

## 14. Safeguarding Adults at Risk

---

### Contents

Summary	375
Adult safeguarding laws	377
A duty to protect	377
Current measures	378
Need to fill the gaps	382
Adult safeguarding agencies	384
Duty to make inquiries	386
At-risk adults	387
Abuse or neglect	390
Consent	392
Serious physical or sexual abuse or neglect	397
Limited ability to consent	400
Unable to contact adult	401
Actions	402
Multi-agency, multi-disciplinary	403
Other actions	405
Coercive powers	407
Reporting abuse	412
Protections	413
Protocols	415

### Summary

14.1 Adult safeguarding laws in each state and territory should provide for the safeguarding and support of at-risk adults. This chapter sets out the broad contours of these adult safeguarding laws, for further consideration and development by the states and territories working with the Council of Australian Governments.

14.2 Most public advocates and guardians already have a role in investigating abuse, particularly abuse of people with impaired decision-making ability by their guardians, financial administrators or those with powers of attorney. But there are other vulnerable adults who are being abused, many of them older people. The ALRC recommends that these other vulnerable adults should be better protected from abuse.

14.3 Safeguarding services should be available to ‘at-risk adults’, which should be defined to mean adults who: (a) need care and support; (b) are being abused or neglected, or are at risk of abuse or neglect; and (c) cannot protect themselves from the abuse.

14.4 Some, but by no means all, older people will meet this definition of ‘at-risk adult’. Poor physical or mental health, conditions such as dementia, and social factors such as isolation, will make some people more vulnerable to abuse and less able to protect themselves from serious harm. ‘At-risk adult’ will also capture adults who are not over 65 years, but are also vulnerable for these and other reasons. This ‘functional’ approach to vulnerability is preferable to providing safeguarding services to all people over a certain age. Most people over 65 are not particularly vulnerable and will not need safeguarding services, while some people under 65 will need these services.

14.5 In most cases, safeguarding and support should involve working with the at-risk adult to arrange for health, medical, legal and other services. In some cases, it might also involve seeking court orders to prevent someone suspected of abuse from contacting the at-risk adult. Where necessary, adult safeguarding agencies should lead and coordinate the work of other agencies and services to protect at-risk adults from abuse.

14.6 Consent should be obtained from the at-risk adult, before safeguarding agencies further investigate or take action about suspected abuse. This avoids unwanted paternalism and shows respect for people’s autonomy. In addition a clear rule about consent, the legislation should include general principles to guide safeguarding agencies, stressing that adults generally have the right to make their own decisions about their care and safety.

14.7 However, in particularly serious cases, the safety of an at-risk person may need to be secured, even against their wishes. Although consent should always be sought, it should not be required in serious cases of physical abuse, sexual abuse or neglect. This may be seen to follow from the state’s responsibility to protect citizens from violations of fundamental human rights, such as the right not to be subject to degrading treatment.

14.8 Consent should also not be necessary where safeguarding agencies cannot contact the at-risk adult, despite extensive efforts to do so, or where an adult lacks the decision-making ability to give this consent.

14.9 The legislation should give safeguarding agencies limited coercive information-gathering powers, including, in some circumstances, the power to require certain people to answer questions and produce documents. These powers should be confined to cases of serious abuse.

14.10 People should be encouraged to report suspected abuse to safeguarding agencies and they should be protected from adverse consequences when they do. For this reason, the relevant legislation should include protections from civil liability, workplace discrimination and other consequences that might otherwise follow from reporting suspected abuse. These protections should only be available for reports made in good faith.

14.11 Existing public advocates and public guardians have expertise in responding to abuse, and may be an appropriate body for this broader safeguarding function, if given additional funding and training. However, some states or territories may prefer to give this role to another existing body or to create a new statutory body.

