

## 3. Powers of Investigation

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### Summary

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

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

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

## Investigation gap

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Approaches to filling the investigation gap

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

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

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

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

### Scope of investigative powers

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

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

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

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

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

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

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

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

### Guiding principles

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

### Investigative powers

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

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

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

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

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

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

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

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

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

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

### **Interventions**

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

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

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

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

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

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25 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 7.

26 *Ibid* s 9.

27 *Care Act 2014* (United Kingdom) s 43(2).

28 *Ibid* sch 2 cl 1(1).

29 *Ibid* sch 1 cl 1(2).

30 *Ibid* s 43(4).

31 *Ibid* s 43(3).

32 *Adult Guardianship Act 1996* (British Columbia) s 52.

33 *Ibid* s 51(1).

34 *Ibid* ss 51(1), (3).

35 *Ibid* s 54.

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

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

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

## An investigative function

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

- (a) has care and support needs;
- (b) is, or is at risk of, being abused or neglected; and
- (c) is unable to protect themselves from the abuse or neglect, or the risk of it because of care and support needs.

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

36 Canadian Research Institute for Law and the Family, ‘Civil Investigation and Abuse of Vulnerable Adults in Calgary: An Exploratory Study’ (September 2010) 29.

37 Ibid.

38 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 11.

39 Ibid s 14.

40 Ibid s 19.

41 Ibid s 35(4).

### What should be investigated?

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

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

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

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

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

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

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

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

47 Legal Aid NSW, *Submission 137*.

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



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

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

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

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

- a physical or mental impairment or illness; or
- physical restraint.<sup>50</sup>

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

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

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

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

### Who should investigate?

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

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

### When should an investigation occur?

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

51 Guardianship and financial administration is discussed in ch 6.

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

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

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

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

56 State Trustees Victoria, *Submission 138*.

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

58 *Ibid* 81.

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

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

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

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

## Guiding principles

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

- (a) older people experiencing abuse or neglect have the right to refuse support, assistance or protection;
- (b) the need to protect someone from abuse or neglect must be balanced with respect for the person’s right to make their own decisions about their care; and
- (c) the will, preferences and rights of the older person must be respected.

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

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

3.40 Adults ‘are entitled to make decisions based on their own needs and values’.<sup>64</sup> It requires collaboration with the older person. Under a rights-based harm reduction approach, ‘the person being abused is being offered information and options and then asked “what do you want?”’<sup>65</sup>

## Powers of investigation

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

- (a) furnish information;
- (b) produce documents; or
- (c) participate in an interview

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

<sup>63</sup> People with Disability Australia, *Submission 167*.

<sup>64</sup> Elizabeth Podnieks, ‘Elder Abuse: The Canadian Experience’ (2008) 20 *Journal of Elder Abuse & Neglect* 126, 133–4.

<sup>65</sup> *Ibid* 133.

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

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

## Outcomes of an investigation

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

- (a) refer the older person or the perpetrator to available health care, social, legal, accommodation or other services;
- (b) assist the older person or perpetrator in obtaining those services;
- (c) prepare, in consultation with the older person, a support and assistance plan that specifies any services needed by the older person; or
- (d) decide to take no further action.

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

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

<sup>66</sup> *Public Guardian Act 2014* (Qld) s 22.

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

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

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

3.45 While some stakeholders have argued for the introduction of assessment orders, removal orders and banning orders,<sup>70</sup> such orders may not be compatible with a consent-based ‘support and assist’ model of investigation.

### Third party disclosures of elder abuse

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

- (a) liable, civilly, criminally or under an administrative process;
- (b) found to have departed from standards of professional conduct;
- (c) dismissed or threatened in the course of their employment; or
- (d) discriminated against with respect to employment or membership in a profession or trade union.

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

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

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

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

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

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

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

[w]ithout limiting subsections (3) and (4) [which discuss civil and criminal liability and breaches of codes of conduct and accepted standards of professional conduct]—

...

- (b) if the person would otherwise be required to maintain confidentiality about the information under an Act, oath or rule of law or practice, the person—
  - (i) does not contravene the Act, oath or rule of law or practice by giving the information; and
  - (ii) is not liable to disciplinary action for giving the information.

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

## Collaboration and coordination

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

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

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