: Legal Aid NSW, *Submission 140.*

98 Seniors Rights Service, *Submission 169*.

11. Aged Care

Contents

Summary

11.1 Older people in receipt of aged care—whether in the home or in residential aged care—may experience abuse or neglect. Abuse may be committed by paid staff, other residents in residential care settings, or family members or friends.

11.2 There are a range of existing processes in aged care through which the quality and safety of aged care is monitored. This chapter identifies these, as well as making a number of proposals for reforms to aged care laws and legal frameworks to enhance safeguards against abuse for older people in receipt of aged care. The proposals are in keeping with the broader direction of reform in aged care, which seeks to provide a more flexible aged care system for consumers of aged care, while focusing regulation on 'ensuring safety and quality [and] protecting the vulnerable'.[1]

11.3 In this chapter, the ALRC proposes:

- expanding the scope of the type of incidents required to be reported under the *Aged Care Act 1997* (Cth) (*Aged Care Act*), and establishing a reportable incident scheme;
- reforms relating to the suitability of people working in aged care—enhanced employment screening processes, and ensuring that unregistered staff are subject to the proposed National Code of Conduct for Health Care Workers;
- regulating the use of restrictive practices in aged care; and
- national guidelines for the community visitors scheme, and the introduction of an official visitors scheme to provide independent rights monitoring for people in residential aged care.

11.4 This chapter also addresses decision making in aged care. It highlights the recommendation made in the 2014 ALRC Report, *Equality, Capacity and Disability in Commonwealth Laws* (*Equality, Capacity and Disability* Report) that aged care laws should be reformed consistently with the Commonwealth decision-making model, and proposes that aged care agreements cannot require that a person has formally appointed a decision maker.

The aged care system

11.5 The Commonwealth provides funding for aged care and regulates its provision through granting approvals for providers of aged care and prescribing responsibilities for approved providers. Home care, flexible care and residential care are all regulated under the *Aged Care Act*. Additionally, entry-level home support services for older people[2] are provided through the Commonwealth Home Support Programme (CHSP)

1 Productivity Commission, *Caring for Older Australians: Overview* (Report No 53, 2011) xxv.

2 People aged 65 years and over, or 50 years and over for Aboriginal and Torres Strait Islander people: Department of Social Services (Cth), *Commonwealth Home Support Programme Manual 2015* (2015) 13.

in all states and territories except Western Australia.[3] Recipients of grants to provide services under the CHSP must comply with a range of requirements, including in relation to quality and reporting.[4]

11.6 A number of Principles made under the *Aged Care Act* also regulate the provision of aged care. Included among these Principles are Charters of Care Recipients' Rights and Responsibilities.[5] These include the right to be treated with dignity and to live without exploitation, abuse or neglect.[6] In residential care, they also include the right to live in a safe, secure and homelike environment, and to move freely both within and outside the residential care service without undue restriction.[7]

11.7 The majority of older people live at home without accessing Australian Government-subsidised aged care services.[8] However, the proportion of people receiving aged care increases with age. For example, while only 7% of people aged 65 years and over receive permanent residential care, this increases to 29.7% of people aged 85 years or over.[9]

11.8 More people receive some form of aged care at home than residential aged care. In 2014–15, 231,255 people received permanent residential care, 812,000 people accessed entry-level home care, and 83,800 people accessed home care packages provided under the *Aged Care Act*.[10]

Regulating quality of care

11.9 Ensuring quality of care is perhaps the best safeguard against abuse and neglect. The Department of Health (Cth) submitted that the existing regulatory framework in aged care 'has a strong focus on the quality and accountability of aged care services'.[11] Aged care providers argued that the existing regulatory framework was 'rigorous'.[12] Other stakeholders expressed significant concerns about systemic issues relating to the quality of care in aged care, and the processes for monitoring quality.[13] However,

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3 Negotiations for transition of entry level home care services for older people in Western Australia to the CHSP are ongoing: Ibid 3. There are plans to integrate the two home-based aged care programs—home care regulated under the *Aged Care Act*, and entry-level care provided under the CHSP—into a single care at home program from July 2018: Department of Health (Cth), *Home Care Packages—Reform* <www.agedcare.health.gov.au>.

4 Department of Social Services (Cth), above n 2, 86.

5 *User Rights Principles 2014* (Cth) schs 1–3. Approved providers have a responsibility not to act in a way that is inconsistent with care recipients' rights and responsibilities: *Aged Care Act 1997* (Cth) ss 56-1(m), 56-2(k), 56-3(l).

6 *User Rights Principles 2014* (Cth) sch 1 cl 1(d), sch 2 cl 1(b), (g), sch 3 cl 2(d).

7 Ibid sch 1 cl 1(g).

8 Department of Health (Cth), *2014–15 Report on the Operation of the Aged Care Act 1997* (2015) 8.

9 Ibid 3.

10 Ibid xii. The number of home care packages under the Act will increase to around 100,000 places nationally by 2017–18: Department of Health (Cth), above n 3.

11 Department of Health (Cth), *Submission 113*.

12 UnitingCare Australia, *Submission 162*; Leading Age Services Australia, *Submission 104*; Aged and Community Services Australia, *Submission 102*.

13 A number of submissions to this Inquiry were critical of the quality assurance systems in aged care: see, eg, Seniors Rights Service, *Submission 169*; Aged Care Crisis, *Submission 165*; Australian Nursing & Midwifery Federation, *Submission 163*; Elder Care Watch, *Submission 84*; NSW Nurses and Midwives' Association, *Submission 29*; Quality Aged Care Action Group Incorporated, *Submission 28*.

addressing such concerns requires considerations of a systemic character that are more suited to a broader review.

11.10 The task of ensuring that approved providers meet their responsibilities in relation to quality of care is shared by the Department of Health, the Australian Aged Care Quality Agency (Quality Agency), and the Aged Care Complaints Commissioner (Complaints Commissioner).

Department of Health

11.11 The Department of Health (the Department) monitors compliance with the Act and with any agreements or contracts with the provider.[14] In the event of non-compliance, the Department may take action, including imposing sanctions on the provider. Sanctions include: revoking or suspending the approved provider's approval as an aged care service provider; restricting such approval; revoking or suspending the allocation of some or all of the places allocated to a provider.[15]

Australian Aged Care Quality Agency

11.12 The Quality Agency accredits residential aged care providers, and assesses existing providers against quality standards.[16] Every residential aged care home receives one unannounced assessment against quality standards each year.[17] The Quality Agency may also perform 'review audits' when there are concerns about a home's performance.

11.13 The Quality Agency also reviews home care providers (provided under both the Act and the CHSP) as well as the National Aboriginal and Torres Strait Islander Flexible Aged Care Program against quality standards.[18]

11.14 Where non-compliance with standards is identified, the Quality Agency will require the provider to address the non-compliance and inform the Department. The Department then makes a decision about whether to take any action in relation to the non-compliance.[19] Where the Quality Agency identifies a serious risk to care recipients, the service provider and Department are notified immediately.[20]

11.15 The Quality Agency also promotes high quality care, innovation in quality management and continuous improvement among approved providers, and provides information, education and training to approved providers.[21]

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14 Department of Social Services (Cth), *Aged Care Compliance Policy Statement 2015–2017* (2015) 4.
15 *Aged Care Act 1997* (Cth) s 66-1.
16 *Australian Aged Care Quality Agency Act 2013* (Cth) s 12. See also Australian Aged Care Quality Agency, *Annual Report 2014–2015* (2015) 30. The Accreditation Standards are set out in the *Quality of Care Principles 2014*.
17 Australian Aged Care Quality Agency, above n 16, 32.
18 The Home Care Standards are specified in the *Quality of Care Principles 2014*. The National Aboriginal and Torres Strait Islander Flexible Aged Care Program has a separate quality framework, the National Aboriginal and Torres Strait Islander Flexible Aged Care Program Quality Standards.
19 Department of Social Services (Cth), above n 14, 8.
20 Department of Health (Cth), *Submission 113*.
21 *Australian Aged Care Quality Agency Act 2013* (Cth) ss 9, 12(e)–(f).

Aged Care Complaints Commissioner

11.16 The Complaints Commissioner can receive complaints from any source about concerns relating to an aged care (residential, home or flexible care) service provider's responsibilities under the Act or a provider's agreement with the Australian Government. The Commissioner has the power to direct a service provider to demonstrate that it is meeting its responsibilities under the Act or the agreement. The Commissioner can also refer matters to the Department, the Quality Agency and other relevant agencies.[22]

Aged care reforms

11.17 The aged care system is in a period of reform, the direction of which was broadly set in the 2011 Productivity Commission Report, *Caring for Older Australians*.[23] The Australian Government responded to this report with the 'Living Longer Living Better' reform package.[24] The goal of reform has been described as an aged care system that is 'more consumer-driven, market-based and less regulated'.[25] There is an increased emphasis on providing aged care in the home, and a shift to a 'consumer directed' model of home care.[26]

11.18 The move to marketisation and individualisation in aged care mirrors international trends in the provision of care for older people.[27] Delivering services in this way is said to have a number of benefits:

> First, giving service users (or their agents) purchasing power should empower users by enabling them to exercise consumer sovereignty. Second, this should improve the quality of services and reduce costs to purchasers, by forcing providers to compete for business.[28]

11.19 However, for improved choice, efficiency and quality to be realised, 'certain conditions must be met: information about the price and quality of competing suppliers must be freely available to consumers; the costs of changing suppliers must be low; and suppliers must operate in a competitive market'.[29]

11.20 This may not be the case in aged care. For example, decisions about choosing aged care may be made at a time of crisis, and at short notice, which limit the ability to

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22 Aged Care Complaints Commissioner, *Annual Report 2015–16* (2016).

23 Productivity Commission, *Caring for Older Australians* (Report No 53, 2011).

24 Rebecca de Boer and Peter Yeend, Department of Parliamentary Services (Cth), *Bills Digest*, No 106 of 2012–13 (May 2013).

25 Department of Health (Cth), above n 3. See also Aged Care Sector Committee, *Aged Care Roadmap* (2016); Department of Health (Cth), *What Has Been Achieved so Far* <agedcare.health.gov.au>.

26 Department of Health (Cth), *Why Is Aged Care Changing* <www.agedcare.health.gov.au>. Additional changes to home care will commence on 27 February 2017, and will, among other things, provide that funding for a home care package will follow the consumer, and provide greater portability of home care packages: Department of Health (Cth), *Increasing Choice in Home Care* <www.agedcare.health.gov.au>.

27 See, eg, Deborah Brennan et al, 'The Marketisation of Care: Rationales and Consequences in Nordic and Liberal Care Regimes' (2012) 22(4) *Journal of European Social Policy* 377, 378; Michael D Fine, 'Individualising Care. The Transformation of Personal Support in Old Age' (2013) 33(3) *Ageing & Society* 421.

28 Brennan et al, above n 27, 379.

29 Ibid.

make informed choices. Additionally, where continuity of care is important, the transaction costs of switching providers may limit an aged care consumer's ability to choose other, higher quality, service providers. And finally, consolidation of providers to achieve economies of scale may result in a concentrated market and limit competition over quality and price.[30]

11.21 Some stakeholders were concerned by this approach to the provision of aged care. For example, Aged Care Crisis argued that because aged care recipients are vulnerable, 'the necessary conditions for an unrestricted market to operate do not exist'. The result, it argued, is that 'aged care is a failed market and it has been failing citizens for a long time … The failure to provide basic and empathic care to the vulnerable is a form of elder abuse'.[31]

11.22 Concerns also exist about the move to individualisation through consumer directed care. Consumer directed care is 'both a philosophy and an orientation to service delivery'.[32] It seeks to empower aged care recipients as 'consumers' and provide them with control of the types of care and services they receive, and how they are delivered. It also seeks to utilise market forces to promote improvements in quality.[33]

11.23 However, some have argued that there are risks of abuse in this model. For example, the Office of Public Advocate (Vic) submitted that its main concern was 'how people with cognitive impairment or mental ill-health are assisted to make decisions in these frameworks'.[34] Other submissions raised concerns about the ability of older people to access and understand meaningful information about care choices.[35] The Australian College of Nursing, for example, said that

> A significant risk of [consumer directed care] is an older person's lack of awareness or understanding of the range of services and service alternatives that are available to them. If a care and/or service recipient is not appropriately informed they may select service options that are not in their best interest or of greatest benefit to them.[36]

11.24 The Complaints Commissioner emphasised the importance of good information provision in consumer directed care:

> The provision of good information at times and in a form that takes account of the individual's needs and circumstances is another important safeguard for consumers as they exercise greater choice and control of their aged care and the associated funding. Good information, including how to raise concerns, is vital and helps to correct the

30 Ibid 379–80.
31 Aged Care Crisis, *Submission 165*.
32 Department of Health (Cth), *Consumer Directed Care* <www.agedcare.health.gov.au>.
33 ARC Centre of Excellence in Population Ageing Research, *Aged Care in Australia: Part II—Industry and Practice* (Research Brief 2014/02) 18.
34 Office of the Public Advocate (Vic), *Submission 95*.
35 See, eg, Aged Care Complaints Commissioner, *Submission 148*; Australian College of Nursing, *Submission 147*; Queensland Nurses' Union, *Submission 47*.
36 Australian College of Nursing, *Submission 147*.

> power imbalance for the consumer. The provision of information must be done well, and in accordance with the requirements of informed consent in the health sector.[37]

11.25 A legislated review of the reforms made by the Living Longer Living Better package is underway.[38] The 'Aged Care Legislated Review' must consider, among other things: demand for aged care places; control of the number and mix of aged care places; further movement towards a consumer directed care model; equity of access; and workforce strategies.[39] It must report by 1 August 2017.[40] This review is the appropriate place to consider the broader policy settings for aged care, including in relation to marketisation and individualisation.

11.26 Further reform is also planned for quality assurance processes in aged care. There are plans to consolidate a range of standards applying to approved providers of residential and home care into a single set of aged care quality standards.[41] Other reforms aim to improve transparency about quality of care. For example, a voluntary National Aged Care Quality Indicator Program began on 1 January 2016 for residential aged care. Home care quality indicators are being developed, with implementation planned for 2018.[42]

11.27 Concerns were raised in this Inquiry about how quality and safety will be regulated in an environment in which approved home care providers can sub-contract or broker services to provide consumer directed care to an older person. Where approved providers do sub-contract or broker services, they remain responsible for service quality and meeting all regulatory responsibilities.[43] However, submissions to this Inquiry suggest that an emerging issue will be how best to regulate the quality and safety of home care in the further reforms to 'streamline' quality accreditation that have been signalled.[44]

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37 Aged Care Complaints Commissioner, *Submission 148*.

38 *Aged Care (Living Longer Living Better) Act 2013* (Cth) ss 4(1), (4); Department of Health (Cth), *Aged Care Legislated Review* <www.agedcare.health.gov.au>.

39 *Aged Care (Living Longer Living Better) Act 2013* (Cth) s 4(2).

40 Department of Health (Cth), above n 38.

41 Consultation on draft standards is planned for 2017: Department of Health (Cth), *Single Set of Aged Care Quality Standards* <www.agedcare.health.gov.au>.

42 Department of Health (Cth), *About the National Aged Care Quality Indicator Program* <www.agedcare.health.gov.au>; Department of Health (Cth), *Home Care Quality Indicators* <www.agedcare.health.gov.au>. The Department has also indicated that it is developing options for making additional quality information publicly available to 'help consumers make informed choices' about care: Department of Health (Cth), *Improved Information on Quality of Services* <www.agedcare.health.gov.au>.

43 Department of Health (Cth), *Home Care Packages Programme Operational Manual: A Guide for Home Care Providers* (2015) 38.

44 Department of Health (Cth), *Streamlined Accreditation Arrangements Across Residential and Community Aged Care* <www.agedcare.health.gov.au>. Submissions raising this issue included Australian Nursing & Midwifery Federation, *Submission 163*; NSW Nurses and Midwives' Association, *Submission 29*; Older Women's Network NSW, *Submission 136*.

11.28 Improvements to quality assurance processes may prevent or lessen the risk of elder abuse. For example, in developing the single set of aged care quality standards, consideration could be given to including standards relating to approved providers' provision of safeguards against abuse and neglect of care recipients.[45]

11.29 Some stakeholders advocated for increased transparency of quality information.[46] For example, Alzheimer's Australia submitted that:

> Data on performance and quality of aged care services should be routinely collected, analysed, and made publicly available, to assist consumers in making informed choices in regard to the services they receive. The public availability of such data will also help to drive service competition and quality improvement.[47]

11.30 However, National Seniors expressed caution about the ability of quality indicators to address elder abuse, arguing that

> there is a real threat that these may in fact heighten rather than lessen risk. There have already been concerns expressed, for example, that specific quality indicators create perverse incentives which divert resources at the expense of other areas. … Unless quality indicators are able to focus resources towards the things that residents and their representatives themselves believe make them safe and supported, quality monitoring systems such as the QI Programme will not actively reduce the risks of abuse in residential care. The same will be true in the home care setting.[48]

11.31 The Aged Care Legislated Review, in its analysis of whether further steps could be taken to move to a consumer driven demands model of aged care service delivery, provides an opportunity to consider the sufficiency of publicly available information about quality of care.[49] In particular, it might explore possibilities for making available information relating to a provider's provision of safeguards against abuse and neglect of care recipients.

Abuse and neglect in aged care

11.32 Some stakeholders submitted that the majority of elder abuse occurs in the community, rather than in formal aged care.[50] There is no comprehensive data available on the prevalence of abuse of people receiving aged care. There is data available on numbers of alleged or suspected 'reportable' assaults in residential aged care notified to the Department of Health each year. However, as the Department of Health has noted, this information 'reflects the number of reports made by providers …

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45 For example, safeguarding people from abuse is a fundamental standard for care in the UK: *The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014* cl 13. See also ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; Queensland Nurses' Union, *Submission 47*; Alice's Garage, *Submission 36*.

46 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; Townsville Community Legal Service Inc, *Submission 141*; Capacity Australia, *Submission 134*; Elder Care Watch, *Submission 84*; Australian and New Zealand Society for Geriatric Medicine, *Submission 51*; Queensland Nurses' Union, *Submission 47*.

47 Alzheimer's Australia, *Submission 80*.

48 National Seniors Australia, *Submission 154*.

49 *Aged Care (Living Longer Living Better) Act 2013* (Cth) s 4(2)(c).

50 See, eg, Resthaven, *Submission 114*; Aged and Community Services Australia, *Submission 102*.

and does not reflect the number of substantiated allegations'.[51] Reportable assaults also capture a more narrow range of conduct than what may be described as elder abuse.

11.33 There is also data available relating to complaints made about home and residential aged care to the Complaints Commissioner or its predecessor schemes. Not all these complaints relate to abuse or neglect. Further, not all complaints of abuse are substantiated.[52] A number of stakeholders also reported the results of projects that capture reports of abuse or neglect in aged care,[53] and there is some evidence available relating to deaths in nursing homes.[54]

11.34 Stakeholders reported many instances of abuse of people receiving aged care. These included reports of abuse by paid care workers[55] and other residents of care homes[56] as well as by family members and/or appointed decision makers of care recipients.[57] For example, Alzheimer's Australia provided the following examples of physical and emotional abuse:

> When working as a PCA [personal care assistant] in 2 high care units, I witnessed multiple, daily examples of residents who were unable to communicate being abused including: PCA telling resident to 'die you f---ing old bitch!' because she resisted being bed bathed. Hoist lifting was always done by one PCA on their own not 2 as per guidelines and time pressures meant PCAs often using considerable physical force to get resistive people into hoists; resident not secured in hoist dropped through and broke arm—died soon after; residents being slapped, forcibly restrained and force-fed or not fed at all; resident with no relatives never moved out of bed, frequently left alone for hours without attention; residents belongings being stolen and food brought in by relatives eaten by PCAs.[58]

11.35 The ALRC also received reports of other forms of abuse, including sexual[59] and financial abuse.[60] Restrictions on movement[61] and visitation[62] were also reported. Many submissions also identified neglect of care recipients.[63]

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51 Department of Health (Cth), *Submission 113*.