## Adult safeguarding laws

**Recommendation 14–1** Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting ‘at-risk adults’.

### A duty to protect

14.12 The starting point for responding to elder abuse, Professor Jonathan Herring has written, should be that

older people have a fundamental human right to protection from abuse. That obliges the state to put in place legal and social structures to combat elder abuse.<sup>1</sup>

14.13 Abuse will often violate a person’s human rights.<sup>2</sup> Where it results in death, abuse will violate a person’s right to life. More commonly, abuse will violate a person’s right not to be subject to cruel or degrading treatment, which is considered an absolute right.<sup>3</sup> A person locked in a room or restrained will be denied their liberty.

14.14 Respect for private life is also a human right. It has been taken to include a right to bodily integrity, psychological integrity, personal development, and ‘the right to establish and develop relationships with other human beings and the outside world’.<sup>4</sup> Elder abuse will commonly violate this human right. For example, physical and sexual assault violates a person’s bodily integrity; emotional abuse may violate their psychological integrity.

14.15 Properly enforced criminal law is perhaps the primary state protection against elder abuse. However, the adult safeguarding laws recommended in this chapter are a further way the state can seek to protect at-risk adults from abuse.<sup>5</sup> Protecting people

1 Jonathan Herring, ‘Elder Abuse: A Human Rights Agenda for the Future’ in Israel Doron and Ann M Soden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer Science & Business Media, 2012) 175. See also Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) ch 5.

2 ‘Human rights treaties do not directly bind non-state actors such as individuals, groups or corporations’: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) [1.4]. However, this is not to say that individuals cannot themselves violate the human rights of other individuals. ‘Human rights do not only come into play when a state abuses a citizen but are as much in play when one citizen abuses another. If you are tortured, your human rights are seriously infringed, whoever is doing the torturing’: Herring, above n 1, 133. ‘[D]omestic and family violence violates a wide range of human rights’, including the right to life, freedom of expression, and the right to be free from cruel, inhuman or degrading treatment: Australian Human Rights Commission, *Why Is Domestic Violence a Human Rights Issue?* <[www.humanrights.gov.au/our-work/family-and-domestic-violence/why-domestic-violence-human-rights-issue](http://www.humanrights.gov.au/our-work/family-and-domestic-violence/why-domestic-violence-human-rights-issue)>.

3 Herring, ‘Elder Abuse: A Human Rights Agenda for the Future’, above n 1, 178–79.

4 Ibid 182.

5 ‘Under international human rights law a state is bound to take all reasonable measures, including having in place appropriate laws or practices, to prevent individuals, groups or companies from breaching the rights of others, and to provide remedies where such breaches take place’: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2014) [1.4]. The ALRC is not suggesting that adult safeguarding laws must necessarily be enacted for Australia to meet its international

from abuse, Herring writes, requires ‘a clear set of duties’ on relevant government agencies to ‘investigate, intervene and protect older people who are being, or are at risk of, abuse’.<sup>6</sup>

14.16 As discussed later in this chapter, providing this protection will usually support people’s autonomy and show respect for their dignity.<sup>7</sup> However, in some cases, a person subjected to abuse may refuse the support and protection of the state. In such cases, there may be a conflict between a person’s present and future autonomy interests. There can also be a conflict between the state’s duty to protect people from abuse and its duty to respect people’s freedom and autonomy. The adult safeguarding policy recommended in this chapter is designed to give great weight to the autonomy interests of people affected by abuse but, in some limited circumstances, state intervention will be justified even without the adult’s consent.<sup>8</sup>

14.17 Abuse is also an assault on a person’s dignity. Physical and sexual assault are clear cases, but neglect, psychological and social abuse also show a marked disrespect for a person’s dignity. For this reason, protections from abuse, particularly when given with consent, will also serve to protect people’s dignity.

