

# 1. Introduction to the Inquiry

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## 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'<sup>1</sup> 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'.<sup>2</sup>

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

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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)*<sup>3</sup> also frames the Inquiry.

1.4 As stakeholders observed, elder abuse is 'complex and multidimensional'<sup>4</sup> and requires a 'multi-faceted response'.<sup>5</sup> The Law Council of Australia stated that 'the prevalence and devastating impact of elder abuse is abhorrent'.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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’,<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

1.12 This description is used across a range of government and non-government bodies.<sup>14</sup>

## 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](http://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](http://www.myagedcare.gov.au/financial-and-legal/elder-abuse-concerns)>; Elder Abuse Prevention Unit, *Elder Abuse: Definition* <[www.eapu.com.au/elder-abuse](http://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,<sup>15</sup> 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.<sup>16</sup> Verbal abuse was the most common complaint,<sup>17</sup> followed by ‘pressuring, intimidating or bullying/harassment’,<sup>18</sup> and ‘name calling, degrading, humiliating or treating the person like a child, in private or public’.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

### ***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.<sup>22</sup> Common types of financial abuse were: someone incurring bills for which the older person is responsible;<sup>23</sup> someone living in the older person’s home for reasons other than for the benefit of the older person;<sup>24</sup> someone stealing the older person’s goods;<sup>25</sup>

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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’;<sup>26</sup> and abusing power of attorney arrangements.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup> 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;<sup>30</sup> kicking, punching, slapping, biting or burning;<sup>31</sup> and rough handling.<sup>32</sup>

1.23 Australian crime statistics suggest that older people are less likely to be murdered, robbed or physically assaulted than younger people.<sup>33</sup> 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.

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.<sup>34</sup>

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.<sup>35</sup>

### **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.<sup>36</sup> 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'.<sup>37</sup> 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.<sup>38</sup>

### **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.<sup>39</sup> 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

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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.<sup>40</sup>

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.<sup>41</sup>

### **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.<sup>42</sup>

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.<sup>43</sup>

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

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.<sup>44</sup> 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’.<sup>45</sup>

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’.<sup>46</sup> 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.<sup>47</sup>

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).<sup>48</sup>

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.<sup>49</sup>

#### 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.<sup>50</sup>

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'.<sup>51</sup>

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.<sup>52</sup>

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.<sup>53</sup>

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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.<sup>54</sup> 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.<sup>55</sup>

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'.<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup>

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’.<sup>59</sup>

### **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.<sup>60</sup> Elder abuse guidelines in Tasmania and Victoria note that abuse may occur as a result of ignorance or negligence, or it may be deliberate.<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup>

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.<sup>64</sup>

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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’.<sup>65</sup>

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.

...

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.<sup>66</sup>

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.<sup>67</sup>

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.<sup>68</sup> 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

65 Law Council of Australia, *Submission 61*. Gagens Lawyers refer to situations where a carer may not realise that their actions are causing harm or distress: Gagens 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.<sup>69</sup>

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.<sup>70</sup>

### ***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.<sup>71</sup>

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.<sup>72</sup>

1.59 The ALRC acknowledges that problems with intrusive telemarketing may cause distress to many people, and that older persons may be particularly affected.<sup>73</sup> 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 Victimization The Relationship between Age and Consumer Fraud Victimization' (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.<sup>74</sup>

### ***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.<sup>75</sup>

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.<sup>76</sup>

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:<sup>77</sup>

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.<sup>78</sup>

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’.<sup>79</sup> 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’.<sup>80</sup>

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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’;<sup>81</sup> 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.<sup>82</sup>

### ‘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’.<sup>83</sup> 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.<sup>84</sup>

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’.<sup>85</sup> Two factors were identified as having particular implications for developing an understanding of elder abuse: cultural obligations and the circumstances of grandparents.<sup>86</sup>

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.<sup>87</sup>

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

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'.<sup>88</sup>

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.<sup>89</sup>

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'.<sup>90</sup>

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'.<sup>91</sup>

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'.<sup>92</sup> 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.<sup>93</sup>

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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.<sup>94</sup>

1.75 Understanding the dynamics of elder abuse in particular contexts will be a crucial aspect of developing informed policy responses.<sup>95</sup> 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.<sup>96</sup> 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’.<sup>97</sup>

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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.<sup>98</sup>

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’.<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup>

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’.<sup>103</sup> 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.

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’.<sup>104</sup>

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’.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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.<sup>108</sup>

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.<sup>109</sup> 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.<sup>110</sup>

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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.<sup>111</sup>

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.<sup>112</sup> 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"',<sup>113</sup> driven, as another put it, by the fact that the older person 'doesn't die soon enough for the abuser'.<sup>114</sup> 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.<sup>115</sup> 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).<sup>116</sup>

### **Elder abuse as a human rights issue**

1.89 Kaspiew, Carson and Rhoades describe elder abuse as 'fundamentally a human rights issue'.<sup>117</sup> 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

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’.<sup>118</sup>

1.90 Professor Wendy Lacey urged that human rights should be the ‘normative framework’ for adult protection.<sup>119</sup> 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’.<sup>120</sup>

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.<sup>121</sup> The *Universal Declaration of Human Rights* specifically protects the right to security in old age.<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup> A number of non-binding international instruments, including the *United Nations Principles for Older Persons*<sup>125</sup> and the *Madrid International Plan of Action on Ageing*,<sup>126</sup> relate to the human rights of older persons.

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.<sup>127</sup> Moreover, a lack of appropriate action, as Leading Age Service Australia submitted, ‘detracts from a person’s rights and impacts on their dignity’.<sup>128</sup> 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.<sup>129</sup>

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.<sup>130</sup>

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’.<sup>131</sup>

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.<sup>132</sup>

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.<sup>133</sup>

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

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.<sup>136</sup>

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’.<sup>137</sup>

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’.<sup>138</sup>

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’.<sup>139</sup> 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.<sup>140</sup> It is a key principle of the National Disability Strategy;<sup>141</sup> and is reflected in the objects and principles of the National Disability Insurance Scheme.<sup>142</sup> The ALRC *Equality, Capacity and Disability Inquiry* was informed by autonomy in the sense of ‘empowerment’, not just ‘non-interference’,<sup>143</sup> which involves seeing an individual in relation to others, in a ‘relational’ or ‘social’ sense,<sup>144</sup> 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.<sup>145</sup>

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'.<sup>146</sup>

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.<sup>147</sup> 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.<sup>148</sup> 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

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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'.<sup>149</sup> 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'.<sup>150</sup>

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'.<sup>151</sup>

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'.<sup>152</sup> 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.<sup>153</sup> 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'.<sup>154</sup>

## 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

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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);<sup>155</sup> 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).<sup>156</sup>

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.<sup>157</sup> 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’.<sup>158</sup> A supporter is an individual or organisation that provides a person with

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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.<sup>159</sup> A representative's role is to provide full support in decision making,<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup>

### **'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.<sup>164</sup>

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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.<sup>165</sup>

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.<sup>166</sup> '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.'<sup>167</sup>

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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.<sup>168</sup> 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.<sup>169</sup>

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.<sup>170</sup> 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’.<sup>171</sup> 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’.<sup>172</sup> 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’;<sup>173</sup> and has been supported in other law reform inquiries.<sup>174</sup>

## 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.