52 Aged Care Complaints Commissioner, *Submission 148*.

53 See, eg, Seniors Rights Service, *Submission 169*; ARAS, *Submission 166*; Aged Care Crisis, *Submission 165*; Elder Care Watch, *Submission 84*; NSW Nurses and Midwives' Association, *Submission 29*. See also NSW Nurses and Midwives Association, *Who Will Keep Me Safe? Elder Abuse in Residential Aged Care* (2016).

54 See further Professor J Ibrahim, *Submission 63*.

55 See, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; TASC National, *Submission 91*; Advocare Inc (WA), *Submission 86*; Elder Care Watch, *Submission 84*; Alzheimer's Australia, *Submission 80*; Name Withheld, *Submission 19*.

56 See, eg, Name Withheld, *Submission 189*; C Jenkinson, *Submission 188*; Alzheimer's Australia, *Submission 80*.

57 See, eg, Seniors Rights Service, *Submission 169*; L Barratt, *Submission 155*; State Trustees Victoria, *Submission 138*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*; Older Persons Advocacy Network, *Submission 43*.

58 Alzheimer's Australia, *Submission 80*. For a number of other examples, see, eg, Australian Nursing & Midwifery Federation, *Submission 163*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Elder Care Watch, *Submission 84*; Advocare Inc (WA), *Submission 86*.

59 See, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Dr C Barrett, *Submission 68*. See also Rosemary Mann et al, 'Norma's Project: A Research Study into the Sexual Assault of Older Women in Australia' (Monograph Series No 98, Australian Research Centre in Sex, Health and Society, La Trobe University, 2014).

60 See, eg, Older Persons Advocacy Network, *Submission 43*; State Trustees Victoria, *Submission 138*.

Compulsory reporting of abuse and complaint handling

Proposal 11–1 Aged care legislation should establish a reportable incidents scheme. The scheme should require approved providers to notify reportable incidents to the Aged Care Complaints Commissioner, who will oversee the approved provider's investigation of and response to those incidents.

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

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

(a) a sexual offence, sexual misconduct, assault, fraud/financial abuse, ill-treatment or neglect committed by a staff member on or toward a care recipient;

(b) a sexual offence, an incident causing serious injury, an incident involving the use of a weapon, or an incident that is part of a pattern of abuse when committed by a care recipient toward another care recipient; or

(c) an incident resulting in an unexplained serious injury to a care recipient.

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

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

11.36 The ALRC proposes the introduction of a reportable incident scheme in aged care, modelled on New South Wales' disability reportable incidents scheme, and that this scheme replace the current statutory compulsory reporting scheme. Under the proposed scheme, approved providers would be required to report a broader range of abusive conduct to the Complaints Commissioner. The scheme should sit alongside existing complaint mechanisms, and strengthen the system's responses to complaints (including compulsory reports) of abuse and neglect.

61 See, eg, ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Capacity Australia, *Submission 134*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*; Older Persons Advocacy Network, *Submission 43*.

62 See, eg, Legal Aid ACT, *Submission 58*; Law Council of Australia, *Submission 61*.

63 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; Capacity Australia, *Submission 134*; Queensland Nurses' Union, *Submission 47*; NSW Nurses and Midwives' Association, *Submission 29*; Aged Care Service, Murrumbidgee Local Health District, *Submission 18*.

The current requirements for reporting allegations of abuse

11.37 Under the current system, approved providers are required to report certain allegations of abuse in respect of residential care recipients. 'Reportable assaults' are defined as

> unlawful sexual contact, unreasonable use of force, or assault specified in the *Accountability Principles* and constituting an offence against a law of the Commonwealth or a State or Territory …
>
> *staff member* of an approved provider means an individual who is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruiting agency) to provide care or other services.[64]

11.38 An approved provider must report an allegation, or a suspicion on reasonable grounds, of a 'reportable assault' on a care recipient to police and the Department of Health within 24 hours.[65]

11.39 The dual reporting requirement has been described as follows:

> The purpose of the police involvement is to assess whether criminal activity has occurred and if charges need to be laid. The police are the best and most appropriate authorities to make that judgment. The purpose of reporting to the Department is for us to consider whether the approved provider has actually met its responsibilities under the aged-care legislation.[66]

11.40 There are exemptions to reporting 'resident–on–resident' incidents, where the resident alleged to have committed the offending conduct has a pre-diagnosed cognitive impairment, provided the approved provider implements arrangements to manage the person's behaviour within 24 hours.[67]

11.41 Approved providers must also take reasonable steps to ensure that staff know their reporting obligations, and take reasonable measures to protect those reporting reportable assaults.[68]

11.42 In 2014–2015, prior to the current complaints scheme being implemented, there were 2,625 notifications of 'reportable assaults'.[69] Of these reports, 2,199 were recorded as alleged or suspected unreasonable use of force, 379 as alleged or suspected unlawful sexual contact, and 47 as both.[70] This represents an incidence of reports of suspected or alleged assaults of 1.1% of people receiving permanent residential care during that period.[71]

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64 *Aged Care Act 1997* (Cth) s 63-1AA(9).
65 Ibid s 63-1AA(2).
66 Senate Standing Committee on Community Affairs, Parliament of Australia, *Aged Care Amendment (Security and Protection) Bill 2007 (Provisions)* (2007) 11.
67 *Accountability Principles 2014* (Cth) s 53.
68 *Aged Care Act 1997* (Cth) s 63-1AA(5)–(8).
69 Department of Health (Cth), above n 8, 107.
70 Ibid.
71 Ibid.

11.43 There is little information beyond these numbers that gives any more detail on these incidents, including who the alleged perpetrator was, what action was taken in response to the report, or the outcome.

The current framework for complaint handling

11.44 The complaint handling process with respect to aged care incorporates two aspects. First, approved providers are required under the *Aged Care Act* to have a 'complaint resolution mechanism', and to use the mechanism to address complaints made by, or on behalf of, a care recipient.[72] Secondly, complaints can be made to the Complaints Commissioner.

11.45 The Complaints Commissioner submitted to the ALRC that, in the first six months of 2016, her office received just 113 complaints identifiable with the keyword 'abuse', representing 2% of all complaints received by her office in that period.[73]

11.46 Reportable assaults are not automatically treated as 'complaints'. The Complaints Commissioner can receive complaints of 'mandatory reports' (or reportable assaults) referred by the Department of Health,[74] however it is unclear how often, if ever, this occurs.

Gaps in the current frameworks

11.47 Both the reportable assault scheme and the complaints scheme enable reports of abuse and neglect in aged care to be brought to light, by providing mechanisms where data relating to complaints of abuse against older people receiving Commonwealth funded aged care is captured. There are, however, gaps in how the two schemes operate together to respond to incidents of abuse, and how they function to safeguard care recipients.

11.48 First, an approved provider is not required to take any 'action' in response to a reportable assault, other than to report it and maintain appropriate records. This means that a provider can satisfy the regulatory compliance obligations without performing any sort of investigation or review into the incident. There are quality standards that providers are required to maintain, but these focus more broadly on quality of care provided, rather than a provider's response to a particular incident.

11.49 Second, reportable assaults are not automatically treated as 'complaints', and therefore the response of approved providers to those incidents is not monitored. Indeed, the Complaints Commissioner would have to rely on a referral of information from either a victim, another concerned party (for example, a family member or care worker) or the Department before that office would know about a reportable assault having occurred.

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72 *Aged Care Act 1997* (Cth) s 56-4, 59-1(1)(g).
73 Aged Care Complaints Commissioner, *Submission 148*.
74 Ibid.

Approved provider response to reportable assaults

11.50 The Department of Health describes its role as 'confirming that reporting is made within the specified timeframe; that there are appropriate systems in place for reporting; and that appropriate action has been taken'.[75] It states that it 'may' take compliance action where approved providers do not meet their obligations under the Act.

11.51 The Department's unequivocal position is that 'investigation of alleged assault is the responsibility of the police who will determine whether the incident is criminal in nature and what further action is required'.[76]

11.52 It is concerning that there is no requirement that an approved provider perform any type of investigation into incidents concerning care recipients in their care. There are likely to be many matters where police determine not to pursue a criminal investigation, yet where there may still be significant concerns and risks arising from the incident that require investigation and analysis to safeguard and protect those in care—both the alleged victim and other care recipients. That an incident is unlikely to result in a criminal investigation or prosecution ought not preclude it from being investigated and examined by the agency responsible for providing care to the alleged victim. There may still be significant risks to the victim or others that could be identified and responded to if an appropriate investigation were performed.

11.53 The ALRC acknowledges the comments of some approved providers that 'responsible' providers will take appropriate action in response to reportable assaults.[77] However, given the serious nature of the incidents captured by the scheme; the approved providers' duty of care owed to, and level of control over the day to day lives of, care recipients; the vulnerability of many of those care recipients; and the potential for conflicts of interest in relation to the management of reportable assaults, there is a strong argument supporting the establishment of a scheme that would function to increase accountability, transparency and organisational responses to serious incidents of abuse of older people.

Treating reportable assaults as complaints

11.54 Proposal 11-1 to 11-3 provide a framework that brings together the aged care complaints function and an oversight function for reportable incidents under the jurisdiction of the Complaints Commissioner.

11.55 The complaints scheme has already had several incarnations. At one time the Act provided for a 'Complaints Investigation Scheme' (CIS). The CIS was a broad complaints scheme and it was not restricted to responding to 'reportable assault' matters. Unlike the current scheme, it was not independent of the Department of Health.

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75 Department of Health (Cth), *Guide for Reporting Reportable Assaults* <www.agedcare.health.gov.au/>.
76 Ibid.
77 See, eg, UnitingCare Australia, *Submission 162*; Resthaven, *Submission 114*.

11.56 The Aged Care Complaints Scheme replaced the CIS in 2011, following a review, that had emphasised the importance of having an investigatory function to resolve complaints, that could operate alongside a resolution or mediation–focused mechanism:

> We would also note that the current complaints scheme embodies significant reforms on the earlier scheme. Many of these reforms are critical to achieving positive outcomes for complainants and for systemic improvements in service delivery in aged care along with identifying and rectifying matters of serious concern. The move away from mediation towards investigation has been a positive step. At the same time, as noted above, we would see benefits in ensuring that the shift away from mediation is not seen as a rejection of individual complaints resolution as a legitimate dimension of the scheme.[78]

11.57 When the legislation establishing the independence of the Complaints Commissioner was passed, part of the rationale was said to be that 'the change will result in a separation of complaints management from the funder and regulator, which reflects best practice in complaints handling'.[79]

11.58 However as noted, 'reportable assaults' are not required to be notified to the Complaints Commissioner. The Commissioner has said that the focus of her role is on 'ensuring service providers have acted appropriately to: ensure any affected residents are safe; find out what happened; ensure it doesn't happen again; and the right people are told'.[80]

11.59 The ALRC considers that such incidents ought to be responded to as 'complaints'. There is a strong argument for incidents of such a serious nature (those that are defined as a 'reportable assault') to be *required* to be reported in a way that triggers an appropriate investigation and response (by the approved provider) that is able to be monitored or overseen by an independent complaints–handling body that can also support and advise the provider to ensure best practice in the management of the incident.

11.60 The ALRC is of the view that there is significant gap in the legislative protection afforded under the current reporting regime, and notes that it was designed to offer 'safeguards to older people' receiving aged care. As observed by the NSW Ombudsman

> a reporting and independent oversight system is an important and necessary component of a comprehensive framework for preventing and effectively responding to, abuse, neglect and exploitation of more vulnerable people members of the community … and is fundamental to enabling a genuinely person-centred approach to supports.[81]

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78 Associate Professor Merrilyn Walton, 'Review of the Aged Care Complaints Investigation Scheme' (Commonwealth Ombudsman, September 2009) 11.

79 Commonwealth *Parliamentary Debates*, House of Representatives, 13 August 2015, 5240 (Mitch Fifield).

80 Aged Care Complaints Commissioner, *Submission 148.*

81 NSW Ombudsman, *Submission 160*.

11.61 To address these gaps, the ALRC proposes that a reportable incident scheme be established in aged care.

Reportable incidents

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

11.63 The proposed reportable incident scheme is modelled on the 'disability reportable incidents scheme' (DRIS), established by Part 3C of the *Ombudsman Act 1974* (NSW).[82]

11.64 The ALRC acknowledges the concerns raised by stakeholders regarding the compulsory reporting regime,[83] and has considered the expanded scope of conduct captured by the DRIS, and the distinction between certain categories of incident under that scheme. The benefits of reportable conduct schemes have been acknowledged, including their ability to improve systemic responses across a sector.[84]

11.65 The DRIS provides an instructive model upon which to base a reporting regime for aged care, as it captures people who are closer to the cohort of people the subject of this Inquiry, that is, older people with disability, and draws on 16 years of experience of the employment related child-protection function provided by Part 3A.[85]

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82 Part 3C is modelled on Part 3A of the *Ombudsman Act 1974*, which has provided for a reportable conduct scheme since 1999. There are currently no equivalent schemes in other jurisdictions, however Victoria and the ACT have reported they are developing them, and COAG has welcomed a proposal for 'nationally harmonised reportable conduct schemes to improve oversight of responses to allegations of child abuse and neglect [and has] agreed, in-principle, to harmonise reportable conduct schemes, similar to the current model in operation in NSW and announced in the ACT and Victoria': Department of Justice and Regulation (Vic), *Overview of Child Safe Standards and Reportable Conduct Scheme* <www.justice.vic.gov.au/>; Andrew Barr, MLA, 'New Reportable Conduct Scheme to Better Protect Children' (Media Release, 9 June 2016); Council of Australian Governments *Communiqué* (1 April 2016).

83 Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; Aged Care Crisis, *Submission 165*; Australian College of Nursing, *Submission 147*; Townsville Community Legal Service Inc, *Submission 141*; UNSW Law Society, *Submission 117*; National LGBTI Health Alliance, *Submission 116*; Office of the Public Advocate (Vic), *Submission 95*; Northern Territory Anti-Discrimination Commission, *Submission 93*; Law Council of Australia, *Submission 61*.

84 See, eg, Department of Justice and Regulation (Vic), above n 82; NSW Ombudsman, *Strengthening the Oversight of Workplace Child Abuse Allegations. A Special Report to Parliament under Section 31 of the Ombudsman Act 1974* (2016).

85 'Disability' is defined as 'long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person's full and effective participation in the community on an equal basis with others': *Disability Inclusion Act 2014* (NSW) s 7.

11.66 The NSW Ombudsman has said that it has received 'consistent feedback' that providers subject to the DRIS welcome the introduction of the scheme, and have embraced the opportunity to receive feedback and guidance on best practice in preventing and responding to serious incidents.[86]

11.67 The proposed scheme sits in the *Aged Care Act*, however there is a cohort of older people that receive aged care and support from services that are not in receipt of federal funding,[87] and are therefore not cared for by 'approved providers' covered by the *Aged Care Act*. There is an argument that it would be possible for the scheme to apply more broadly, by linking it not to the *Aged Care Act*, but rather establishing a nexus with Australia's international obligations under various instruments and relying on the external affairs power.[88]

11.68 Australia has a number of obligations under various instruments, including the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of Persons with Disabilities* and the *International Convention on Civil and Political Rights*. These obligations include, for example, taking 'all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities … from all forms of exploitation, violence and abuse'.[89]

11.69 It would be preferable to cast a wide net to ensure safeguards are extended to all older people receiving aged care, irrespective of whether the provider is regulated under the *Aged Care Act*. However, the ALRC's preliminary view is that it would be more appropriate, and offer more certainty, to establish the scheme under existing Commonwealth legislation, where an existing policy position supporting compulsory reporting already exists specifically to safeguard those receiving care under the Act. After evaluation, consideration could be given to potentially expanding into other areas in the future.

The independent oversight and monitoring role

11.70 A fundamental feature of the scheme is the independence of the oversight and monitoring body. Review mechanisms that are independent ensure greater accountability and transparency: that decision making by the review body is based on relevant information and facts, and free from the influence of extraneous factors which ought not be considered. Such factors might include political or social pressures or, in the context of schemes like the DRIS and in the aged care sector, real or potential conflicts of interest. A typical example might arise where an organisation is

86 NSW Ombudsman, Submission No 29 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings* (April 2015) 23.

87 For example, private enterprises including boarding houses and retirement homes and villages.

88 For a discussion of 'potential basis' for the Commonwealth legislating in respect of elder abuse by relying on the external affairs power, see Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Research Report 35, Australian Institute of Family Studies, 2016).

89 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

investigating an allegation in respect of one of its staff members, or the standard of service being provided.

11.71 The DRIS requires the head of an agency covered to notify all reportable incidents to the NSW Ombudsman within 30 days of becoming aware of the allegation. The Ombudsman, on receipt of the notification, will determine whether the agency's investigation into the incident has been properly conducted and whether appropriate action to manage risk has been taken. The Ombudsman may monitor the investigation and, where an incident is the subject of monitoring, the agency is required to report the results of investigation and risk management action taken, to the Ombudsman.

11.72 The Ombudsman reported that the DRIS legislation 'requires and enables' it to

> **receive and assess notifications** concerning reportable allegations or convictions
>
> **scrutinise agency systems** for preventing reportable incidents, and for handling and responding to allegations of reportable incidents
>
> **monitor and oversight** agency investigations of reportable incidents
>
> **respond to complaints** about inappropriate handling of any reportable allegation or conviction
>
> **conduct direct investigations** concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable incident or conviction
>
> **conduct audits and education and training** activities to improve the understanding of, and responses to, reportable incidents, and
>
> **report on trends and issues** in connection with reportable incident matters.[90]

11.73 The DRIS has a number of elements that operate together to form a necessary component of a safeguarding framework. The ALRC proposes that these elements form the foundation of the aged care model. These elements include:

- an independent oversight and monitoring body;
- a definition of 'reportable assault' that captures an appropriate scope of conduct, but distinguishes between assaults perpetrated by those with cognitive impairment, and other incidents;
- powers to enable effective oversight and monitoring, including powers to compel production of documents, to provide information, and to conduct 'own motion' investigations; and
- information sharing provisions.

11.74 The ALRC proposes that the Complaints Commissioner be the independent oversight and monitoring body. The Complaints Commissioner already has jurisdiction to resolve complaints about aged care services, as well as to educate service providers about responding to complaints.[91]

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90 NSW Ombudsman, *Submission 160*.

91 Aged Care Complaints Commissioner, *Submission 148*; *Aged Care Act 1997* (Cth) pt 6.6.

11.75 The Commissioner noted the importance of working cooperatively with complainants and providers to uphold the rights of care recipients, and described the focus of her office as 'resolution rather than sanctions on individuals or aged care services'.[92]

Powers

11.76 The Complaints Commissioner can exercise a range of powers when working to resolve complaints, including the power to commence own-initiative investigations.[93] The Commissioner may also appoint 'authorised complaints officers'. These officers are able to exercise a number of powers, including the power to search premises, take photographs, inspect documents and to ask people questions.[94] However they are unable to enter the premises without the consent of the occupier.[95]

11.77 The NSW Ombudsman has substantial powers conferred upon it under the *Ombudsman Act 1975* (NSW). These include powers to require the production of documents, to require statements of information,[96] to enter and inspect premises,[97] to hold inquiries,[98] to make recommendations,[99] and to report to Parliament and to the public.[100] These powers enable it to effectively oversee and monitor agencies that are subject to the scheme.

11.78 Where the Complaints Commissioner, upon assessing a complaint, forms a view that an approved provider is not meeting their responsibilities under the Act, the Commissioner may issue a direction that the provider make certain changes. Where a provider fails to comply with the direction, the Commissioner may refer the matter to the Department to consider compliance action,[101] or to the Quality Agency to consider any systemic issues identified.[102]

11.79 It is worth noting that the NSW Ombudsman retains a complaints mechanism that relates to disability service providers other than the compulsory reports required under the DRIS. The practical effect is that, while anyone may make a complaint under the complaints function, there is a requirement for service providers to notify certain serious incidents under the DRIS.

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92 Aged Care Complaints Commissioner, *Submission 148.*
93 Ibid.
94 *Aged Care Act 1997* (Cth) s 94B-2.
95 Ibid s 94B-3(3).
96 *Ombudsman Act 1974* (NSW) s 25U(3).
97 Ibid s 20.
98 Ibid s 19.
99 Ibid pt 4.
100 Ibid s 31.
101 Aged Care Complaints Commissioner, *Guidelines for the Aged Care Complaints Commissioner Version 2.0* (2016).
102 Aged Care Complaints Commissioner and Australian Aged Care Quality Agency, *Memorandum of Understanding* (2016); Department of Health (Cth) and Aged Care Complaints Commissioner, *Memorandum of Understanding* (2016).