### **Current measures**

14.18 In addition to the support and protection often provided by family, friends, neighbours and carers, support and protection is currently available for older people experiencing abuse from a number of government agencies and community organisations, including:

- the police and the criminal justice system;
- medical and ambulance services;
- elder abuse help lines, which can provide information and refer people to other services;
- advocacy services;
- community based organisations, such as women’s services, family violence prevention legal services, and community housing organisations;
- state and territory public advocates and guardians (where the person has limited decision-making ability);<sup>9</sup>

---

human rights obligations, but only that such laws would serve to better protect at-risk adults from abuse—abuse which will sometimes amount to a violation of a person’s human rights.

<sup>6</sup> Herring, ‘Elder Abuse: A Human Rights Agenda for the Future’, above n 1.

<sup>7</sup> See also ch 2.

<sup>8</sup> This is discussed further below, in the section about consent. The need to protect people with impaired decision-making ability from harm is also recognised in the safeguarding principles discussed in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

<sup>9</sup> *Human Rights Commission Act 2005* (ACT) s 27B; *Guardianship of Adults Act 2016* (NT) s 61; *Guardianship and Administration Act 2000* (Qld) sch 4; *Public Guardian Act 2014* (Qld) s 19; *Guardianship and Administration Act 1993* (SA) s 28; *Guardianship and Administration Act 1995* (Tas)

- aged care service providers, such as nursing homes, which must not only meet certain standards of care but are also required to report allegations of abuse by staff and other people in aged care; and
- the Aged Care Complaints Commissioner, who investigates and conciliates complaints about aged care.

14.19 Despite this, the protection and support available to adults at risk of abuse may be inadequate. Some of the reasons for this are discussed below.

### ***Police and the criminal law***

14.20 Elder abuse will often be a crime, and may be reported to and investigated by the police. Indeed, the criminal law may be the primary state response to elder abuse. Although not targeted specifically at older people, criminal laws prohibiting murder, assault, theft and other abusive actions also serve to protect older people from abuse.<sup>10</sup>

14.21 While police have a vital role to play, and are often the ‘default’ agency of last resort for all kinds of social problems, there are a number of reasons why additional support and protection should be available to vulnerable adults suffering abuse. Many people suffering elder abuse may be reluctant to report abuse to the police, particularly when it is committed by a son or daughter or other family member of the abused person.<sup>11</sup> They may fear a loved one will be prosecuted and fined or even imprisoned. They may also fear harming their relationship with the abusive person,<sup>12</sup> or how the abusive person may react if the police are involved. Legal Aid ACT submitted that ‘there is a significant risk that older Australians may be reluctant to report instances of abuse due to fear of reprisal, feelings of shame, or a desire not to jeopardise familial relationships’.<sup>13</sup>

14.22 No doubt some of these concerns will remain where another state agency, other than the police, is involved in the response. However, some people may be more likely to contact an agency that does not prosecute crimes and employs people who specialise in the needs of vulnerable adults suffering abuse.

14.23 Some people subject to abuse may also consider the abuse too trivial to involve the police, and police priorities may mean that reports of less serious abuse are not fully investigated. The safeguarding agencies recommended in this chapter may be

---

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

10 See ch 13.

11 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].

12 See also National Ageing Research Institute and Seniors Rights Victoria, ‘The Older Person’s Experience: Outcomes of Interventions into Elder Abuse’ (June 2016) 23–4. Another stakeholder expressed concern that a ‘too punitive approach will drive some older people away as they fear for the child whom they love yet who is causing them distress’: FMC Mediation & Counselling, *Submission 284*.

13 Legal Aid ACT, *Submission 223*.

particularly useful where abuse either falls short of criminal activity, or is perceived to be at the lower range of criminal activity and, for this reason, not fully investigated.<sup>14</sup>

14.24 Other reasons for not relying entirely on the criminal justice system to respond to elder abuse include the high standard of proof required for a criminal conviction and the fact that police may have limited resources to devote to the often complex social issues involved in an abusive situation. The Scottish Borders Inquiry, which led to the introduction of adult safeguarding legislation in Scotland, found that certain social workers had failed to appreciate why the criminal law cannot always provide sufficient protection against abuse:

A recurring theme ... is the view that if an allegation is withdrawn or does not result in criminal charges or a conviction, social work has no locus to act. This attitude fails to take account of social work authorities' duty to assess need, to provide services and to protect, regardless of whether criminal behaviour has been established in accordance with a criminal standard of proof. ...