11.80 The impact on the number of incidents was evident within the first eight months of the DRIS' operation, with the NSW Ombudsman reporting that the DRIS received 437 notifications under the scheme.[103] This represents approximately 50 notifications per month. Deputy Ombudsman, Steve Kinmond, noted the significant increase in reports emanating from the DRIS when compared to those coming through the complaints mechanism that is also managed by the NSW Ombudsman:

> Comparing the data we have in relation to complaints of abuse and neglect, and of course that is one of the functions we perform as compared to the notification of abuse and neglect matters that we have received in relation to the reportable incidents scheme, there is an over 10 times increase in the number of abuse and neglect matters that we receive from this mandatory reporting system than what we receive under the complaints system.[104]

11.81 Mr Kinmond asserted that this provided 'a compelling case for legislative mandatory reporting for certain types of incidents'.[105]

11.82 Combining complaints and compulsory reporting would address a gap identified by some stakeholders, namely that reportable assaults are not necessarily treated as complaints, and responded to appropriately.

11.83 The current complaints system was said to be unable to respond to serious complaints. Mr Rodney Lewis, a solicitor with over 15 years of legal practice in the area of elder law, suggested there is a 'good case' for arguing that the current complaints system is 'inadequate for those whose complaints are serious and not amenable to settlement by mediation or the limited pathways which the system offers'.[106] Quality Aged Care Action Group Inc asserted that there is a 'gap between what 'should' happen and what actually does'.[107]

11.84 The safeguards afforded by the Charter of Residents Rights and Responsibilities were also criticised because the Charter has no 'enforcement or compliance mechanisms and is therefore exhortatory'.[108] Townsville Community Legal Service, in recognising the Charter rights, commented that

> whether this right [to live free from abuse and neglect] truly exists depends on how it translates into the accreditation and quality regime for aged care providers. There is a disconnect here between what the Charter says and the outcomes it produces.[109]

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103 NSW Ombudsman, Submission No 122 to Legislative Council General Purpose Standing Committee 2, Parliament of NSW, *Inquiry into Elder Abuse in NSW* (April 2016). Numbers represent DRIS notifications for the period 3 December 2014 to 25 August 2015.

104 Evidence to the Senate Standing Committee on Community Affairs, Parliament of Australia, Sydney, 27 August 2015, (Steve Kinmond).

105 Ibid.

106 R Lewis, *Submission 100*.

107 Quality Aged Care Action Group Incorporated, *Submission 28*. See also Aged Care Crisis, *Submission 165*.

108 Michael Barnett and Robert Hayes, 'Not Seen and Not Heard: Protecting Elder Human Rights in Aged Care' (2010) 14 *University of Western Sydney Law Review* 45, 57.

109 Townsville Community Legal Service Inc, *Submission 141*.

11.85 Consistent with the DRIS model, the ALRC does not propose that the Complaints Commissioner have any enforcement powers with respect to oversight and monitoring. Instead, the Commissioner should have the power to make recommendations, as well as to publicly report on any of its operations, including in respect of particular incidents or providers.

11.86 The ALRC notes the concern of the Seniors Rights Service that the Complaints Commissioner is a 'toothless tiger',[110] but suggests that there is greater potential for systemic reform through the proposed approach. It has been said that

> a truly remedial institution may not be best served by 'teeth'… an order, grudgingly accepted and implemented can only change one result. A recommendation, if it is persuasive and compelling, can change a mindset.[111]

11.87 The dual functions of complaint resolution and independent oversight and monitoring of internal complaint handling offers many benefits. It builds on the existing expertise of the Complaints Commissioner in relation to aged care; utilises and builds upon the existing complaints function; enables information captured across both functions to be utilised to develop an intelligence profile of approved providers and aged care staff and thus informs more comprehensive risk assessment and management of staff members and providers.

11.88 The proposal also incorporates an education and training element, which builds on the Complaints Commissioner's education function to 'educate people about … best practice in the handling of complaints that relate to responsibilities of approved providers under this Act and the Principles … and matters arising from such complaints'.[112]

11.89 Under the DRIS, the Ombudsman conducts education and training with service providers and key agencies on responding to serious incidents in disability services settings. This component has contributed to providers being better equipped to identify and respond to neglect and abuse; to understand the systems and processes that contribute to a 'client-safe' environment; and to understand the fundamental principles and strategies for conducting investigations.[113]

11.90 Finally, the scheme will contribute to a better understanding of the nature of serious incidents occurring in aged care, and enable data to be captured in a centralised location, thus supporting other safeguarding mechanisms including enhanced employment screening.[114]

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110 Seniors Rights Service, *Submission 169.*

111 Former Chair of the Royal Canadian Mounted Police Commission, Shirley Heafey quoted in Sankar Sen, *Enforcing Police Accountability through Civilian Oversight* (SAGE Publications India, 2010) 77.

112 *Aged Care Act 1997* (Cth) s 95A-1(2)(b).

113 NSW Ombudsman, *Submission 160*.

114 Law Council of Australia, *Submission 61*.

What should be reported?

11.91 Although some stakeholders questioned the merits of the compulsory reporting regime,[115] a strong theme in submissions was that the scope of the current compulsory reporting scheme is too restricted, and focused too heavily on regulatory compliance rather than reporting serious incidents in a way that activates an appropriate investigation and response into the matter.

11.92 Advocates and consumer groups have suggested that the scope of what constitutes a 'reportable assault' under the current scheme is inadequate. In summary, their concerns are that:

- the scope of conduct covered by the scheme was too limited and failed to include other serious forms of abuse;
- the scope was limited to care recipients in residential care;
- the exemption in respect of resident–on–resident assaults, where the offender had a pre-diagnosed cognitive impairment, afforded too broad a discretion to approved providers not to report, and resulted in a lack of understanding of how such incidents were managed, potentially raising broader safety issues in respect of other care recipients, and concealed the number and nature of such incidents.

11.93 If it is accepted that a key rationale for implementing a compulsory reporting regime is to enable visibility of such incidents so that appropriate action can be taken to protect and safeguard victims (and potential victims of abuse), it is important that any compulsory reporting scheme requires notification of an appropriate scope of serious conduct.

11.94 The proposal draws on the definition of 'reportable incident' in the DRIS, which captures a broad *range* of conduct, but draws a distinction between employee-to-client as opposed to client-to-client incidents. The DRIS categories are:

- Employee-to-client incidents—notifications are required in respect of a (relatively) broad range of conduct including any sexual offence, sexual misconduct, assault, Part 4AA offences,[116] ill-treatment and neglect;
- Client-to-client incidents—a higher threshold must be met before a notification is required, including where the incident involves a sexual offence, causes a serious injury, involves use of a weapon or is part of a pattern of abuse;
- incidents involving a contravention of an apprehended violence order (AVO) where the protected person is the person with disability;[117]
- incidents resulting in an unexplained serious injury to a person with disability.[118]

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115 See, eg, Leading Age Services Australia, *Submission 104*.
116 Part 4AA provides for fraud offences, and could capture some forms of financial abuse: *Crimes Act 1900* (NSW).
117 Referred to as intervention orders in some jurisdictions.
118 NSW Ombudsman, *Submission 160*; *Ombudsman Act 1974* (NSW) s 25P.

11.95 It is important to note the distinction, and in particular the different threshold, applicable to incidents where the alleged perpetrator is an employee, as opposed to a resident. In respect of client–to–client matters, the DRIS requires a higher threshold of harm or risk be met before they become 'reportable incidents'.

11.96 These different categories have the capacity to respond to a number of concerns raised by stakeholders.

Scope of conduct captured by 'reportable assault' in aged care

11.97 One of the concerns identified by stakeholders is that the type of conduct defined by the legislation as being a 'reportable assault' is too limited and fails to capture various forms of serious 'abuse' that can result in grave consequences for victims.[119] For example, the UNSW Law Society submitted that the reporting obligation should extend to a 'broader range of serious abuses of a non-sexual or non-physical nature' on the basis that

> globally accepted definitions of elder abuse recognise that it includes a host of practices which are detrimental to recipients of aged care [including] financial abuse, differential treatment, wilful or unintentional neglect, poor practice, bullying and psychological abuse.[120]

11.98 The Australian College of Nursing noted that information relating to 'minor' incidents can assist in assessing risk:

> There should be no provisions allowing aged care services to determine if a complaint should be reported, processed and assessed. In some cases, this information could provide important background information and build evidence in support of future claims or potentially trigger action to mitigate risks. This could be a very important measure in the community context where, for reasons such as social isolation, suspected or 'minor' incidents of elder abuse can easily go undetected and unreported.[121]

11.99 Some stakeholders, including National Seniors and the Old Colonists' Association of Victoria, advocated for a broader scope of conduct to be compulsorily reported, specifically in respect of financial abuse.[122]

11.100 Aged Care Crisis noted the 'narrow' definition of 'reportable assault', and commented they had raised concerns at the commencement of the regime on the basis that the definition failed to address 'poor nutrition, hydration, verbal and emotional abuse [and] financial fraud'.[123] UnitingCare Australia commented that reports of reported assaults 'do not give a full picture'[124] of abuse, because they 'do not extend to all forms of elder abuse'.[125]

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119 Seniors Rights Service, *Submission 169*; National LGBTI Health Alliance, *Submission 116*; Northern Territory Anti-Discrimination Commission, *Submission 93*; Law Council of Australia, *Submission 61*.
120 UNSW Law Society, *Submission 117*.
121 Australian College of Nursing, *Submission 147*.
122 National Seniors Australia, *Submission 154*; Old Colonists' Association of Victoria, *Submission 16*.
123 Aged Care Crisis, *Submission 165*.
124 UnitingCare Australia, *Submission 162*.
125 Ibid.

11.101 Under the DRIS, examples of neglect and ill-treatment include inappropriate use of restrictive practices to manage behaviour, leaving residents unsupervised for an extended period of time, withholding food, locking residents outside for extended periods and depriving them of food and water, and failing to connect or flush enteral nutrition tubes.[126]

11.102 These types of incidents are broadly representative of the types of conduct that stakeholders submitted should be required to be notified, and which the proposed scheme would require to be notified.[127]

11.103 The proposed scheme does not include the DRIS category relating to breaches of intervention orders. In that scheme, such incidents comprised a very small number of notifications (1%),[128] and the ALRC has not heard that it is a significant issue in the aged care context, but invites comment on this issue.

Exemption to reporting resident–on–resident incidents in aged care

11.104 The exemption to reporting resident–on–resident incidents where the perpetrator has cognitive impairment has been an issue of significant interest to stakeholders from the time the notification regime was introduced[129] and continued to elicit responses from stakeholders to this Inquiry.[130]

11.105 The Office of the Public Advocate Victoria asserted that the 'exception to mandatory reporting of assaults under these conditions is too lenient'.[131] It argued that, without visibility of such incidents, and transparency and accountability of the response, it is difficult to evaluate the efficacy and appropriateness, and further develop policy and program responses to those incidents.

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126 NSW Ombudsman, Submission No 122 to Legislative Council General Purpose Standing Committee 2, Parliament of NSW, *Inquiry into Elder Abuse in NSW* (April 2016).

127 See, eg, National LGBTI Health Alliance, *Submission 156*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; Alzheimer's Australia, *Submission 80*; Quality Aged Care Action Group Incorporated, *Submission 28*.

128 NSW Ombudsman, Submission No 122 to Legislative Council General Purpose Standing Committee 2, Parliament of NSW, *Inquiry into Elder Abuse in NSW* (April 2016).

129 In 2007 the Bill establishing the reporting regime was the subject of scrutiny by the Senate Standing Committee on Community Affairs, Parliament of Australia, *Aged Care Amendment (Security and Protection) Bill 2007 (Provisions)* (2007), which noted concerns that the 'discretion in relation to assaults by aged residents with mental impairments would detract from approved providers' obligations to provide a safe environment for all aged care residents'. The rationale for the exemption is outlined in the explanatory note to the amending legislation. It refers to the concerns of the aged care sector that 'minor assaults by [residents with mental impairment] are not uncommon and in such cases the focus should be on behaviour management and not police and Departmental involvement which can be traumatic for all involved'. The exemption is described as providing for '… alternative arrangements for these very specific circumstances where the focus should be on effective behaviour management. This approach enables cases involving residents with a mental impairment to be clinically managed by the approved provider where this is the most appropriate response': Explanatory Memorandum, Aged Care Amendment (Security and Protection) Bill 2007 (Cth).

130 Seniors Rights Service, *Submission 169*; Townsville Community Legal Service Inc, *Submission 141*; Office of the Public Advocate (Vic), *Submission 95*; Combined Pensioners & Superannuants Association of NSW Inc, *Submission 76*; NSW Nurses and Midwives' Association, *Submission 29*; Quality Aged Care Action Group Incorporated, *Submission 28*.

131 Office of the Public Advocate (Vic), *Submission 95*.

11.106 Although the legislation requires that approved providers implement a behaviour management plan, a number of stakeholders raised concerns about the appropriateness of plans implemented; and said they were troubled by the lack of oversight in that regard. The NSW Nurses and Midwives' Association, for example, submitted that although providers are required to implement a behaviour management plan, 'our members tell us that there are often inadequate staffing ratios to fulfil the requirements of a robust behaviour management plan and little monitoring of this process by the [Australian Aged Care Quality Agency]'.[132]

11.107 People with Disability Australia (PWDA) argued that the exemption risked creating 'two forms of justice':

> While we acknowledge the issue of criminalisation of people with cognitive impairments, co-residents should have their assaults taken seriously and should be given the opportunity to report to the police. Individuals should be supported to engage in the justice system, as violence is violence, and people with disability are entitled to a justice system response on an equal basis to others. There should not be two forms of justice: one for people without disability, and one for people with disability.[133]

11.108 The Townsville Community Legal Service echoed the position that it did not wish to see residents with cognitive impairments persecuted, but that the exemption brought into question the utility of the reporting system and is 'antithetical to the objects of a protective system'.[134] It submitted the regime ought to be a 'dynamic system that protects all from abuse'.[135]

11.109 PWDA advocated for a 'formal' response to such incidents:

> We have concerns where the aged care provider puts in place arrangements to 'manage' the behaviour or care of this resident, especially as the sole response to a violent incident. Oftentimes, these forms of behaviour management involve the use of restrictive practices, such as limiting the resident's access within or outside of the facility, or medicating the resident to make them more compliant. Instead, the precursors for the assault should be assessed, taking into consideration why the individual acted in the way they did, and a positive behaviour management plan be put in place.[136]

11.110 Advocare Inc (WA) supported removing the exemption, arguing that it concealed what was actually occurring in respect of both the incident and the provider's response:

> An unscrupulous care facility could therefore hide multiple assaults by the same resident. This reporting exemption should be abolished, to allow a clearer picture of the extent of assaults and to ensure appropriate preventative interventions are put in place…[137]

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132 NSW Nurses and Midwives' Association, *Submission 29*.
133 People with Disability Australia, *Submission 167*; NSW Nurses and Midwives' Association, *Submission 29*.
134 Townsville Community Legal Service Inc, *Submission 141*.
135 Ibid.
136 People with Disability Australia, *Submission 167*.
137 Advocare Inc (WA), *Submission 86*.

11.111 Responding to a parliamentary committee, Leading Age Services Australia, enunciated a different view, arguing the current requirements to keep appropriate records of resident–on–resident incidents and the requirements to demonstrate appropriate standards in respect of behaviour management under the *Accountability Principles 2014* were appropriate.[138]

11.112 It was suggested that the consequential impacts, of not requiring such incidents to be reported, included a loss of a right to redress or remedy for the victim, a reinforced substandard response to risks and violence, the family of the victim being unaware of the incident and a lack of sanction, or consideration of sanction, against a perpetrator and/or the service provider.[139] This was the personal experience of one inquiry participant whose mother was assaulted by another care recipient with dementia:

> My late mother was assaulted in an aged care dementia unit in Melbourne. A man punched her in the chest and tried to suffocate her with a pillow—he was pulled off her by staff. The aged care provider deemed it an 'unreportable assault'. There had been at least one previous 'unreportable assault' with a pillow by the same man, and preventative measures were supposed to be in place.
>
> They obviously weren't working …
>
> The new Australian Aged Care Quality Agency is supposed to regulate and monitor aged care compliance (Corporate Plan 2016–2020). It is not possible to do either when assaults are not reported and are not taken into account. Whether or not providers comply with specified actions of non-reportable assaults is not able to be monitored either, since their actions are part of what is not reportable …
>
> I was then required to mediate with the provider, rather than action being taken by the regulatory body. This automatically put me in a conflict situation with the provider, and things got worse …
>
> Section 63-1AA of the *Aged Care Act* enabled the aged care provider to be in control of the entire process, of staff (some lost their jobs) and of my mother. It is my experience—and that of my late mother—that Section 63-1AA(3) of the *Aged Care Act 1997* and the accompanying *Accountability Principles 2014*, Part 7, section 53 equates to legalised abuse within aged care dementia units, and that it further denies institutionalised individuals the fundamental rights of safety, care, empathy, compassion, protection, dignity, health and well-being, and instead enables abuse, violent assault, exploitation and neglect, and as such is a violation of basic human rights.
>
> As the daughter of an 82 year old assault and abuse victim whose rights were not only not addressed but were denied by legislated procedures, it is my opinion that there can be no serious claim of protecting older Australians against abuse without amending the legalised abuse which is Section 63-1AA of the *Aged Care Act*.[140]

11.113 The discretion not to report resident–on–resident incidents effectively 'hides' a potentially significant number of incidents occurring in aged care environments from

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138 Leading Age Services NSW–ACT, *Answers to Supplementary Questions on Notice*, Legislative Council General Purpose Standing Committee 2, Parliament of NSW, Inquiry into Elder Abuse in NSW (March 2016) 2–3.

139 Townsville Community Legal Service Inc, *Submission 141*.

140 Name withheld, *Submission 189*.

view, which affects the ability to develop appropriate policy and operational responses to risk and risk management around vulnerable adults.

11.114 The issue also arises in the disability service context. In NSW, the DRIS responds to it by adopting a nuanced approach. It requires that a higher threshold is met before an incident becomes notifiable. It places the 'main focus' in responding to client–to–client incidents on 'managing and reducing risks, including identifying the cause of the abuse, and the action that needs to be taken (and the support that needs to be provided) to prevent recurrence'.[141]

11.115 The category distinctions in the DRIS model are designed to strike a balance between the 'undesirability' of reporting such incidents and the risk of criminalising people with cognitive impairment, with the need to ensure resident–on–resident incidents are not 'normalised', and are subject to an appropriate response.

11.116 The ALRC likewise proposes that there be a higher threshold of seriousness met before a notification is required to be made in relation to an incident between two care recipients where one has a pre-diagnosed cognitive impairment. Specifically, these should include the types of conduct provided for in the DRIS, namely sexual offences, incidents causing serious injury, incidents involving the use of a weapon, incidents that are part of a pattern of abuse.[142]

11.117 This approach acknowledges the policy rationale behind the existing exemption, but recognises that such serious incidents should be reported, and is designed to ensure that the provider response is appropriate, transparent and accountable. The requirement to report these incidents will also shed light on the nature and extent of such incidents, enabling a better understanding of them and how the system can respond to them.

Limited expansion of the requirement to report beyond the residential care context

11.118 A number of stakeholders noted that older people are increasingly receiving flexible care or home care from approved providers, where no compulsory reporting requirements apply.

11.119 It was suggested that this represented an unacceptable gap in the regime.[143] The University of NSW Law Society said that

> [t]his effectively means that aged care providers in home based or flexible care settings are not subject to the mandatory reporting requirements. This is concerning as it drastically reduces the accountability of an entire subset of staff members, volunteers or key personnel of aged care providers that do not fall within residential care. We submit that there appears to be no principled reason for exempting home-based or flexible care providers from mandatory reporting obligations.[144]

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141 NSW Ombudsman, *Submission 160*.
142 *Ombudsman Act 1974* (NSW) s 25P(2)(b).
143 See, eg, Advocare Inc (WA), *Submission 86*.
144 UNSW Law Society, *Submission 117*.

11.120 The Australian Nursing and Midwifery Federation argued for the compulsory reporting requirements to be amended to 'incorporate approved providers of community-based aged care … services'.[145]

11.121 Leading Age Services Australia also acknowledged that those receiving aged care outside the residential context would 'obviously go unreported'.[146] In its view, 'the reporting requirements imposed on the industry had little positive effect … and only concentrates on a limited area of aged care and does not include other forms of abuse'.[147]

11.122 In the ALRC's view, the current restricted application of the reporting requirement to residential care recipients affords less protection to care recipients receiving aged care outside the residential context. The ALRC therefore proposes that the reportable incident regime apply, in limited circumstances, where a care recipient is receiving home or flexible care. It is proposed to require a notification to be made where the alleged perpetrator is a staff member of an approved provider.

11.123 The proposal attempts to strike an appropriate balance on threshold issues, recognising that where a person is in residential care, an approved provider has a greater duty of care, and controls many aspects of the care recipient's life, including who has access to them. Therefore, reports of abuse ought to be made in all cases, regardless of who the alleged perpetrator is.

11.124 In the home or flexible care context, an approved provider has less control or capacity to act protectively. However, where a staff member is alleged to have acted inappropriately, their employer should report and respond. Where there is alleged abuse of the care recipient by another person, such as a family member, it is not proposed to require mandated reporting of those incidents for the reasons noted by many stakeholders regarding autonomy and choice.[148]

11.125 This does not mean that a person (including a staff member of an approved provider) who has concerns for the welfare of person receiving flexible or home care should not report their concerns to anyone, but merely that they are not required to do so under the compulsory reporting regime. It may be that a report to the police, or to the public advocate (see Chapter 3) is appropriate.[149]

Reporting to other agencies and timeframe for notification

11.126 The DRIS legislation does not impose a requirement on service providers to report reportable incidents to the police or to funding or compliance bodies, although

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145 Australian Nursing & Midwifery Federation, *Submission 163*.
146 Leading Age Services Australia, *Submission 104*.
147 Ibid.
148 Australian Association of Social Workers, *Submission 153*; Townsville Community Legal Service Inc, *Submission 141*; Aged and Community Services Australia, *Submission 102*.
149 For an example of an approved provider responding to such an incident, refer to case study of Mr and Mrs C in Resthaven, *Submission 114*.

providers may have obligations to do so under other laws and frameworks.[150] However, the DRIS notification forms include questions about whether the incident has been reported to the police. This serves an educative function for providers, while also enabling questions to be asked by the oversight body, if necessary, about organisational decisions related to the reporting of incidents, thus allowing a more considered and nuanced approach in respect of matters referred to the police.

11.127 In 2009, the Productivity Commission commented that the 'requirement for the Department to be informed within 24 hours appears to be a necessary pre-condition to protect current and future resident safety'.[151] However, it is not clear that the Department takes an active role in specifically overseeing the provider's response to each notification made.

11.128 It is critical that serious incidents are reported to the police as soon as possible. The ALRC has not formed a firm view on whether it is necessary to impose a legislative requirement to that effect. The DRIS model does not impose such a requirement, but through training and engagement with providers strongly encourages reporting to police for appropriate incidents.

11.129 Similarly, with regard to reporting to the Department of Health, the ALRC considers that there may be sound reasons for such reports to be made, including to enable the Department to assess a provider's compliance with regulatory obligations. Whether such a report is necessary within 24 hours should be considered in light of the purpose of the reporting.

11.130 The ALRC considers that the timeframe applicable for a reportable incident to be notified to the oversight body, that is 'no later than 30 days' from when the provider became aware of the allegation, is appropriate. Such a design enables a provider to consider its plan to investigate and respond to the incident, and to provide a more thorough and considered report outlining its proposed course of action than the current 24 hour window.

Other issues

11.131 A number of other issues have been identified that the ALRC proposes be incorporated into the aged care model. These build on provisions in the DRIS and include enhanced information sharing provisions; whistleblower protections; and data capture capabilities.

Expanded information sharing provisions

11.132 The ALRC proposes that the model include a further information sharing provision that would enable the head of an approved provider to provide to, and receive

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150 For example, some jurisdictions criminal codes may require the reporting of suspicion of serious offences to the police: see *Crimes Act 1900* (NSW). There may also be professional or organisational codes of conduct that require reporting to police. Where a provider is receiving government funding, there may be contractual or regulatory compliance obligations to report such incidents to the funding body.

151 Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services* (Research Report, 2009) 50.

from, other approved providers and public authorities, information that relates to the promotion of safety of people receiving aged care in connection with responding to a reportable incident.

11.133 The DRIS contains provisions that allow disclosure of information by the head of an agency (or the Ombudsman) about reportable incidents with certain people. These people include the person with disability that is the subject of the incident or their nominee.[152] It also includes, in certain circumstances,[153] the person's guardian, attorney,[154] financial manager/administrator, or a close friend or relative of the person.

11.134 However, it is foreseeable that circumstances may arise where a service provider, having information about a reportable incident in relation to a particular person, may develop a concern for the welfare and safety of a care recipient and, in order to protect that person, may need to share information that would otherwise be protected from disclosure.

11.135 Although the DRIS does not have such provisions, they do apply (although much more broadly) in respect of the reportable conduct scheme in respect of children.[155] It is not proposed to expand the provisions to be as broad as those in Ch 16A.

11.136 The NSW Ombudsman has been advocating for amendments to DRIS information sharing provisions that would enable the exchange of information between a range of agencies in circumstances where the exchange of personal information forms part of providing a reasonable response to any safety or significant welfare issue relating to, or arising out of, a reportable incident.[156] The agencies that the Ombudsman proposes be included in the provision encompass a range of disability service providers (including accommodation, employment, community participation, day program and respite services), police, and labour hire agencies, in respect of the DRIS.

11.137 The Ombudsman described a number of examples that demonstrate the problem in the disability context, but which are apposite in the aged care arena:

> **Need to disclose information between disability services relating to risks associated with employees**
>
> A person is working for three different disability services as a casual support worker. in one service, allegations are made that the person committed fraud against a person with disability living in the accommodation service. A police investigation substantiates the allegations, but due to technical reasons no charges are laid. the worker resigns from the service. the service is aware that the worker is employed by two other accommodation services. Neither service is aware of the significant adverse finding that has been made against the worker, or the risks that need to be managed.

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152 *Ombudsman Act 1974* (NSW) ss 25WA(2)(a)–(b).

153 In circumstances where the head of the agency or Ombudsman has a reasonable belief that the person does not have capacity to understand the information or to nominate a person: Ibid s 25WA(2)(c).

154 This is 'a person who holds and enduring power of attorney in respect of the person with a disability': Ibid s 25WA(2)(c)(ii).

155 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ch 16A.

156 NSW Ombudsman, *Submission on the Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework* (May 2016).

Need to disclose information between disability services and labour hire agencies relating to risks associated with employees

A service uses a labour hire agency to access casual staff. Allegations of neglect are made against one of the agency casual workers, including that they failed to seek medical attention for a client who was seriously ill, and left a client unattended in the bath while the worker had a cigarette outside. The service conducts an investigation and substantiates the allegations. the service advises the labour hire agency that they no longer want the worker to cover any shifts, however the labour hire agency requires details of the allegations and sustained findings in order to manage risk to other clients.[157]

11.138 There are sound reasons to include such a provision relating to aged care. Approved providers owe a duty of care to care recipients. The nature of 'reportable incidents' are indicative of potential serious risk to the individual and other care recipients. It is proposed that the provision be restricted to sharing of information in circumstances where doing so will enhance the safety of people receiving aged care.

11.139 It is also critical that information sharing provisions enable the sharing of information comprising adverse findings that have been made against staff members, in circumstances where there are safety or significant welfare issues that would justify the exchange of information, with a national database which would contribute to enhanced employment screening. This is discussed further below.

Whistleblower protection

11.140 The current reporting regime affords protection to whistleblowers when the incident is a 'reportable assault', however the restricted definitional scope may not protect those workers that report matters that fall outside the current definition. A common theme emerging in submissions was the need for whistleblower protections for workers who report incidents.[158]

11.141 Stakeholders, particularly those representing workers in the aged care industry, submitted that the protections afforded to whistleblowers under the reporting regime were inadequate.[159] The basis for this assertion is that the protections only apply in limited circumstances, namely in those circumstances that are able to be defined as a 'reportable assault'. Two consequences were noted as a result of this.

11.142 First, it was argued that, because the protection failed to extend to a broad range of abuse of older people that many workers witnessed in the course of their work, staff reporting abuse that is outside the scope of a 'reportable assault' are left vulnerable to intimidation and harassment from their employer and others.[160]

11.143 The second is that staff members may decide *not* to report such abuse for fear of repercussions, meaning that much abuse remains hidden. The Older Women's

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157 Email from NSW Ombudsman to ALRC, 26 October 2016.

158 National Older Persons Legal Services Network, *Submission 180*; Aged Care Crisis, *Submission 165*; United Voice, *Submission 145*; R Lewis, *Submission 99*; NSW Nurses and Midwives' Association, *Submission 29*.

159 See, eg, United Voice, *Submission 145*; NSW Nurses and Midwives' Association, *Submission 29*.

160 National Older Persons Legal Services Network, *Submission 180*; Aged Care Crisis, *Submission 165*.

Network NSW submitted, for example, that the inadequate protections meant that staff lacked confidence to report abuse, and therefore 'reported assaults are the tip of the iceberg'.[161]

11.144 It is critical for appropriate protection to be afforded to those who report incidents in good faith. The ALRC proposes that such protections be incorporated into the reportable incidents scheme.

11.145 The proposed expanded scope of the definition of what is required to be notified should also expand whistleblower protections to those who report any incident that falls within that definition, provided the report is made in good faith.

Data capture

11.146 There is currently only limited data about reportable assaults. If a broader range of abusive conduct were required to be reported, as the ALRC proposes, then this information could be used to inform policy and system responses.

11.147 The narrow definition of the term 'reportable assault' effectively conceals incidents that may have serious consequences for the victim but, because they are not captured, are not required to be reported. Examples of types of abuse that the current scheme does not capture includes, for example, neglect and financial abuse. While there may be some anecdotal data about abuse that falls outside the current scope captured by, for example, elder abuse hotlines and by the Complaints Commissioner, all rely on a person choosing to report, as there is no compulsory requirement to report such incidents.

11.148 A number of stakeholders, advocated for better data about abuse of older people.[162] PWDA noted the issues with the current regime and the closed nature of aged care facilities:

> Far too often, older people with disability experience elder violence at the hands of home care workers, support workers, staff in residential facilities and co-residents in residential institutions…we know that closed institutions bring with them higher levels of violence. Data on violence in closed aged care settings is limited, as approved providers are only mandated to report certain types of assaults…However, data from the NSW Bureau of Crime Statistics and Research…and the NSW Ombudsman's Disability Reportable Incidents Scheme illustrates that there is a significant amount of violence occurring in closed settings such as boarding houses, supported group accommodation, nursing homes and aged care facilities.[163]

11.149 The data resulting from the DRIS indicate that, in the disability space, there are concerns about the conduct of staff and volunteers toward clients. The NSW Ombudsman reported that over half of the 437 notifications in the first eight months of the scheme's operation were employee-to-client matters (240 incidents or 55%).

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161 Australian Nursing & Midwifery Federation, *Submission 163*; Older Women's Network NSW, *Submission 136*.

162 National Seniors Australia, *Submission 154*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*.

163 People with Disability Australia, *Submission 167*.

Physical assaults comprised the largest proportion of reports (38%), followed by neglect (20%).

11.150 About a third of notifications were client-to-client matters (148 incidents or 34%), most of which were notifications of a pattern of abuse (34%). About a quarter of notifications of client-on-client incidents were for assault causing serious injury, and sexual offences and assault involving the use of a weapon comprised 20% of notifications respectively. Notifications for unexplained serious injuries comprised 10% of notifications, while AVO breaches made up only 1%.

11.151 While there is a lack of data about abuse in aged care, by requiring notification of a broader range of abuse the proposal would contribute to enhanced understandings of the nature and scope of abuse occurring in the aged care context, which in turn will enable the development of better policy and program responses.[164]

Employment screening in aged care

Proposal 11–4 There should be a national employment screening process for Australian Government funded aged care. The screening process should determine whether a clearance should be granted to work in aged care, based on an assessment of:

(a) a person's national criminal history;

(b) relevant reportable incidents under the proposed reportable incidents scheme; and

(c) relevant disciplinary proceedings or complaints.

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

11.152 It is critical that potential aged care workers are subjected to proper screening processes to ensure that, as far as possible, only those who are appropriately qualified and do not pose an unreasonable risk are placed in those roles.

11.153 The ALRC proposes that the safeguards to care recipients be improved by enhancing the employment screening of people working in aged care. The proposal builds on the proposed reportable incident scheme (Proposals 11-1 to 11-3) by requiring that information about adverse findings made against employees working in aged care be shared with a centralised screening agency.

11.154 The ALRC proposes that people wishing to work or volunteer in Commonwealth-funded aged care should be required to apply for a clearance with the screening agency. That process would screen a person's national criminal history, any

164 See also the proposals for a National Plan to Address Elder Abuse, and a national prevalence study in ch 2.

adverse findings or notifications made about the applicant that resulted from a reportable incident, as well as any findings from disciplinary or complaint action taken by registration or complaint handling bodies. The identification of potential risk enables the screening agency to conduct a risk assessment of the applicant.

11.155 The *Aged Care Act* contains a number of provisions that set out suitability requirements for employment in aged care, including:

- Any person who is 'key personnel'[165] of an approved provider must not have been convicted of an indictable offence, be insolvent, or be of 'unsound mind'.[166] Penalties may apply where an approved provider has a 'disqualified person' in a key personnel role.[167]
- Staff[168] of approved providers must be issued with a police certificate. Police certificates are current for three years. Where a person has been convicted of murder or sexual assault, or has been convicted of any other form of assault where the sentence included a term of imprisonment, the person is unable to be employed or to volunteer in aged care.[169]
- Where a police certificate discloses something that is not an outright bar to employment, police certificate guidelines published by the Aged Care Quality and Compliance Group (Guidelines) provide direction to approved providers on assessing the information, noting that '[a]n approved provider's decision regarding the employment of a person with any recorded convictions must be rigorous, defensible and transparent'.[170]

11.156 Other employment safeguards that may operate include reference checks conducted as part of recruitment processes,[171] and registration requirements for certain professions involved in aged care. For some groups of employees, for example nurses and doctors, there are registration or accreditation requirements, usually overseen by a regulatory agency.[172] Codes of conduct usually apply to individuals who are subject to accreditation processes, with the possibility of disciplinary action where an individual has breached the relevant Code.

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165 Key personnel include members of the group of persons who are responsible for the executive decisions of the entity; and any other person with authority or responsibility (or significant influence over) planning, directing or controlling the activities of the entity at that time: *Aged Care Act 1997* (Cth) s 8-3A.

166 Ibid s 10A-1.

167 Ibid s 10A-2.

168 'Staff member' is defined as being a person that is at least 16 years old; and is employed, hired, retained or contracted by the approved provider (whether directly or through an employment or recruitment agency) to provide care or other services under the control of the approved provider; and has, or is reasonably likely to have, access to care recipients: *Accountability Principles 2014* (Cth) s 4.

169 Ibid s 48.

170 Department of Social Services, *Aged Care Quality and Compliance Group—Police Certificate Guidelines* (2014) 11.

171 Leading Age Services Australia, *Submission 104*; Alzheimer's Australia, *Submission 80*.

172 See, for example, Australian Health Practitioner Regulation Agency.

Gaps in the current framework

11.157 The concept of conducting screening of potential employees is based on the notion that past behaviour is a potential indicator of future behaviour, and can assist in identifying and assessing risk. The importance of staff screening has been recognised in respect of vulnerable or at-risk groups.[173] The NSW Ombudsman urged that 'it is of vital importance to ensure that, wherever practical, those individuals in the community who engage in inappropriate behaviour or take advantage of vulnerable people are prevented from working in care-focussed support roles'.[174]

11.158 This is the rationale underpinning the existing requirements. While no system of background checking will be 'fail-safe', police checks are an important component that can assist in determining whether an applicant is appropriate in the circumstances.

11.159 Police checks have some limitations in enabling a thorough assessment of the risk posed by an individual. A police clearance does not provide other relevant information that may assist in assessing the risk posed by the applicant to the people they would be providing care to. Examples of the type of information that might be relevant include:

- relevant employment proceedings, including information about disciplinary action taken against the person;
- spent convictions or convictions arising when a person was a juvenile;
- allegations or police investigations involving the person; and
- apprehended violence, intervention and prohibition orders.[175]

11.160 Additionally, the conduct must meet a very high evidentiary threshold before it will be recorded on a police check. It has been argued that it is important to capture conduct that meets a lower (balance of probabilities) threshold, for the purposes of assessing risk.[176]

11.161 Police check information may not be current. Although police clearances are required to be obtained and/or renewed every three years, and providers must take 'reasonable steps' to ensure staff notify them of any convictions, there is no capacity for continuous monitoring of national criminal records.[177]

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173 See, eg, Joint Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into Handling of Abuse by Religious and Other Non-Government Organisations Vol 2* (2013) 229.

174 NSW Ombudsman, *Submission 160*.

175 Australian Institute of Family Studies, *Pre-Employment Screening: Working With Children Checks and Police Checks* (2016).

176 National Disability Services, *Improving Safety Screening for Support Workers* (2014) 9.

177 While there are variations across jurisdictions, current screening systems with regard to working with children checks do monitor criminal records from the jurisdiction in which the check is being conducted. The Royal Commission into Institutional Responses to Child Sexual Abuse has recommended that the Commonwealth Government enhance the capacity for national criminal history to be accessed and assessed to prevent an individual from committing an offence in another jurisdiction that could remain

11.162 The mobililty of individuals across different community support sectors (children, disability and aged care), and across borders is also an identified gap.[178]

11.163 Reference checking may not always be reliable. For example, it is unlikely that applicants will list a former employer as a referee if there had been issues with their performance or conduct while under the employer's management.

Enhanced employment screening in other community service sectors

11.164 In the ALRC's view, there is capacity for enhanced employment screening in aged care that could offer better protection to care recipients. The key components of the proposal would be the establishment of a screening mechanism that would draw on a person's national criminal history, reportable incidents under the proposed reportable incidents scheme for aged care and relevant disciplinary proceedings in assessing their suitability to work in aged care.

11.165 This scheme would be similar to working with children and working with vulnerable person checks. All Australian jurisdictions require persons working with children to hold a working with children check.[179] Two Australian jurisdictions, the ACT and Tasmania, have moved to broaden their employment screening to people working with other vulnerable groups.[180]

11.166 The value of utilising relevant employment proceedings in determining a person's suitability for work with vulnerable groups has been recognised.[181]

11.167 Working with children checks generally capture a broader range of information than what is reported in a national police check. Working with children checks may include: convictions (including spent or juvenile convictions; intervention orders; charges (for example, where a conviction has not been recorded because a proceeding has not been heard or finalised by a court, or where charges have been dismissed or withdrawn); relevant allegations or police investigations involving the individual; and relevant employment proceedings and disciplinary information from professional organisations (for example, organisations associated with teachers, childcare service providers, foster carers, and health practitioners).[182]

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undetected until the check was due for renewal: Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report* (2015) 19, 108.

178 ARTD Consultants, *National Disability Insurance Scheme Quality and Safeguarding Framework Department of Social Services Consultation Report* (2015) 43; National Disability Services, above n 176, 7.

179 *Working with Vulnerable People (Background Checking) Act 2011* (ACT); *Working with Children (Criminal Record Checking) Act 2004* (WA); *Working With Children Act 2005* (Vic); *Working with Children (Risk Management and Screening) Act 2000* (Qld); *Care and Protection of Children Act 2007* (NT); *Child Protection (Working with Children) Act 2012* (NSW); *Registration to Work with Vulnerable People Act 2013* (Tas); *Children's Protection Act 1993* (SA).