Sexual abuse allegations are very often retracted, particularly when the complainant is put under pressure, is not offered effective support, remains in the same household as the abuser and does not feel that protection will be provided as a result of the allegation. Social work staff showed insufficient understanding of this dynamic of sexual abuse. The result of this lack of understanding was ill-informed assumptions about the truth of the allegations and a failure to base service provision on a comprehensive assessment of need and risk in relation to each incident or allegation.<sup>15</sup>

14.25 Finally, police officers may feel that they are not trained or equipped to provide the necessary support an at-risk adult may need.<sup>16</sup> Safeguarding agencies will in some cases need to coordinate a number of services for the affected adult over an extended period of time. In fact, police are likely to value being able to refer some cases of elder abuse to people trained and focused on supporting vulnerable adults.<sup>17</sup>

### ***Helplines and advocacy services***

14.26 Elder abuse helplines, established in all states and territories, provide an invaluable service.<sup>18</sup> However, they are largely confined to giving information and

14 '[A]buse in any given situation may not constitute a crime or at least a crime that is likely to be successfully prosecuted. Anecdotal evidence also indicates that, in cases of abuse perpetrated against older persons, it can be very difficult to secure a conviction or to convince the victim that the abuse should be treated as a crime. Many perpetrators are known to the victim, are close family members or carers, and the complexities of the familial or personal relationships involved can create barriers and difficulties associated with the application of the criminal law': Office of the Public Advocate (SA), *Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (2011) 23.

15 Scottish Social Work Services Inspectorate, *Report of the Inspection of Scottish Borders Council Social Work Services for People Affected by Learning Disabilities* (2004) 13.

16 See ch 13.

17 This may be in addition to, rather than a substitute for, a criminal justice response.

18 These include: in the ACT—Older Persons Abuse Prevention Referral and Information Line and the ACT Disability, Aged and Carer Advocacy Service (ADACAS); NSW—NSW Elder Abuse Helpline; NT—Elder Abuse Information Line; Qld—Elder Abuse Prevention Unit; Aged and Disability Advocacy Australia (ADA Australia); SA—SA Elder Abuse Prevention phone line; Tas—Tasmanian Elder Abuse Helpline; Vic—Seniors Rights Victoria and Elder Rights Advocacy; WA—Advocare; nationally—Alzheimer's Australia.

referring people to other services. Many are not-for-profit bodies, which may not be equipped to provide an ongoing, personalised support service. They also do not have the legal powers to investigate accusations of abuse (for example, powers to compel people to answer questions) and they are also not in a position to authoritatively coordinate the services of other government agencies. This might also be said of advocacy services, such as Seniors Rights Victoria, Senior Rights Service in NSW and Caxton Legal Centre in Queensland, which provide legal advice to older persons in relation to elder abuse.

### ***Aged care providers***

14.27 Measures to protect people from abuse in residential care facilities and from abuse from those who deliver in-home care are discussed in Chapter 4. While carers, nurses and others who provide services to older people play a vital role in protecting older people from abuse, particularly neglect, most vulnerable adults, and indeed most older people, do not live in residential care facilities, and many do not receive other in-home services.<sup>19</sup>

### ***Public Advocates and Public Guardians***

14.28 Most public advocates and guardians<sup>20</sup> in Australia have some responsibility to investigate the abuse of people with limited decision-making ability, but not of other adults at risk of abuse. For example, in Queensland, the Public Guardian may investigate any complaint or allegation that an adult with impaired capacity ‘is being or has been neglected, exploited or abused’.<sup>21</sup> In the NT, there is power to investigate abuse by someone’s guardian or administrator.<sup>22</sup> In Tasmania, they may investigate abuse by people acting or purporting to act under an enduring power of attorney.<sup>23</sup>