180 *Working with Vulnerable People (Background Checking) Act 2011* (ACT); *Registration to Work with Vulnerable People Act 2013* (Tas); *Safeguarding Vulnerable Groups Act 2006* (UK).

181 NSW Auditor-General, *Working with Children Check: NSW Commission for Children and Young People* (2010) 15; Royal Commission into Institutional Responses to Child Sexual Abuse, above n 177, 5.

182 Australian Institute of Family Studies, above n 175. The information captured across jurisdictions can vary.

11.168 In New South Wales, the working with children check also includes consideration of reportable conduct matters.[183] Reportable conduct schemes do not exist in other jurisdictions. Most jurisdictions that consider employment history as part of the check take into account any disciplinary proceedings conducted by professional bodies.[184]

11.169 While professional bodies are involved in responding to complaints about those people who are subject to regulation by them, there are some people who are not subject to regulation in the aged care context. This is considered further below when discussing the proposed National Code of Conduct for Health Care Workers.

11.170 The Australian Health Practitioner Regulation Agency (APHRA) requires certain categories of people[185] to report 'notifiable conduct', although the threshold to make a mandatory complaint is high. A notifier must have a 'reasonable belief that a practitioner has behaved in a way that constitutes notifiable conduct and that their belief is based on reasonable grounds'.[186]

11.171 In contrast, the reportable conduct scheme for people working with children is allegation based. This means that an organisation must notify when they receive an allegation, as opposed to when, or if, they form a 'reasonable belief'. This lower threshold for notification responds to concerns about the 'hidden' nature of child abuse and neglect, and recognises that, for various reasons, including the alleged victim's (in)capacity, the higher 'reasonable belief' threshold might not be met but nonetheless a risk may still be present.

11.172 The ACT and Victorian employment screening mechanisms apply more widely than to people working with children, extending to 'vulnerable persons'. Both schemes are in the early implementation phase and focus primarily on employment screening of people applying to work with children.

11.173 Under the ACT and Victorian schemes, a person must apply for registration to engage in a regulated activity with a vulnerable person. 'Vulnerable persons' are defined as people accessing a regulated activity.[187]

11.174 'Regulated activities' are broadly defined in the ACT, and encompass activities or services for vulnerable people, including mental health and addiction services; services delivered to migrants … and 'people who cannot communicate or who have difficulty communicating in English'; services delivered to homeless people; housing and accommodation services delivered to people suffering social or financial

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183 Findings and notifications resulting from reportable conduct incidents feed into the information used to assess the suitability of a person to work with children. See also *Ombudsman Act 1976* (Cth) pt 3A.

184 For example, registration or accreditation bodies that regulate nurses, teachers, foster carers and certain health practitioners.

185 Registered health practitioners, employers and education providers.

186 Defined to include: practising while intoxicated by alcohol or drugs; sexual misconduct in the practice of the profession placing the public at risk of substantial harm because of an impairment (health issue), or placing the public at risk because of a significant departure from accepted professional standards: Australian Health Practitioner Regulation Agency, *Mandatory Reporting* <www.ahpra.gov.au/>.

187 *Working with Vulnerable People (Background Checking) Act 2011* (ACT) s 7; *Registration to Work with Vulnerable People Act 2013* (Tas) s 4.

hardship; victims of crime; community, disability and respite services.[188] However, the ACT's vulnerable person check does not apply to staff members under the *Aged Care Act*.[189]

11.175 The proposed reportable incident scheme would, if implemented as suggested, enable adverse findings that result from a reportable incident to be captured and disclosed in circumstances where the individual subsequently applies to work in Commonwealth funded aged care.

11.176 A number of stakeholders submitted that a more robust screening system of people working or volunteering in aged care would better safeguard older people receiving care.[190] The Australian Association of Social Workers said that such checks were 'necessary'.[191]

11.177 Alzheimer's Australia stated:

> To help prevent and address physical, psychological and sexual abuse of residents of aged care facilities, all direct care workers in both residential and community aged care should be required to undertake more extensive background checks analogous to Working with Children Checks.[192]

11.178 Other stakeholders also referred to working with children checks and working vulnerable person checks.[193] However not all supported further screening. There were concerns about privacy and the administrative burden and cost of further screening processes. The national peak body for aged and community care workers, Aged and Community Services Australia (ACSA), suggested that while it understood the intent behind such schemes, it was

> cautious about introducing another administrative process unless there is clear evidence from an ageing/aged care sector perspective that demonstrates such a check provides additional protection for older people and employers without infringing on the rights of employees.[194]

11.179 Similar concerns have been raised in regard to the working with children check schemes, namely that there is limited evidence of their efficacy and that they come with a significant operational cost. Notwithstanding those concerns, in its review of the various schemes across Australia, the Royal Commission into Institutional Responses to Child Sexual Abuse indicated that it shared 'the view held by the majority of government and non-government stakeholders … consulted about [working

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188 *Working with Vulnerable People (Background Checking) Act 2011* (ACT) sch 1 pt 1.2. The Tasmanian legislation is modelled on the ACT's, however Tasmania has yet to define 'regulated activities' in respect of vulnerable adults.

189 Ibid s 12(2)(i)(v).

190 See, eg, NSW Ombudsman, *Submission 160*; Australian Association of Social Workers, *Submission 153*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*.

191 Australian Association of Social Workers, *Submission 153*.

192 Alzheimer's Australia, *Submission 80*.

193 National LGBTI Health Alliance, *Submission 156*; Aged and Community Services Australia, *Submission 102*; Law Council of Australia, *Submission 61*.

194 Aged and Community Services Australia, *Submission 102*.

with children checks]: that they deliver unquestionable benefits to the safeguarding of children'.[195]

A national aged care workforce screening process

11.180 The key features of Proposal 11-4 are that relevant staff members[196] of approved providers should be subject to employment screening by an independent Commonwealth agency. The agency will assess the person's suitability to work in aged care by taking into account the person's criminal history through a national police check, any findings or notifications resulting from the proposed reportable incident scheme, and any disciplinary proceedings that the person has been subject to.

11.181 The outcomes and status of clearances should be maintained on a register that is able to be checked by approved providers when employing staff.

Criminal history and national police checks

11.182 As discussed above, police checks are already required to be performed in respect of people seeking to work in Commonwealth funded aged care. The proposal builds on this requirement.

11.183 The ALRC agrees that it is critical to retain a check of an individual's criminal history, and notes the scope of the current police checks conducted for those applying to work in aged care: convictions; guilty, but no conviction recorded; and pending criminal charges.

11.184 Although other information could be extracted from national criminal history checks (discussed previously in this chapter), there has been no research that the ALRC is aware of that suggests such information is as relevant to assessing risk posed to older people as there is in respect of children. For example, in respect of children, it is widely understood that there will be people against whom allegations of abuse have been made, and who may have been the subject of investigation or even charges, but where no conviction has followed.[197] In those instances, there are strong arguments for capturing such information in working with children checks.

Notifications or findings from reportable incident scheme

Question 11–1 Where a person is the subject of an adverse finding in respect of a reportable incident, what sort of incident should automatically exclude the person from working in aged care?

195 Royal Commission into Institutional Responses to Child Sexual Abuse, above n 177, p 5.

196 As defined: *Aged Care Act 1997* (Cth) s 63-1AA(9).

197 Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study 6: The Response of a Primary School and the Toowoomba Catholic Education Office to the Conduct of Gerard Byrnes* (2015); Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study 2: YMCA NSW's Response to the Conduct of Jonathan Lord* (2014); Royal Commission into Institutional Responses to Child Sexual Abuse, above n 177.

11.185 The proposed reportable incident scheme would provide information resulting from notifications and findings made in respect of a person employed or volunteering in aged care.

11.186 The ALRC proposes that any adverse findings/determinations should be assessed as representing a higher risk than notifications made in respect of a person where the conduct is similar. For example, where the reportable incident involves financial abuse, an adverse finding made in respect of a person should be considered more serious than a notification in respect of the same conduct but where no adverse finding resulted.

11.187 However, both determinations and notifications should be considered as 'red flags' in respect of a person, and trigger an assessment of their suitability.

11.188 The ALRC's preliminary view is that there may be incidents captured under the proposed reportable incident scheme that ought to automatically exclude a person in the event an adverse finding is made. This approach recognises and responds to risks posed by individuals whose conduct, while perhaps not satisfying a criminal threshold, is found to have breached standards and as such ought to be subject to either a prohibition or further risk assessment (depending on the nature of the incident).

11.189 The ALRC considers that such information—information specifically relevant to a person's conduct in the aged care workforce—is of significance in assessing a person's suitability to work with vulnerable people.\

11.190 The ALRC invites comment on the type of reportable incidents that should, in the event an adverse finding is made against a staff member, result in the staff member being refused a clearance to work in aged care.

Disciplinary proceedings and complaints

11.191 Disciplinary action may be taken against members of certain professions by registration or accreditation bodies. There are also complaint bodies that can receive complaints about people working in those professions.

11.192 In some cases, these organisations are national,[198] while others are state or territory based.[199] Registration or accreditation agencies and complaint handling bodies may also hold information relevant to assessing the potential risk posed by individuals seeking to work in aged care.

11.193 Consideration could be given to incorporating information held by such agencies, noting that significant work would need to be conducted to identify relevant organisations and establish appropriate information sharing networks. Such an approach could be implemented at a later stage.

198 For example, the Australian Health Practitioner Regulation Agency.

199 For example, NSW Health Care Complaints Commission; Office of the Health Care Complaints Commissioner, Victoria.

Continuous monitoring of people working in aged care

11.194 The police check offers a clearance that represents a point in time. There is no capacity for ongoing monitoring of police records, without applying for a new clearance. The practical effect of this is that a person could have a police clearance, but be subject of criminal proceedings that would not be identified by the checking system.[200]

11.195 Several organisations have supported or recommended national employment screening in respect of children that utilises a continuous monitoring process.[201] The Australian Human Rights Commission has suggested that

> A continuous feed of all state and commonwealth criminal databases should be readily available to the checking body, which should engage in daily monitoring of such records. Such a system has now been implemented in several states, noting that this is for state based offences only. Point-in-time screening only at recruitment or application phase is inadequate to ensure ongoing protection, and may be counterproductive insofar as it induces complacency.[202]

11.196 Continuous monitoring of people who have clearances is an important safeguard that should be embedded in the architecture of the screening mechanism. The screening agency should have the capacity to monitor national criminal history (subject to recommendations for ongoing national police database monitoring being progressed) as well as notifications made under the proposed reportable incidents scheme.

Mechanics

Persons to whom the scheme should apply

11.197 The existing requirement to obtain a police clearance for those people working in Commonwealth subsidised aged care offers a definable group of persons to whom the proposal should apply, at least in the first instance.

How long should a clearance last before renewal is required?

Question 11–2 How long should an employment clearance remain valid?

11.198 The current police clearance must be renewed every three years. The duration of working with children and vulnerable person checks in Australian jurisdictions varies across jurisdictions.[203]

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200 Australian Human Rights Commission, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 1: Working with Children Checks* (August 2013) 5–6.

201 Ibid 8; Royal Commission into Institutional Responses to Child Sexual Abuse, above n 177, 45.

202 Australian Human Rights Commission, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 1: Working with Children Checks* (August 2013) 8.

203 South Australia has a 'point in time' check, while a clearance lasts for two years in the Northern Territory, three years in the ACT, Queensland, Tasmania, and Western Australia, and five years in Victoria and New South Wales: Australian Institute of Family Studies, above n 175.

11.199 The Royal Commission into Institutional Responses to Child Sexual Abuse recommended that, subject to continuous monitoring of criminal history records, working with children checks should remain valid for five years before a person must apply for renewal.[204] This included recognition of the impost, including cost, on organisations to conduct checks among other factors.[205]

11.200 The ALRC invites comment on how long a clearance under the proposed national employment screening scheme should last.

How should risk be assessed and checks determined?

> **Question 11–3** Are there further offences which should preclude a person from employment in aged care?

11.201 Currently, there are a number of criminal offences (see above at 11.155)[206] which bar a person from being employed in aged care.

11.202 The ALRC invites comment on whether there are further criminal offences that should exclude a person from working in aged care.

11.203 Where a police certificate returns convictions for offences that are not an outright bar, the ALRC suggests that the decision about whether a person should be given a clearance should lie with the screening agency, who would be responsible for conducting a risk assessment and determining an outcome. This represents a shift away from the current process, whereby an approved provider can determine whether to employ a person whose police check returns a conviction for an offence that is not an automatic bar to employment. Approved providers would still take other steps to establish a person's suitability, including by conducting reference checks with a person's previous employers.

11.204 The ALRC suggests that it is appropriate that a single, independent organisation be responsible for assessing risk in such instances, and that that agency have appropriately trained staff to perform such assessments. This approach reflects the approach taken in respect of working with children and vulnerable person checks.

11.205 The screening agency will also need to conduct risk assessments of individuals whose check returns certain information that, while not meeting the 'outright bar' threshold, nonetheless may present a risk to older people.

11.206 At this stage, the issue of which organisation or agency should be responsible for conducting the check is not an issue about which the ALRC has a view.

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204 Royal Commission into Institutional Responses to Child Sexual Abuse, above n 177, rec 31.
205 Ibid 108.
206 *Accountability Principles 2014* (Cth) s 48.

11.207 The ALRC acknowledges that there will be implementation issues to be resolved, including who will be responsible for the scheme and the architecture that will establish it and, importantly, mechanisms for information sharing across jurisdictions.

11.208 There are a number of substantive issues that will require significantly more work before the scheme could become operational. These include where a disclosure does not automatically bar a person but signifies the need to conduct a risk assessment, how should risk be assessed and determined.

11.209 There is some guidance on these issues in respect of working with children checks,[207] however there has not been sufficient examination of the evidence base in regards to aged care.

11.210 In part, this issue is likely to be impacted by the question of having nationally consistent screening that would apply across community sectors including children, disability and aged care, noting that some of these are already conducted at state and territory level. This is discussed further below.

National approach across sectors

11.211 It has been suggested that a nationally consistent workforce screening process be established across service delivery to children, people with disability and older persons.[208]

11.212 Such an approach would better address the mobility issues referred to above, as well as offer enhanced safeguards and deliver cost savings in the future. The Department of Social Services reported that, in response to the proposed National Disability Insurance Scheme Quality and Safeguarding Framework,

> [t]here was also strong support for establishing a consistent approach across relevant sectors because the same type of information would be important for deciding who is safe to work in these sectors. Most references were to the need for consistency with aged care and children's services because staff often work in positions that have contact with these groups at the same time or move between these sectors. But there was also reference to the benefit of consistency across the broader community services sector.[209]

11.213 The ALRC acknowledges that several stakeholders, including the NSW Ombudsman, indicated support for enhanced staff screening as a safeguarding mechanism. It said 'there would be merit in exploring the introduction of a nationally consistent screening system for vulnerable people more broadly (including child-related, aged care, and disability support)'.[210]

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207 Royal Commission into Institutional Responses to Child Sexual Abuse, above n 177.

208 Ibid; ARTD Consultants, above n 178, 40.

209 ARTD Consultants, above n 178, p 43; NSW Ombudsman, *Submission 160*; National Disability Services, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper 1: Working with Children Checks* (August 2013) 2.

210 NSW Ombudsman, *Submission 160*; Australian Association of Social Workers, *Submission 153*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*.

11.214 Although beyond the scope of this Inquiry, the ALRC considers that there may be merit in incorporating the proposed national check designed to cover those working in aged care, with other national clearances that have been either recommended or proposed in respect of children and people with disability. This would require significant investment, but could foreseeably result in savings in the mid-to-long term, while also providing more comprehensive safeguards for children, people with disability and people receiving aged care by restricting individuals refused a clearance from working in one sector from moving across to another sector.

Code of conduct for aged care workers

Proposal 11–6 Unregistered aged care workers who provide direct care should be subject to the planned National Code of Conduct for Health Care Workers.

11.215 The ALRC proposes that, to provide a further safeguard relating to the suitability of people working in aged care, unregistered aged care workers who provide personal care should be subject to state and territory legislation giving effect to the National Code of Conduct for Health Care Workers.

11.216 Some people who work in aged care—such as registered and enrolled nurses—are members of a registered profession. The Health Practitioner Regulation National Law[211] creates a National Registration and Accreditation Scheme (National Scheme) for registered health practitioners—14 professions, including medical practitioners, nurses and midwives, physiotherapists and psychologists. The professions are regulated by a corresponding National Board. The Australian Health Practitioner Regulation Agency (AHPRA) supports the National Boards to implement the National Scheme.[212]

11.217 The National Scheme has, as one of its objectives, keeping the public safe by 'ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered'.[213] Measures to ensure public safety include, among other things:

- requiring that National Boards develop registration standards for registered professions;[214]

211 The National Law is enacted through legislation in each state and territory: Australian Health Practitioner Regulation Agency, *Legislation* <www.ahpra.gov.au>.
212 Australian Health Practitioner Regulation Agency, *Who We Are* <www.ahpra.gov.au>.
213 Australian Health Practitioner Regulation Agency, *Home* <www.ahpra.gov.au>.
214 Health Practitioner Regulation National Law s 38.

- requiring that certain conduct of a health practitioner (including engaging in sexual misconduct and placing the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards) be notified to AHPRA;[215] and
- allowing for complaints to be made about a registered health practitioner.[216]

11.218 However, many aged care workers—variously employed as assistants in nursing, aged care workers, or personal care workers—are unregistered.[217] The Council of Australian Governments (COAG) Health Council has noted that this may present risks to persons receiving care:

> There is no nationally uniform or consistent mechanism for prohibiting or limiting practice when an unregistered health practitioner's impairment, incompetence or professional misconduct presents a serious risk to the public. There is evidence that practitioners will move to those jurisdictions that have less regulatory scrutiny, in order to continue their illegal or unethical conduct.[218]

11.219 To address these concerns about unregistered health practitioners, state and territory Ministers have agreed, in principle, to implement a National Code of Conduct for Health Care Workers (National Code of Conduct).[219] Some stakeholders argued that a specific licensing body or registration scheme should be established for aged care workers.[220] However, given that there is agreement in relation to enacting a National Code of Conduct, the ALRC proposes instead that aged care workers providing direct care should be included in the planned National Code of Conduct.[221]

11.220 The National Code of Conduct is to be implemented by state and territory legislation. The National Code of Conduct is a 'negative licensing' scheme. It does not restrict entry into health care work, but will set national standards against which disciplinary action can be taken and, if necessary, a prohibition order issued, in circumstances where a health care worker's continued practice presents a serious risk to public health and safety.[222] Any person would be able to make a complaint about a breach of the National Code of Conduct.[223]

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215 Health Practitioner Regulation National Law pt 8 div 2.

216 Health Practitioner Regulation National Law pt 8 div 3.

217 Many of these will have obtained a vocational qualification such as a Certificate III in Individual Support: *CHC33015—Certificate III in Individual Support* <www.training.gov.au>.

218 COAG Health Council, *Final Report: A National Code of Conduct for Health Care Workers* (2015) 14.

219 Ibid 8, 11. NSW and South Australia have previously implemented a Code of Conduct for unregistered health practitioners: Ibid 12. Queensland has implemented the National Code of Conduct, effective from 1 October 2015: Office of the Health Ombudsman (Qld), *Unregistered Health Practitioner Notifications* <www.oho.qld.gov.au>.

220 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; National Seniors Australia, *Submission 154*; United Voice, *Submission 145*. See also Legislative Council General Purpose Standing Committee No 3, Parliament of NSW, *Registered Nurses in New South Wales Nursing Homes* (27 October 2015) rec 6: the NSW Government, through the Council of Australian Governments, urge the Commonwealth Government to establish a licensing body for aged care workers.

221 COAG Health Council, above n 219.

222 The Code includes requirements such as: health care workers are to provide services in a safe and ethical manner; are not to financially exploit clients; engage in sexual misconduct: Ibid appendix 1.

223 Ibid rec 5. The Complaint would be made to the relevant state or territory health complaints entity.

11.221 In its Final Report containing recommendations about the Code, the COAG Health Council defines 'health care worker' as a natural person who provides a health service. The COAG Health Council Report also provides a recommended definition of 'health service'. Relevantly, a health service includes 'health-related disability, palliative care or aged care service', as well as support services necessary to implement these.[224] However, the Report noted that it can sometimes be unclear whether a service provided by, for example, an assistant in nursing in aged care, is a 'health service'.[225] The ALRC considers that all aged care workers who provide direct care services should be covered by the National Code of Conduct and proposes that legislation enacting the Code should ensure that these workers are covered by the definition of 'health care worker'.

11.222 Some Australian Government-funded aged care services may provide services that do not involve direct care, such as transport, home maintenance or domestic assistance services. The ALRC does not consider that workers providing these services should be subject to the Code, but should, in appropriate cases, be required to be subject to employment screening processes as set out in Proposals 11-4 and 11-5.

Other staffing issues

11.223 Stakeholders raised a range of other issues relating to staffing in aged care, including: the adequacy of numbers and mix of staff; appropriate qualifications for performing aged care work; the quality of training of aged care workers; pay and conditions; and the challenges presented by an expanding need for care workers.[226] The Aged Care Legislated Review is required to consider workforce strategies in aged care, and is better positioned to make recommendations relating to these issues.[227]

11.224 As the Older Women's Network pointed out, aged care work is 'important work, carrying high levels of responsibility, requiring well trained, compassionate care workers and care managers'.[228] United Voice also emphasised the important role to be played by the aged care workforce in safeguarding older persons form abuse, arguing that '[q]uality support that respects and advances the rights of older Australians to live free from harm and exercise choice and control in their own lives requires a stable, professionally trained, qualified and dedicated workforce'.[229]

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224 Ibid rec 4.

225 Ibid 24–25.

226 See, eg, Seniors Rights Service, *Submission 169*; Australian Nursing & Midwifery Federation, *Submission 163*; L Barratt, *Submission 155*; Australian College of Nursing, *Submission 147*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; Advocare Inc (WA), *Submission 86*; Alzheimer's Australia, *Submission 80*; Queensland Nurses' Union, *Submission 47*.

227 Department of Health (Cth), above n 38. The Senate Standing Committee on Community Affairs is also conducting an Inquiry into the future of Australia's aged care sector workforce, to report on 28 April 2017: *Future of Australia's Aged Care Sector Workforce* <www.aph.gov.au>. See also Debra King et al, 'The Aged Care Workforce, 2012—Final Report' (Department of Health and Ageing, 2013).

228 Older Women's Network NSW, *Submission 136*.

229 United Voice, *Submission 145*.

11.225 As stakeholders argued, strategies to address elder abuse in aged care must be integrated with broader aged care policy settings. The NSW Nurses and Midwives Association, for example, observed that

> There will be increasing reliance on registered nurses, enrolled nurses and assistants in nursing to meet the needs of the ageing population. This means that strategies to reduce the incidence of elder abuse must be aligned with wider government reform within the aged care sector as a whole. Consumer directed care; increasing use of community based care services and workforce planning within the aged care sector will all impact on the ability of frontline staff and the wider community to ensure adequate protections are in place for the most vulnerable elderly.[230]

11.226 Appropriate planning for a well-supported and qualified aged care workforce is particularly important given projections about the expansion of the aged care workforce as the population ages. Some estimates suggest that, by 2050, the number of employees engaged in the provision of aged care will account for 4.9% of all employees in Australia.[231]

11.227 A 2011 systematic review concluded that research on the staffing models for residential aged care that provide the best outcomes for residents and staff is limited, and further research is required.[232] In this Inquiry, the Australian College of Nursing also called for further research to 'identify the right skill-mix of staff to prevent decreases in quality of care in aged care settings including the neglect of care recipients'.[233]

11.228 A number of submissions to the Inquiry raised significant concerns about the adequacy of staffing in residential aged care.[234] For example, an Australian Nursing and Midwifery Federation survey about aged care reported that 80% of participants who worked in residential aged care considered that staffing levels were insufficient to provide an adequate level of care to residents.[235] Emeritus Professor Rhonda Nay has commented that

> We tolerate a level of staffing and staff mix in aged care that would close wards in the acute system. Despite years of discussion and criticism it is still possible to work with

230 NSW Nurses and Midwives' Association, *Submission 29*.

231 Productivity Commission, above n 23, 354.

232 Brent Hodgkinson et al, 'Effectiveness of Staffing Models in Residential, Subacute, Extended Aged Care Settings on Patient and Staff Outcomes' [2011] (6) *Cochrane Database of Systematic Reviews*. The review used the term 'staffing models' to mean how staffing was organised to meet resident/patient needs and included the mix, and the level of skills, as well as interventions such as staffing ratios, skill mixes, continuity of care and primary nursing: Ibid 3.

233 Australian College of Nursing, *Submission 147*. See also United Voice, *Submission 145*.

234 See, eg, Seniors Rights Service, *Submission 169*; Australian Nursing & Midwifery Federation, *Submission 163*; L Barratt, *Submission 155*; Australian College of Nursing, *Submission 147*; Elder Care Watch, *Submission 84*; Alzheimer's Australia, *Submission 80*; Queensland Nurses' Union, *Submission 47*; NSW Nurses and Midwives' Association, *Submission 29*; Quality Aged Care Action Group Incorporated, *Submission 28*.

235 Australian Nursing & Midwifery Federation, *ANMF National Aged Care Survey Final Report* (2016) 13. The survey was referred to in Australian Nursing & Midwifery Federation, *Submission 163*.

> extremely vulnerable older people while having no relevant qualification. This should be an outrage.[236]

11.229 The *Aged Care Act* requires that residential aged care providers 'maintain an adequate number of appropriately skilled staff to ensure that the care needs of care recipients are met'.[237] However, there have been consistent calls, repeated in this Inquiry, for a legislated mandated minimum of staff and/or registered nurses in residential aged care. [238] Concerns were raised that an adequate number and mix of staff are not being maintained in residential aged care. The NSW Nurses and Midwives Association provided this account from a care recipient's relative:

> On a public holiday there was one qualified nurse for 85 people. The catheter had fallen out [and] the nurse was unable to replace it. The hospital phoned for an ambulance to take dad to hospital. It was 8 hours before an ambulance arrived.[239]

11.230 They also cited a number of aged care workers who raised concerns about staffing levels. For example, an assistant in nursing said that

> Lack of staffing and /or resources can lead to instances of inadvertent abuse of elders. E.g. when residents unable to speak up for themselves are left for hours in wet/ soiled beds or continence aids because staff are busy attending to other, more vocal residents.[240]

11.231 A registered nurse reported:

> Where I work NEGLECT would be without a doubt the main form of Elder Abuse in residential aged care. The cause is time constraints, inadequate training and lack of resources (registered nurses and assistants in nursing) I have seen people who may have difficulty walking soon become wheelchair bound because the nursing and care staff do not have time to walk the resident often enough.[241]

11.232 Another concern raised by submissions related to the qualifications of workers who may provide home-based aged care. The Queensland Nurses Union noted, for example, that people with complex health needs are increasingly receiving aged care in the home, and argued that such care should be 'provided or supervised and evaluated by a registered nurse'.[242]

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236 Rhonda Nay, 'The Good, the Bad and the Downright Ugly: Reflections on 10 Years' (2016) 11(4) *Residential Aged Care Communiqué* 6.

237 *Aged Care Act 1997* (Cth) s 54-1(b). The Quality Agency, when assessing a residential aged care service, should assess the adequacy of staffing numbers and types: Australian Aged Care Quality Agency, *Pocket Guide to the Accreditation Standards* (2014) 12.

238 See, eg, People with Disability Australia, *Submission 167*; Australian Nursing & Midwifery Federation, *Submission 163*; L Barratt, *Submission 155*; Australian College of Nursing, *Submission 147*; Capacity Australia, *Submission 134*; Alzheimer's Australia, *Submission 80*; Queensland Nurses' Union, *Submission 47*; Australian National University Elder Abuse Law Student Research Group, *Submission 146*. For previous calls for mandated minimum staffing levels, see, eg, Legislative Council General Purpose Standing Committee No 3, Parliament of NSW, *Registered Nurses in New South Wales Nursing Homes* (27 October 2015) 30–1; NSW Nurses and Midwives' Association, *Let's Have RNs 24/7 in Aged Care Across Australia!* <www.nswnma.asn.au>.

239 NSW Nurses and Midwives' Association, *Submission 29.*

240 Ibid.

241 Ibid.

242 Queensland Nurses' Union, *Submission 47*.

Restrictive Practices

Proposal 11–7 The *Aged Care Act 1997* (Cth) should regulate the use of restrictive practices in residential aged care. The Act should provide that restrictive practices only be used:

(a) when necessary to prevent physical harm;

(b) to the extent necessary to prevent the harm;

(c) with the approval of an independent decision maker, such as a senior clinician, with statutory authority to make this decision; and

(d) as prescribed in a person's behaviour management plan.

11.233 The use of restrictive practices will, in some circumstances, be elder abuse. Restrictive practices can deprive people of their liberty and dignity—basic legal and human rights. The practices might also sometimes amount to assault, false imprisonment and other civil and criminal wrongs. The ALRC proposes that the use of these practices in residential aged care facilities be regulated in the *Aged Care Act*. If regulated, restrictive practices may be used less often and only when appropriate. This will reduce one type of elder abuse and serve to protect older people's legal and human rights.

11.234 The key elements of regulation set out in the proposal are intended to discourage the use of restrictive practices and set a clear and high standard, so that the practices are subject to proper safeguards and only used when strictly necessary.

What are restrictive practices?

11.235 Restrictive practice has been defined as 'any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability, with the primary purpose of protecting the person or others from harm'.[243]

11.236 Common forms of restrictive practice include: detention (eg, locking a person in a room or ward indefinitely); seclusion (eg, locking a person in a room or ward for a limited period of time); physical restraint (eg, clasping a person's hands or feet to stop them from moving); mechanical restraint (eg, tying a person to a chair or bed); and chemical restraint (eg, giving a person sedatives).[244] The Australian and New Zealand Society for Geriatric Medicine submitted that restrictive practices are 'still

243 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014) 4.

244 Admitting a person to a residential care facility against their wishes or without their consent (perhaps when they do not have the capacity to consent) may also be considered a type of restrictive practice. In the UK, this is governed by 'deprivation of liberty safeguards', which have been the subject of criticism and a current Law Commission inquiry: Law Commission (UK), *Mental Capacity and Deprivation of Liberty* <www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/>.

pervasive' in residential aged care facilities, 'particularly in relation to chemical sedation and inappropriate use of drugs'.[245]

11.237 Although not commonly included in discussions of elder abuse, the use of restrictive practices can amount to abuse. Concerns have been expressed about the use of restrictions as a 'means of coercion, discipline, convenience or retaliation by staff or others providing support, when aged care facilities are understaffed'.[246]

11.238 In practice, restrictive practices are most often used on people with an intellectual disability or cognitive impairment who exhibit 'challenging behaviours', such as striking themselves or other people or 'wandering'. They are therefore intended to be used to protect the restrained person or others from harm.

11.239 However, some question whether restrictive practices are ever truly necessary, often stressing the importance of instead using 'Positive Behaviour Support'. Instead of using restraints, care workers and informal carers 'need to be supported and given adequate time to provide responsive and flexible and individualized care'.[247] PWDA also said these practices should be stopped, and that there should instead be a focus on the 'environmental or service factors' that cause problematic behaviour.[248] Others submitted that, although they should be a last resort, restrictive practices are sometimes necessary 'to protect other care recipients and staff'.[249]

11.240 The proposal in this section is not intended to imply that restrictive practices are sometimes necessary, much less condone their use. Rather, it is intended to limit and carefully regulate the use of restrictive practices. If it is never necessary to use these practices, the proposed law would serve to prohibit the use of restrictive practices.

Regulating restrictive practices in aged care

11.241 A national framework exists for reducing and eliminating the use of restrictive practices in the disability service sector.[250] In aged care, the use of restrictive practices is not explicitly regulated, although guidance has been provided.[251]

11.242 In the *Equality, Capacity and Disability* Report, the ALRC discussed the use of restrictive practices in Australia, highlighted the 'patchwork' of federal, state and

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245 Australian and New Zealand Society for Geriatric Medicine, *Submission 51*. 'Much of this practice is driven my lack of skills and knowledge as well as staffing numbers': Ibid.

246 Older Women's Network NSW, *Submission 136* quoting Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016).

247 Older Women's Network, *Submission 136*.

248 They also suggested that government guidance on the use of restrictive practices may amount to 'tacit approval of these practices': People with Disability Australia, *Submission 167*.

249 National Seniors Australia, *Submission 154*.

250 Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (2014).

251 The Department of Health submitted that it had 'produced tool kits to assist staff and management working in both residential and community aged care settings to make informed decisions in relation to the use of restraints': Department of Health, *Submission 113*.

territory laws and policies governing restrictive practices, and set out stakeholder calls for reform.[252] The report recommended that Commonwealth, state and territory governments 'develop a national approach to the regulation of restrictive practices', including in the aged care sector.[253] Calls for reform, including for nationally consistent legislated regulation, were repeated in submissions to this Inquiry into elder abuse.[254]

11.243 That the use of restrictive practices may sometimes amount to elder abuse provides further support for the need for additional regulation. In this Inquiry, the ALRC proposes that the *Aged Care Act* be amended to regulate the use of restrictive practices in residential care facilities. The scheme in the *Disability Act 2006* (Vic) pt 7 may be a suitable model.[255] Some of the key elements of the Victorian law are contained in the above proposal, including the requirement that the restraint only be used when necessary to prevent harm.

11.244 That restrictive practices should only be used when necessary was stressed in many submissions to this Inquiry. For example, the Australian College of Nursing urged that 'restrictive practices in all circumstances must be practices of last resort'.[256] National Seniors Australia also said they should only be used when necessary, and outlined some safeguards:

> Restrictive practices should only be used following assessment by a qualified medical practitioner, preferably a psychogeriatrician, geriatrician or geropsychologist or after advice from a Dementia Behavioural Management Advisory Service or Older Persons Mental Health Service. Restrictive practices should also only be used after the consent of a guardian or representative has been obtained. Restrictive practices should only be used when all behavioural prevention strategies have been systematically attempted or considered.[257]

11.245 Similarly, the Office of the Public Advocate (Qld) argued that the legal framework should ensure that restrictive practices should are 'only ever used in aged care environments as a last resort, that they are complemented by appropriate safeguards and that there is appropriate monitoring and oversight of their use'.[258]

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252 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 8. See also Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014) ch 6; Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 15.

253 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 8-2.

254 See, eg, Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; Australian Nursing & Midwifery Federation, *Submission 163*; National LGBTI Health Alliance, *Submission 156*; Office of the Public Advocate (Qld), *Submission 149*; Leading Age Services Australia, *Submission 104*; Queensland Nurses' Union, *Submission 47*.

255 See Michael Williams, John Chesterman and Richard Laufer, 'Consent vs Scrutiny: Restrictive Liberties in Post-Bournewood Victoria' (2014) 21 *Journal of Law and Medicine* 1. See also Office of the Public Advocate (Vic), *Submission 95*.

256 Australian College of Nursing, *Submission 147*.

257 National Seniors Australia, *Submission 154*.

258 Office of the Public Advocate (Qld), *Submission 149*.

11.246 Staff shortages or convenience should not justify the use of a restrictive practice. If only used when strictly necessary, restrictive practices are more likely to be a proportionate and justified limitation on the rights of people who are restrained.

Decision making

11.247 Abuse of formal and informal decision-making powers was identified in submissions as a form of elder abuse in aged care. Stakeholders raised concerns about:

- failures to respect or acknowledge the decision-making ability of an older person;[259]
- abuse by informal and appointed decision makers, including misuse of powers of attorney, and abusive or prohibitive lifestyle decisions;[260]
- a lack of understanding of the powers and duties of appointed decision makers, by both the decision maker and aged care workers;[261] and
- in relation to consumer directed care, concern about family members inappropriately influencing the decisions made by older people about the design of a care package.[262]

11.248 In the *Equality, Capacity and Disability* Report, the ALRC recommended that aged care laws and legal frameworks should be amended consistently with its National Decision-Making Principles.[263] These Principles emphasise the equal rights of all adults to make decisions that affect their lives, and prescribe that the will, preferences and rights of a person who may require decision-making support must direct these decisions.[264] The ALRC also developed a 'Commonwealth decision-making model' that, among other things, makes provision for the appointment of a

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259 A number of submissions raised concerns about decision making in relation to admission to residential aged care: Justice Connect, *Submission 182*; Office of the Public Advocate (Qld), *Submission 149*; Townsville Community Legal Service Inc, *Submission 141*; Office of the Public Advocate (Vic), *Submission 95*. See also the example of June, in a case study provided in ADA Australia, *Submission 150*.

260 For example, the NSW Nurses and Midwives Association submitted that one third of members responding to a survey about elder abuse had either witnessed, or were unsure about witnessing financial abuse of a person by relatives who held Power of Attorney: NSW Nurses and Midwives' Association, *Submission 29*. See also Justice Connect, *Submission 182*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; GLBTI Rights in Ageing Institute, *Submission 132*; Leading Age Services Australia, *Submission 104*; Office of the Public Advocate (Vic), *Submission 95*; Alice's Garage, *Submission 36*.

261 ADA Australia, *Submission 150*; Advocare Inc (WA), *Submission 86*.

262 Office of the Public Advocate (SA), *Submission 170*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian College of Nursing, *Submission 147*; Aged and Community Services Australia, *Submission 102*; Advocare Inc (WA), *Submission 86*. There are existing safeguards against inappropriate care packages being developed through a CDC model. These include providers' responsibilities in relation to providing ongoing review of a person's home care package: *Aged Care Act 1997* (Cth) s 56-2(k); *User Rights Principles 2014* (Cth) sch 2 cl 3(d); Department of Health (Cth), above n 43, 36. There are also limits on what home care package funds can be spent on: *Quality of Care Principles 2014* (Cth) sch 3 pt 2.

263 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 6-2.

264 Ibid rec 3-1. The National Decision-Making Principles, and the ALRC's approach to supported decision making, are discussed further in Chapter 1.

'supporter' or a 'representative' for a person who requires decision-making support, and recommended that aged care legislation be amended consistently with this model.[265]

11.249 The ALRC considers that the implementation of these recommendations will assist in ensuring that decisions in aged care are made in accordance with an older person's will, preferences and rights.

11.250 The *Aged Care Act* and associated Principles contain a number of provisions relating to decision making. For example, the Charters of Care Recipients' Rights and Responsibilities include rights in relation to decision making in residential and home care.[266] There are also provisions in aged care legislation that allow for supported or representative decision making. However, the use of terminology across the legislation, and the powers and duties attached to persons who may act in these roles, are not consistent. As the *Equality, Capacity and Disability* Report noted, the

> current legal framework provides for some elements of supported and representative decision-making in aged care. Section 96-5 of the Aged Care Act provides for a person, other than an approved provider, to represent an aged care recipient who, because of any 'physical incapacity or mental impairment' is unable to enter into agreements relating to residential care, home care, extra services, accommodation bonds and accommodation charges. Section 96-6 states that in making an application or giving information under the Act, a 'person authorised to act on the care recipient's behalf' can do so.[267]

11.251 The *Quality of Care Principles* define 'representative' in a way that is 'similar to both supporters and representatives in the Commonwealth decision-making model'.[268]

11.252 Implementation of the ALRC's recommendation to amend aged care legislation in line with the Commonwealth decision-making model would provide a consistent approach to supported decision making, and offer an important safeguard against abuse for older people receiving aged care. It would provide clear statutory guidance for decision making, with the starting point that the older person's will, preferences and rights should guide decisions made regarding their care.

11.253 Implementation of the ALRC's recommendation would also require:

- consideration of interaction with state and territory appointed decision makers;[269]

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265 Ibid rec 6-2. For a discussion of how the ALRC's recommended terminology of 'representative' maps on to the existing use of 'representative' in the *Aged Care Act*, see Ibid 168–73.

266 *User Rights Principles 2014* (Cth) sch 1 cl 1(n), sch2 cls 2(c)–(d), 5(d).

267 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 168.

268 Ibid 169; *Quality of Care Principles 2014* (Cth) s 5.

269 The ALRC considered this in the context of decision making in the NDIS in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) ch 5.