14.29 In Victoria and Western Australia, abuse is investigated where it would be appropriate to make or change a guardianship or financial administration order.<sup>24</sup> The Victorian Law Reform Commission has 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>25</sup>

19 See chs 2 and 4.

20 The terminology differs between states and territories. For ease of reference, this chapter will sometimes use ‘public advocate’ to refer to public advocates or public guardians.

21 *Public Guardian Act 2014* (Qld) s 19; *Guardianship and Administration Act 2000* (Qld) sch 4. Capacity is defined to mean the person is ‘capable of—(a) understanding the nature and effect of decisions about the matter; and (b) freely and voluntarily making decisions about the matter; and (c) communicating the decisions in some way’: *Ibid* sch 4.

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

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

24 *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.

25 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 328–329. See also *Ibid* [20.17].

14.30 In the ACT, one of the functions of the Public Advocate is ‘promoting the protection of people with a disability from abuse and exploitation’.<sup>26</sup> ‘Disability’ includes ‘a physical, mental, psychological or intellectual condition’, if the condition ‘gives rise to a need for protection from abuse, exploitation or neglect’.<sup>27</sup> In New South Wales, the Public Guardian has no express statutory power to investigate abuse.<sup>28</sup>

14.31 Harmonising the existing powers to investigate abuse held by state and territory public advocates may go some way towards reducing elder abuse. Inconsistencies between state and territory laws can cause confusion in the community and inhibit nationwide initiatives designed to educate the community about investigating abuse. Inconsistencies may also inhibit cooperation between state public advocates—if their laws were more consistent, they may be in an even better position to learn from each other and cooperate to reduce abuse. However, these benefits of harmonisation must be balanced against one of the benefits of a federation, namely, that different states and territories might try different approaches and later adopt best practice.

14.32 Public advocates and guardians play a crucial role in protecting people with limited decision-making ability and there is a case for giving them additional powers to investigate the abuse of these people, as recommended by the Victorian Law Reform Commission.<sup>29</sup> However, many vulnerable and older people do not have such decision-making limited ability but nevertheless also need support and protection. In this chapter, the ALRC recommends that adult safeguarding services be provided to other at-risk adults.

### **Need to fill the gaps**

14.33 A 2016 NSW Parliamentary inquiry into elder abuse reported that there was a ‘clear call across a range of stakeholders for a body that has the power to investigate allegations of elder abuse’:

The committee heard that powers of the police, the Helpline, the Guardianship Division of NCAT [the NSW Civil and Administrative Tribunal] and the Public Guardian are all circumscribed and that the gap between them leaves people unprotected when they are very much at risk. There was also a clear call among many participants that the investigation gap should be filled by a statutory office of the

26 *Human Rights Commission Act 2005* (ACT) s 27B(1)(a)(iv).

27 *Ibid* s 27B(2).

28 However, the Public Guardian can apply to the Guardianship Division of the NSW Civil and Administrative Tribunal for a short-term order to investigate the care and circumstances of a person with impaired decision-making: see NSW Ombudsman, *Submission 160*. ‘It is problematic that a guardianship order is the only mechanism currently available for the Public Guardian to conduct investigations in relation to vulnerable adults who are reported to be at risk in the community. It does not enable a swift response, and is not the least restrictive option’: *Ibid*. NSW Trustee and Guardian said it supported the establishment of a Public Advocate with powers to investigate the abuse of people with impaired decision-making ability: NSW Trustee and Guardian, *Submission 120*.

29 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 330–34. Although, as discussed further below, some consider that coercive powers may be seen to undermine the advocacy role of public advocates.