- revision of guidelines and operational manuals across the aged care system, including for aged care assessment teams, approved providers, and advocacy services to ensure consistent guidance about decision making; and
- training and education for aged care workers in principles for decision making for care recipients, including powers and duties of appointed decision makers, and avenues for reporting concerns about abuse of decision-making powers.[270]

11.254 The Office of the Public Advocate (Vic) supported the recommendations relating to aged care made in the *Equality, Capacity and Disability* Report, arguing that these will help 'ensure older people with cognitive impairment are adequately supported to make and enact decisions according to their will and preferences, thereby protecting them from people making decisions for them that contravene their rights'.[271] The GLBTI Rights in Ageing Institute argued that an 'individual's rights and autonomy would be better protected by legal frameworks which emphasised the benefits of supported decision-making processes'.[272] The Australian College of Nursing noted that a person's ability to make decisions may change, and that following a period of dependence, 'processes must facilitate and protect an older person's right to resume control in directing their care planning and resume independence in decision-making'.[273]

11.255 A revision of the decision-making provisions in aged care laws and legal frameworks is particularly timely given the move towards consumer directed care. As a number of submissions to this Inquiry noted, many recipients of aged care may need support to make decisions about care planning.[274] For example, Speech Pathology Australia noted that communication difficulties 'are one of the greatest barriers to the execution of choice and active participation in decision making and care planning, including development of a support or care plan under a consumer directed care model'.[275] The importance of funded advocacy programs in providing decision-making support was also highlighted by stakeholders.[276]

11.256 Reforms proposed elsewhere in this Discussion Paper will also assist in providing safeguards against abuse of a person's decision-making rights. These include proposals for reform of laws relating to enduring powers of attorney and guardianship (Chapter 5); guardianship and financial administration (Chapter 6) as well as the proposal to provide oversight of the use of restrictive practices in aged care (Proposal 11-7).

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270 This was supported by Justice Connect, *Submission 182*; ADA Australia, *Submission 150*; NSW Nurses and Midwives' Association, *Submission 29*.

271 Office of the Public Advocate (Vic), *Submission 95*.

272 GLBTI Rights in Ageing Institute, *Submission 132*. See also Speech Pathology Australia, *Submission 168*; Australian College of Nursing, *Submission 147*; TASC National, *Submission 91*; Law Council of Australia, *Submission 61*.

273 Australian College of Nursing, *Submission 147*.

274 See, eg, Speech Pathology Australia, *Submission 168*; Australian Association of Social Workers, *Submission 153*; Office of the Public Advocate (Vic), *Submission 95*.

275 Speech Pathology Australia, *Submission 168*.

276 See, eg, Australian Nursing & Midwifery Federation, *Submission 163*; Advocare Inc (WA), *Submission 86*.

Requiring appointed decision makers

Proposal 11–8 Aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the care recipient has appointed a decision maker for lifestyle, personal or financial matters.

11.257 Some submissions observed that it was the practice of some approved residential aged care providers to require, as part of an agreement with the provider, that a person has appointed a financial and/or a lifestyle decision maker as a condition of entry into residential aged care.[277]

11.258 The Office of the Public Advocate (Qld) observed that the 'rationale for this policy is likely to be a financial and legal safeguard for the facility by ensuring that all people seeking placement have a mechanism in place to ensure continuity of decision-making in respect of the person's placement should they cease to have capacity'.[278]

11.259 Other submissions outlined the complexities that aged care providers can face in relation to decision making. The Australian College of Nursing noted that 'aged care providers can be significantly challenged by situations when an older person does not have advance care directives about the appointment of guardians and there is no suitable substitute decision maker to work with'.[279] Resthaven stated that providers 'face a real challenge for the older person who has not made any Advance Directives about the appointment of guardians prior to their loss of competency and where it is not evident there is a suitable substitute decision maker to work with'.[280]

11.260 While recognising these challenges, the ALRC considers that appointing a representative decision maker should not be required as a condition of receipt of aged care. Advance planning for decision-making support in aged care should be encouraged.[281] However, requiring that a person has appointed a decision maker before entry into aged care is an inappropriate encroachment on the decision-making rights of older people.

11.261 In keeping with an emphasis on respecting a person's decision-making ability, the ALRC proposes that aged care legislation should provide that agreements entered into between an approved provider and a care recipient cannot require that the

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277 See, eg, Seniors Rights Service, *Submission 169*; Office of the Public Advocate (Qld), *Submission 149*; Townsville Community Legal Service Inc, *Submission 141*. Agreements entered into between an approved provider and a residential care recipient include accommodation agreements and resident agreements. The Act specifies a number of requirements for those agreements: *Aged Care Act 1997* (Cth) ss 52F-3, 59-1, 61-1.

278 Office of the Public Advocate (Qld), *Submission 149*.

279 Australian College of Nursing, *Submission 147*.

280 Resthaven, *Submission 114*.

281 Information and education about the utility for older people of putting in place arrangements for a person to make financial and/or lifestyle decisions on their behalf would form part of the proposed National Plan to reduce elder abuse (see prop 2-1). National Seniors Australia supported an 'ongoing public campaign' in relation to this: National Seniors Australia, *Submission 154*.

care recipient has appointed a decision maker for lifestyle, personal or financial matters.

11.262 As Seniors Rights Service argued, 'a resident should have the right to choose whether or not they will appoint a substitute decision maker. The provider may wish to take steps to ensure that their fees are paid but this should not encroach on the fundamental rights of the resident to make their own decisions'.[282]

Community visitors

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

(a) provide policies and procedures for community visitors to follow if they have concerns about abuse or neglect of care recipients;

(b) provide policies and procedures for community visitors to refer care recipients to advocacy services or complaints mechanisms where this may assist them; and

(c) require training of community visitors in these policies and procedures.

11.263 The 'community visitors scheme' (CVS) is a scheme in which recipients of both residential and home care, who are socially isolated or at risk of social isolation, are matched with volunteer visitors. Volunteers are coordinated by organisations funded by the Australian Government (auspices).[283] Community visitors are not advocates, and are directed to report any concerns they have about care to their auspicing organisation.[284]

11.264 The CVS provides an important role in reducing social isolation, which may itself be protective against abuse.[285] In 2014–15, community visitors made more than 148,000 visits to residents in aged care homes.[286] The ALRC does not propose any change to the community visitors' primary function—providing companionship. Nor does it propose that community visitors take on a pro-active role in identifying elder abuse. Instead, in Proposal 11-10, it proposes that an official visitors scheme be established.

11.265 However, the ALRC considers it essential that community visitors have an understanding of the avenues available to care recipients to protect and enforce their rights, as well as procedures for reporting concerns about abuse or neglect. At present, the CVS lacks detailed national guidelines. Auspices are required to develop internal

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282 Seniors Rights Service, *Submission 169*.. See also Office of the Public Advocate (Qld), *Submission 149*.

283 *Aged Care Act 1997* (Cth) pt 5.6; Department of Social Services (Cth), *Community Visitors Scheme (CVS) Policy Guide 2013–2016* (2013).

284 Department of Social Services (Cth), *Community Visitors Scheme (CVS) Frequently Asked Questions—Auspices*.

285 See further Kaspiew, Carson and Rhoades, above n 88, 8–9.

286 Department of Health (Cth), above n 8, 24.

policies relating to the CVS. However, there is limited guidance on what these should contain, including limited guidance about how to respond to concerns about abuse or neglect.[287] The ALRC proposes that national guidelines applying to the CVS should be developed, in place of the current approach that directs auspices to develop their own internal policies for the scheme. The guidelines should set consistent policies and procedures for visitors to follow if they have concerns about abuse or neglect of care recipients; provide policies and procedures for visitors to refer care recipients to advocacy services or complaints mechanisms where this may assist them; and require training of community visitors in these policies and procedures.

Official visitors

Proposal 11–10 The *Aged Care Act 1997* (Cth) should provide for an 'official visitors' scheme for residential aged care. Official visitors' functions should be to inquire into and report on:

(a) whether the rights of care recipients are being upheld;

(b) the adequacy of information provided to care recipients about their rights, including the availability of advocacy services and complaints mechanisms; and

(c) concerns relating to abuse and neglect of care recipients.

Proposal 11–11 Official visitors should be empowered to:

(a) enter and inspect a residential aged care service;

(b) confer alone with residents and staff of a residential aged care service; and

(c) make complaints or reports about suspected abuse or neglect of care recipients to appropriate persons or entities.

11.266 The ALRC proposes that there should be an 'official visitors' scheme established for residential aged care. Such a program would offer an additional safeguarding mechanism for older people in residential aged care, providing independent monitoring of residential aged care to ensure that residents' rights are being upheld, and to identify issues of abuse and neglect.

11.267 Such a scheme would complement existing (independent complaints and advocacy services) and proposed (reportable conduct, employment screening and oversight of restrictive practices) safeguards in aged care to provide an enhanced safeguarding strategy against abuse and neglect in aged care. Official visitors should be limited to residential aged care. While provision of aged care in the home is increasing, the ALRC considers that the powers of entry and inspection proposed for official

287 Department of Social Services (Cth), above n 285, 4–5.

visitors are not appropriate to private residential settings. The reportable incident scheme (Proposals 11-1 to 11-3) and the expanded powers proposed for public advocates or public guardians (Chapter 3) will assist in addressing concerns about abuse of recipients of home-based aged care.

11.268 Official visitors would perform a different function to advocacy services, who are reliant on being contacted by the care recipient or a representative. They would complement complaints and reportable incident schemes, by providing an additional opportunity to identify issues of concern, especially on behalf of those with cognitive or communication disabilities, and those with fewer social supports.

11.269 The ALRC has heard reports that some residential aged care staff, residents and family members felt inhibited to raise concerns about care through existing complaints and quality oversight processes. For example, the Australian Nursing and Midwifery Federation reported that:

> Our members working in [residential aged care facilities] feel unable to be open with [Quality Agency] assessors about perceived care failures due to fear of reprisal from their employers. Few systems exist for reporting on the operation of the home between inspections, which are often over a year apart.[288]

11.270 The ACT Disability, Aged and Carer Advocacy Service described its experience of aged care residents who 'report that some staff are abusive in the manner in which they go about their work … yet are fearful of making a complaint due to anxiety about retribution'.[289] Official visitors, operating as independent monitors, and empowered to speak to staff and residents, may enable the concerns of such residents and staff to be heard and appropriately responded to.

11.271 A number of submissions were supportive of a visitors program with a rights-monitoring focus in aged care.[290] The Productivity Commission also recommended that there be a similar program introduced into aged care as part of its recommended reforms to aged care in *Caring for Older Australians*.[291]

11.272 Similar visitors schemes operate in a number of states and the Northern Territory for people receiving mental health or disability services.[292] In Victoria, for example, it is a function of a community visitor to inquire into any case of suspected abuse or neglect of a resident in a range of accommodation settings, and can make

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288 Australian Nursing & Midwifery Federation, *Submission 163*.

289 ACT Disability, Aged and Carer Advocacy Service, *Submission 139*. See also Office of the Public Guardian (Qld), *Submission 173*; National Seniors Australia, *Submission 154*; Australian Research Network on Law and Ageing, *Submission 90*; Advocare Inc (WA), *Submission 86*; Queensland Nurses' Union, *Submission 47*; NSW Nurses and Midwives' Association, *Submission 29*; Quality Aged Care Action Group Incorporated, *Submission 28*.

290 See, eg, Office of the Public Advocate (Qld), *Submission 149*; United Voice, *Submission 145*; Australian College of Nursing, *Submission 147*; State Trustees Victoria, *Submission 138*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*.

291 Productivity Commission, above n 23, rec 15.3.

292 See, eg, *Public Guardian Act 2014* (Qld) pt 6; *Mental Health Act 2013* (Tas) pt 2; *Disability Services Act 2012* (NT) pt 6.

reports directly to the Department of Health and Human Services and the Victorian Parliament.[293]

11.273 In NSW, the Ombudsman coordinates an 'Official Community Visitor' scheme. The Ombudsman reported that this scheme performed 'a critical role in independent monitoring, resolution of complaints and emerging issues, and advocacy support'.[294] The Ombudsman submitted that the close link between the Official Visitors and its own complaints function has

> achieved substantial change and improved outcomes for people with disability … particularly in relation to matters concerning violence, abuse and neglect in residential care. These matters have benefitted from the separate but complementary functions we perform: notably, the ability of visitors to identify incidents of abuse and neglect … and to act to raise and resolve the issues as independent persons; and the powers and ability of our office to progress these matters on an individual and/or systemic basis.[295]

11.274 The ALRC considers that integrating its proposed expanded reportable incident scheme with an official visitors scheme could achieve similar improvements in the safeguarding of older people in residential aged care. The proposed powers of official visitors build on existing powers of community visitors and advocates under aged care legislation, and are similar to many of the state and territory schemes.[296]

11.275 An official visitors scheme adds an additional layer to the regulation and oversight of aged care that some stakeholders may consider unduly burdensome.[297] However, the ALRC considers it is important to embed independent oversight mechanisms into aged care in concert with plans for increasing deregulation of aged care.[298]

11.276 Some stakeholders suggested that the existing community visitors scheme could be reformed to take on a more active rights-monitoring role.[299] However, existing visitors and their auspicing organisations may not be well suited to this role, given the primary focus of the CVS is on providing companionship for aged care recipients. The CVS is important in reducing social isolation for aged care recipients,

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293 Office of the Public Advocate (Vic), *Submission 95*.

294 NSW Ombudsman, *Submission 160*.

295 Ibid.

296 Aged care legislation currently makes provision for access to a residential care service at any time for a person acting for a care recipient, including a community visitor and advocate where the care recipient has asked for their assistance: *User Rights Principles 2014* (Cth) ss 8(1), (2)(b). It also provides for access for advocates and community visitors during business hours in other circumstances: Ibid ss 8(2)(a), (3). For state and territory schemes, see, eg, *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) s 8; *Public Guardian Act 2014* (Qld) s 44; *Disability Services (Community Visitor Scheme) Regulations 2013* (SA) s 4(2).

297 A number of submissions suggested, in relation to monitoring of quality, that standards are rigorous and independently assessed: UnitingCare Australia, *Submission 162*; Resthaven, *Submission 114*; Aged and Community Services Australia, *Submission 102*.

298 The Aged Care Roadmap suggests that the destination of reform in aged care is co-regulation and 'earned autonomy' for approved providers: Aged Care Sector Committee, above n 25.

299 See, eg, Australian College of Nursing, *Submission 147*; Office of the Public Advocate (Vic), *Submission 95*.

and should be retained with clear guidance about how to deal with concerns about abuse or neglect.

Advocacy services

11.277 The National Aged Care Advocacy Programme (NACAP) provides assistance to people receiving Australian Government-funded residential care and home care.[300] The NACAP was reviewed in 2015, and there are plans to redesign the aged care advocacy system.[301] Consultation on a draft National Aged Care Advocacy Framework closed on 7 October 2016.[302]

11.278 The ALRC does not propose any changes to aged care advocacy services. However, submissions to the Inquiry highlighted the importance of an effective system of funded advocacy in providing safeguards for older people. For example, the Office of the Public Advocate (Vic) argued that advocacy services were 'essential to protecting the rights of older people in care. This is particularly important when moving to a consumer directed model of care to enable consumers to get the full benefit of such a system'.[303]

11.279 Stakeholders also pointed out that the effectiveness of advocacy services relied on their independence and accessibility. Accessibility for those with cognitive impairment as well as those who may be isolated or physically frail are key challenges that must be addressed to ensure that advocacy operates as a safeguard for older people. A number of submissions also emphasised the importance of ensuring that advocacy services should be inclusive to all older people receiving aged care, including Aboriginal and Torres Strait Islander; culturally and linguistically diverse; and lesbian, gay, bisexual, transgender and intersex people.[304]

Other issues

Aged care assessments

11.280 Before being approved as a care recipient, a person must have their care needs assessed.[305] For care regulated under the *Aged Care Act*, the assessment is conducted by an Aged Care Assessment Team (ACAT).[306] For the CHSP, the assessment is performed by a Regional Assessment Service (RAS).

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300 *Aged Care Act 1997* (Cth) div 81. Advocacy is also available for those receiving aged care through the CHSP: Australian Healthcare Associates, *Department of Social Services Review of Commonwealth Aged Care Advocacy Services Final Report* (2015) 15.

301 Australian Healthcare Associates, above n 301, 17.

302 Department of Health (Cth), *Consultation on the Draft National Aged Care Advocacy Framework* <www.consultations.health.gov.au>.

303 Office of the Public Advocate (Vic), *Submission 95*. See also ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Australian College of Nursing, *Submission 147*; Office of the Public Advocate (Qld), *Submission 149*.

304 See, eg GLBTI Rights in Ageing Institute, *Submission 132*; Older Persons Advocacy Network, *Submission 43*; Alice's Garage, *Submission 36*.

305 *Aged Care Act 1997* (Cth) s 22-4; Department of Social Services (Cth), above n 2, 76–82.

306 In Victoria, the assessment is provided by an Aged Care Assessment Service. The abbreviation ACAT is used in this chapter to refer to all assessment services for the purposes of the *Aged Care Act*.

11.281 The ALRC does not propose any changes to aged care assessments. As identified in the proposed National Plan,[307] it is important that all people working with older people receive appropriate training regarding elder abuse, and this is applicable also to personnel working in aged care assessment programs.

11.282 A number of submissions commended the value of ACATs, and their potential to play a role in identifying abuse.[308] Notwithstanding this, some noted that their role is a specific one—to assess a person's need for aged care—and argued that they were not appropriately placed to take on a broader case management role in cases of suspected elder abuse.[309]

11.283 The ACAT and RAS use the National Screening and Assessment Form (NSAF) when assessing the aged care needs of clients.[310] The NSAF includes items relating to risks, hazards, or concerns to a person in their home,[311] and concerns relating to living arrangements. It also includes a question asking if a person is 'afraid of someone who hurts, insults, controls or threatens you, or who prevents you from doing what you want.[312] A number of supplementary assessment tools may also be used in the assessment process, including tools relating to pain, alcohol use, and activities of daily living.[313] Consideration might be given to including a validated tool for assessment of risks of elder abuse where concerns have been identified.[314] Additionally, ensuring that ACATs and the RAS have a clear understanding of the referral pathways for elder abuse will be an important component of broader elder abuse response strategies.[315]

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307 See further prop 2-1.

308 See, eg, Office of the Public Advocate (SA), *Submission 170*; Justice Connect, *Submission 182*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; Macarthur Legal Centre, *Submission 110*; GLBTI Rights in Ageing Institute, *Submission 132*; Aged and Community Services Australia, *Submission 102*.

309 UnitingCare Australia, *Submission 162*; Aged and Community Services Australia, *Submission 102*; Australian and New Zealand Society for Geriatric Medicine, *Submission 51*.

310 Department of Social Services (Cth) and My Aged Care, *National Screening and Assessment Form Fact Sheet* (2015).

311 Department of Social Services (Cth) and My Aged Care, *National Screening and Assessment Form User Guide* (2015) 137.

312 Ibid 144–45.

313 Ibid 189.

314 See, eg, in the context of family violence, the Common Risk Assessment Framework: Domestic Violence Resource Centre Victoria, *CRAF* <www.dvrcv.org.au/training/family-violence-risk-assessment-craf>.

315 Office of the Public Advocate (SA), *Submission 170*; Australian Nursing & Midwifery Federation, *Submission 163*; GLBTI Rights in Ageing Institute, *Submission 132*; Law Council of Australia, *Submission 61*.

12. Other Issues

Contents

Summary

12.1 Health professionals play an important role in identifying and responding to elder abuse. As front line service providers, they have regular contact with older people. However, health professionals may often only have a small window of opportunity to assist. This may be due to an older person's reluctance to repeatedly discuss the abuse or neglect they are suffering, or due to limited opportunities to seek assistance. It is therefore important that health professionals are able to take advantage of any opportunity to assist, by for example by relying on multi-disciplinary approaches and integrated models of care to provide coordinated support and assistance for an older person suffering abuse or neglect. Health-justice partnerships in particular may have great potential in responding to elder abuse.

12.2 However, there are also barriers to identifying and responding to elder abuse. There are concerns that health professionals need training to identify and respond to elder abuse, and that duties of confidentiality and privacy laws may limit health professionals' ability to respond to elder abuse.

12.3 This chapter also considers whether the National Disability Insurance Scheme (NDIS) may be an avenue for elder abuse.

Health professionals

12.4 Doctors, nurses, pharmacists and other health professionals are often in an ideal position to identify elder abuse, since most elderly people trust them.[1] Such professionals are also well-placed to identify risks and signs of abuse as part of their clinical assessment.[2] In 2014–15, people aged between 65 and 74 years accounted for

1 A Almogue et al, 'Attitudes and Knowledge of Medical and Nursing Staff toward Elder Abuse' (2010) 51 *Archives of Gerontology and Geriatrics* 86, 86.

2 See, eg, Cohealth and Justice Connect Seniors Law *Submission 179*.

28.8 million unreferred GP visits. People aged 85 years and over accounted for 6.2 million visits.[3]

12.5 In a joint submission, cohealth and Justice Connect Seniors Law stated that 'in relation to any legal problem, not just elder abuse, nearly 30% of people will initially seek the advice of a doctor or another trusted health professional or welfare adviser.'[4] However, a number of factors limit health professionals' ability to identify and respond to elder abuse:

- confidentiality and privacy concerns;
- a limited understanding of what constitutes elder abuse;
- difficulties detecting signs of elder abuse, particularly where the signs are subtle;
- limited knowledge of reporting or referral pathways and available services; and
- views that responding to elder abuse is outside the scope of their professional responsibility.[5]

Multidisciplinary approaches

12.6 Stakeholders emphasised the need for a multidisciplinary response to elder abuse.[6] Many were supportive of the development of health-justice partnerships and other integrated care models.[7] Health-justice partnerships rely on utilising pro bono legal resources to embed legal services in a health service. Key elements are:

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3 Australian Institute of Health and Welfare (Cth), 'Older Australia at a Glance' (2016).

4 Cohealth and Justice Connect Seniors Law *Submission 179*.

5 See, eg, Ibid; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Australian Nursing & Midwifery Federation, *Submission 163*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; MIGA, *Submission 119*.

6 See, eg, National Older Persons Legal Services Network, *Submission 180*; Cohealth and Justice Connect Seniors Law *Submission 179*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Carers Australia, *Submission 157*; ADA Australia, *Submission 150*; Office of the Public Advocate (Qld), *Submission 149*; Townsville Community Legal Service Inc, *Submission 141*; Legal Aid NSW, *Submission 137*; Older Women's Network NSW, *Submission 136*; S Goegan, *Submission 115*; Leading Age Services Australia, *Submission 104*; Office of the Public Advocate (Vic), *Submission 95*; Alzheimer's Australia, *Submission 80*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

7 See, eg, National Legal Aid, *Submission 192*; Commissioner for Senior Victorians, *Submission 187*; Hume Riverina CLS, *Submission 186*; Justice Connect, *Submission 182*; National Older Persons Legal Services Network, *Submission 180*; Cohealth and Justice Connect Seniors Law *Submission 179*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; People with Disability Australia, *Submission 167*; Australian Nursing & Midwifery Federation, *Submission 163*; Carers Australia, *Submission 157*; National Seniors Australia, *Submission 154*; ADA Australia, *Submission 150*; Townsville Community Legal Service Inc, *Submission 141*; Legal Aid NSW, *Submission 140*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; Legal Services Commission SA, *Submission 128*; S Kurrle, *Submission 121*; North Australian Aboriginal Legal Service, *Submission 116*; S Goegan, *Submission 115*; Macarthur Legal Centre, *Submission 110*; Aged and Community Services Australia, *Submission 102*; Office of the Public Advocate (Vic), *Submission 95*; Northern Territory Anti-Discrimination Commission, *Submission 93*; Law Council of Australia, *Submission 61*; Legal Aid ACT, *Submission 58*.

- locating a lawyer at a health service or hospital;
- integrating the lawyer as part of the health service;
- secondary consultations with the lawyers; and
- training health professionals on legal issues.[8]

12.7 Evidence suggests that older people are reluctant to come forward about elder abuse for a number of reasons, including shame and fear.[9] An older person may be reluctant to repeat their concerns numerous times to different professionals. They may also be unable to seek legal assistance discreetly. These concerns may be magnified in smaller rural and regional communities, where an older person may face greater fears of discovery.

12.8 Joubert and Posenelli suggest that 'the "window of opportunity" for responding to aged abuse in a health service is brief'.[10] Health-justice partnerships have great potential to use this window effectively because they can build on the trust developed between health professionals and older persons, and can provide legal advice and assistance discreetly and conveniently. In a health-justice partnership, the health professional can confer with a lawyer to determine appropriate pathways for referrals. With the consent of their patient, the health professional could also brief a lawyer of the older person's concerns and organise for a lawyer to discreetly speak with the older person either as part of a medical appointment, or in a separate consultation. An integrated care model which incorporates legal practitioners into a health practice may reduce the number of separate appointments and interactions required to seek assistance.

12.9 The case study of 'Li's story' provided by cohealth and Justice Connect Seniors Law is illustrative. Ms Li was receiving physiotherapy treatment following a stroke, when she raised concerns about pressure from her husband to access her superannuation funds and savings to make mortgage payments on a house bought in his name. Her husband is very controlling, and does not allow her to go out on her own and manages the family finances. He has also been physically and verbally abusive. Due to her complex health needs, there is limited scope for Ms Li to live independently of her husband. The police have taken out an intervention order which permits him to

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8 Cohealth and Justice Connect Seniors Law *Submission 179*.

9 See, eg, FMC Mediation and Counselling, *Submission 191*; WA Police, *Submission 190*; Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; Seniors Rights Service, *Submission 169*; United Voice, *Submission 145*; Townsville Community Legal Service Inc, *Submission 141*; ACT Disability, Aged and Carer Advocacy Service, *Submission 139*; Legal Aid NSW, *Submission 137*; Older Women's Network NSW, *Submission 136*; Capacity Australia, *Submission 134*; University of Melbourne and Multicultural Centre for Women's Health, *Submission 129*; National LGBTI Health Alliance, *Submission 116*; S Goegan, *Submission 115*; Protecting Seniors Wealth, *Submission 111*; Aged and Community Services Australia, *Submission 102*; Australian Research Network on Law and Ageing, *Submission 90*; Alzheimer's Australia, *Submission 80*; E Cotterell, *Submission 77*; National Ageing Research Institute and Australian Association of Gerontology, *Submission 65*; Law Council of Australia, *Submission 61*; Cochrane Public Health Group, *Submission 54*; Ethnic Communities' Council of Victoria Inc, *Submission 52*; University of Newcastle Legal Centre, *Submission 44*.

10 Lynette Joubert and Sonia Posenelli, above n 9, 712.

remain in the house, but prohibits family violence. Ms Li wishes to prepare a will and protect her interest in the family home. She is concerned that her husband may become violent if he hears of her plans. Ms Li's care coordinator organised, with Ms Li's consent, for a health-justice partnership lawyer to attend her next physiotherapy appointment, who advised Ms Li on preparing a will and checked on Ms Li's ongoing compliance with the intervention order. The lawyer arranged for specialist pro bono lawyers to prepare a will and attend the next physiotherapy appointment, where Ms Li signed the will and binding death nomination form for her superannuation. The pro bono lawyers agreed to store the will at their offices so Ms Li's husband would not find it.[11]

12.10 Surveys of medico-legal partnerships in the United States of America have shown that they provide financial benefits to clients, improve their health and well-being, and increase the knowledge and confidence of health professionals.[12] In Australia, an evaluation of a health-justice partnership established in Victoria between Inner Melbourne Community Legal and the Royal Women's Hospital Victoria aimed at addressing family violence made similar findings.[13] A number of health-justice partnerships targeted at older people have been trialled, and are under development, including between cohealth and Justice Connect Seniors Law and Justice Connect and St Vincent's Hospital Melbourne. The partnership between Justice Connect and St Vincent's Hospital Melbourne is part of a broader multi-disciplinary approach to detecting and responding to elder abuse. It seeks to 'deliver an integrated and consistent approach to the detection and management of suspected elder abuse across the health service'.[14]

12.11 The ALRC is supportive of continued work toward implementing such models of service provision.

Confidentiality and privacy concerns

12.12 The privacy and confidentiality of health information is governed by Commonwealth, state and territory legislation and the common law duty of confidence. Exemptions allowing the use and disclosure of health information under state and territory legislation are similar to the exemptions set out in the Australian Privacy Principles.[15]

12.13 A common theme in submissions was that health professionals may be reluctant to report elder abuse or discuss it with other professionals because of concerns about confidentiality and compliance with privacy laws.[16] Some stakeholders submitted that

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11 Cohealth and Justice Connect Seniors Law *Submission 179*.

12 National Center for Medical-Legal Partnership, 'Making the Case for MLPs: A Review of the Evidence' (February 2013) 3.

13 The University of Melbourne, 'Acting on the Warning Signs Evaluation: Final Report' (August 2014) 1–5.

14 Cohealth and Justice Connect Seniors Law *Submission 179*.

15 This chapter discusses the provisions in the Australian Privacy Principles, but broadly similar exemptions are also available under relevant state and territory privacy laws.

16 ` Cohealth and Justice Connect Seniors Law *Submission 179*; Seniors Rights Service, *Submission 169*; Australian Association of Social Workers, *Submission 153*.

privacy laws may need to be amended to clarify that health professionals can report instances of elder abuse to the police.[17] Stakeholders also submitted that reports or referrals to other public authorities with an investigative role should be exempt from privacy laws.[18]

12.14 However, the Office of the Australian Information Commissioner submitted that privacy is 'often named as a barrier to sharing or accessing personal information, but upon closer examination that it is not usually the case'.[19]

12.15 Although it is generally prohibited to disclose a person's sensitive personal information without their consent, there are exceptions for, among other things, where:

- the person would 'reasonably expect' the disclosure, and the disclosure is 'directly related' to the primary purpose for which the information was collected (secondary purpose exception);[20]
- the disclosure is authorised by or under an Australian law or a court or tribunal order (authorised by law exception);[21]
- the disclosure is required to prevent a serious (or in some jurisdictions 'serious and imminent') threat to the life, health or safety of a person, and it is unreasonable or impracticable to obtain the patient's consent (serious threat exception);[22] or
- the disclosure is 'reasonably necessary for an activity related to law enforcement (law enforcement exception).[23]

12.16 Under the secondary purpose exception, a health professional may, in some circumstances, be able to confer with and discuss an older person's situation with other service providers in order to assist an older person to address elder abuse. In order to rely on this exception, the health professional will need to establish clear expectations with the patient, so the patient understands how their information might be used and to whom it might be disclosed.[24] An open discussion with the older person about a care plan can establish reasonable expectations about what services may be included as part of a multi-disciplinary response to elder abuse.

12.17 A health professional may be able to report elder abuse to police or a public authority under a number of existing exemptions to Commonwealth, state and territory privacy laws. Where a common law duty of care owed by an organisation would require that a health professional report elder abuse, the disclosure would be exempt

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17 See, eg, Australian College of Nursing, Submission 147; Seniors Rights Service, Submission 169.
18 See, eg, Seniors Rights Service, Submission 169; Australian College of Nursing, Submission 147; Legal Aid NSW, Submission 140; Older Women's Network NSW, Submission 136.
19 Office of the Australian Information Commissioner, Submission 132.
20 *Privacy Act 1988* (Cth) sch 1 cl 6.2(a).
21 Ibid sch 1 cl 6.2(b).
22 Ibid sch 1 cl 6.2(c), s 16A.
23 Ibid sch 1 cl 6.2(e).
24 Office of the Australian Information Commissioner (Cth), 'Draft Business Resource: Using and Disclosing Patients' Health Information' (2015).

under the 'authorised by law' exception, as the definition of 'Australian law' includes a rule of common law or equity.[25]

12.18 Under the serious threat exception, if there is a threat to the life, physical or mental health or safety of an older person, and it is potentially life threatening, or could cause other serious injury or illness, a health professional may, without consent, disclose information to relevant authorities in circumstances where it would be unreasonable or impracticable to get the older person's consent prior to disclosure.

12.19 Under the 'law enforcement exception', a health professional may report elder abuse to the police, but not to the public advocate or public guardian. An enforcement body is relevantly defined to mean a state or territory police force or other state or territory body with the power to conduct criminal investigations or inquiries, or impose penalties or sanctions.[26] An enforcement related activity is defined to include the prevention, detection and investigation of criminal offences.[27]

12.20 The ALRC considers that existing exemptions in privacy laws and the proposed immunity for reports to the public advocate or public guardian are sufficient. Under Proposal 3-5, health professionals who make a report of elder abuse to the public advocate or public guardian in good faith and on reasonable suspicion, should not be civilly or criminally liable, including under privacy laws. Health professionals would also not be considered to have breached standards of professional conduct under this proposal. The ALRC supports submissions calling for better information sharing and clear referral pathways to assist health professionals.[28] People with Disability Australia suggest the 'It Stops Here Safer Pathway' introduced in NSW in relation to domestic and family violence services provides useful guidance.[29]

12.21 Some submissions noted that healthcare staff may be reluctant to speak to relatives or significant others without an enduring power of attorney about the patient's situation. This is seen to be of particular concern where the person exercising the enduring power of attorney is perpetrating the abuse.[30] However, existing exemptions under the *My Health Records Act 2012* (Cth) and the Australian Privacy Principles allow health professionals to disclose information to persons other than someone exercising an enduring power of attorney or other enduring document.

12.22 Under the *My Health Records Act 2012* (Cth), a health professional may disclose information in a healthcare recipient's health records if it is 'necessary to lessen or prevent a serious threat to an individual's life, health or safety', and it would be unreasonable or impracticable to gain the health care recipient's consent.[31]

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25 *Privacy Act 1988* (Cth) s 6; Office of the Australian Information Commissioner, *Submission 132*.
26 *Australian Privacy Principles Guidelines* (March 2015) B.70.
27 Ibid B.71.
28 People with Disability Australia, *Submission 167*.
29 Ibid.
30 See, eg, Australian College of Nursing, *Submission 147*.
31 *My Health Records Act 2012* (Cth) s 64.

12.23 Under the Australian Privacy Principles, where the patient is unable to 'communicate consent', disclosure is permitted to a responsible person where necessary for appropriate care and treatment, or for compassionate reasons.[32] Such disclosure is not permitted where it is contrary to a patient's wishes expressed before they became unable to communicate consent, or contrary to wishes the health professional is or could reasonably be expected to be aware of.

12.24 'Responsible persons' for this purpose include:

- parents, children or siblings;
- spouses or de facto partners;
- an individual's relative, where the relative is over 18 and part of the household;
- a guardian;
- a person exercising an enduring power of attorney, exercisable in relation to decisions about a patient's health;
- a person who has an intimate personal relationship with the patient; or
- a person nominated as an emergency contact.[33]

12.25 If a health professional is concerned that an older person with impaired capacity is being abused by someone exercising an enduring power of attorney or by an appointed decision maker, the health professional can apply to the relevant state or territory civil and administrative tribunal for a guardian or financial administrator to be appointed or replaced.[34]

Training

12.26 Many stakeholders identified the need for training and guidance in identifying and responding to elder abuse.[35] The NSW Legislative Council in its inquiry into elder abuse recommended that the NSW Department of Family and Community Services and Ministry of Health 'develop and fund a comprehensive plan addressing the training needs of service providers, to enable better identification of and responses to abuse'.[36]

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32 *Privacy Act 1988* (Cth) sch 1, cl 6.2(d), s 16B.

33 *Privacy Act 1988* (Cth) s 6AA.

34 Chapter 5 discusses a suite of proposals targeted at reducing instances of elder abuse by a person exercising an enduring power of attorney by improving the understanding of both attorneys and third parties dealing with attorneys. Chapter 6 discusses proposals targeted at reducing instances of elder abuse by a person appointed as a guardian or financial administrator.

35 See, eg, Cohealth and Justice Connect Seniors Law *Submission 179*; Seniors Rights Service, *Submission 169*; Speech Pathology Australia, *Submission 168*; Australian Nursing & Midwifery Federation, *Submission 163*; UnitingCare Australia, *Submission 162*; National Seniors Australia, *Submission 154*; Australian Association of Social Workers, *Submission 153*; Australian College of Nursing, *Submission 147*; Capacity Australia, *Submission 134*; S Kurrle, *Submission 121*; MIGA, *Submission 119*; Leading Age Services Australia, *Submission 104*; Aged and Community Services Australia, *Submission 102*; H Vidler, *Submission 12*.

36 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 5.

12.27 The Clinical Guidelines published by the Royal Australasian College of General Practitioners (RACGP) include specific guidance on elder abuse.[37] An example of useful material prepared using the guidance provided by the RACGP is a GP toolkit developed through a joint partnership between the City of Canterbury-Bankstown Council and members of the Bankstown and Canterbury Domestic Violence Liaison committees. It is an eight page infographic document which discusses intimate partner family violence, including how to discuss the issue with a patient, safety planning, and referrals. Further, specific guidance is provided about immigration family violence provisions to allay fears of 'partner visa' applicants from culturally and linguistically diverse backgrounds.[38]

12.28 Training for health professionals should be included in the National Plan discussed in Chapter 2.

Other issues

12.29 The Federation of Ethnic Communities' Councils Australia submitted that in interacting with older people from culturally and linguistically diverse backgrounds, there is a need for 'appropriate language support to facilitate accurate communication'.[39] It noted that the use of family and friends as interpreters could give rise to concerns relating to the accuracy of the interpreting, confidentiality and potential conflicts of interests.[40]

12.30 Cohealth and Justice Connect Seniors Law also recognised that language barriers, and other factors such as increased isolation and limited engagement with mainstream services, make engagement with older people from culturally and linguistically diverse backgrounds more complex. It recommended greater coordination and integration of community workers from culturally and linguistically diverse communities in the delivery of health services.[41] Such strategies could be coordinated through the National Plan discussed in Chapter 2.

The National Disability Insurance Scheme

12.31 The National Disability Insurance Scheme (NDIS) supports people with a 'permanent and significant disability'.[42] Although a person must be under the age of 65 at the time they seek to become a participant in the NDIS,[43] if a person is already in the NDIS when they turn 65, they may elect to remain in the NDIS or enter the aged care framework.[44] It is therefore likely that some older people will be in the NDIS.

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37 Royal Australasian College of General Practitioners, 'Clinical Guidelines—Abuse and Violence: Working with Our Patients in General Practice' (February 2014) 10.1.
38 Women's Legal Service NSW, 'A Toolkit for GPs in NSW' (2013).
39 Federation of Ethnic Communities' Councils of Australia, *Submission 89*.
40 Ibid.
41 Cohealth and Justice Connect Seniors Law *Submission 179*.
42 *National Disability Insurance Scheme Act 2013* (Cth) s 24.
43 Ibid s 22(1)(a).
44 Ibid s 29(1)(b).

12.32 A number of stakeholders noted that at this early stage of the rollout of the NDIS, they have had limited experience with the scheme.[45] Legal Aid NSW and the Law Council of Australia noted that 'it is not aware of any elder abuse being experienced by participants in the NDIS'.[46]

12.33 The government is in the process of developing a national 'Quality and Safeguards' framework, which

> will make sure the national scheme will provide good quality supports, and will maximise the choice and control of participants. It will also be important that the rights of people are protected and participants are safe from harm.[47]

12.34 Some stakeholders expressed preliminary concerns about the potential for abuse and sub-standard care under the NDIS.[48] However, the ALRC considers that it is too early to tell whether the scheme is an avenue for elder abuse, or test whether there are effective safeguards against elder abuse in place.

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45 Office of the Public Guardian (Qld), *Submission 173*; Seniors Rights Victoria, *Submission 171*; The Public Trustee of Queensland, *Submission 98*; Office of the Public Advocate (Vic), *Submission 95*; Federation of Ethnic Communities' Councils of Australia, *Submission 89*; Law Council of Australia, *Submission 61*.

46 Legal Aid NSW, *Submission 137*.

47 Disability Reform Council, 'Consultation Paper—Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework' (February 2015) 3.

48 Office of the Public Guardian (Qld), *Submission 173*; NSW Ombudsman, *Submission 160*; Office of the Public Advocate (Vic), *Submission 95*; Law Council of Australia, *Submission 61*; Legal Aid NSW, *Submission 137*.