Public Advocate, with that body being responsible for both investigating allegations and facilitating their resolution.<sup>30</sup>

14.34 The committee said it ‘strongly supports the establishment of a Public Advocate in New South Wales with the power to investigate complaints about abuse and also to initiate its own investigations’.<sup>31</sup>

14.35 A 2011 South Australian report into elder abuse, *Closing the Gaps*, also recommended the introduction of adult safeguarding legislation in Australia. The report stated:

The present legal framework ... provides protective frameworks for serious cases of abuse and for those who are particularly vulnerable due to mental illness or incapacity, but it does not provide a framework for less intrusive methods of intervention, or early intervention, and at a time when serious abuse or neglect could be avoided.<sup>32</sup>

14.36 Professor Wendy Lacey, a co-author of the *Closing the Gaps* report and the Co-Convenor of the Australian Research Network on Law and Ageing, has summarised the need for adult protection legislation in Australia:

Until strategies are backed by legislative reform, vulnerable adults will continue to fall through the cracks of existing protective mechanisms and specialist services. State-based frameworks presently contain a number of significant flaws: there is no dedicated agency with statutorily mandated responsibility to investigate cases of elder abuse, coordinate interagency responses and seek intervention orders where necessary; ... referral services between agencies can provide partial solutions in cases of elder abuse, but do not encourage a multi-disciplinary and multi-agency response in complex cases.<sup>33</sup>

14.37 The ALRC agrees with this assessment and recommends the introduction of adult safeguarding laws throughout Australia as an important measure towards filling this gap. Such laws have been introduced in a number of other jurisdictions, including in the United Kingdom and Canada. Reflecting on safeguarding laws in England before the enactment of the *Care Act 2014* (UK), Lord Justice Munby said:

There is the remarkable fact that the formal safeguarding agenda in relation to vulnerable adults rests entirely upon Ministerial guidance and otherwise lacks any statutory basis—a state of affairs that, unsurprisingly, can leave local authorities uncertain as to their function and responsibilities in this vital area.<sup>34</sup>

---

30 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [8.76].

31 *Ibid* [8.80].

32 Office of the Public Advocate (SA), above n 14, 23.

33 Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 *Sydney Law Review* 99, 105.

34 Lord Justice Munby ‘Dignity, Happiness and Human Rights’ (2011) 1(1) *Elder Law Journal* 32, 34, quoted in Alison Brammer, ‘Safeguarding and the Elusive, Inclusive Vulnerable Adult’ in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2013).

14.38 The Law Council of Australia recognised the need for an organisation responsible for investigating elder abuse:

without proper investigation it is often impossible to identify or respond to individual allegations of abuse. Unless a particular organisation is tasked with the investigation process, there will be no accountability for conducting this work and victims of abuse will continue to fall between the cracks.<sup>35</sup>

14.39 Disabled People’s Organisations Australia said it supported the establishment of ‘an independent, statutory, national protection mechanism’, which it said was in line with the recommendations from the 2015 Senate Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings.<sup>36</sup>

14.40 No government agency in Australia has the clear statutory role of safeguarding and supporting adults who, despite having full decision-making ability, are nevertheless at risk of abuse. In the ALRC’s view, this protection and support should be provided by state adult safeguarding agencies.

### **Adult safeguarding agencies**

14.41 In this chapter, the ALRC recommends that ‘adult safeguarding agencies’ be given a role in safeguarding at-risk adults. These need not be new agencies. The safeguarding function could be given to existing state and territory agencies, such as public advocates, or government departments.<sup>37</sup> However, the ALRC considers that, as the ACT Human Rights Commission submitted, ‘it would be preferable to allow flexibility for state and territory governments to determine how, and by which agency, those powers and functions should be exercised’.<sup>38</sup>

14.42 In the Discussion Paper, the ALRC proposed that a broader adult safeguarding function, not limited to people with impaired decision-making ability, be given to existing state and territory public advocates. One benefit of giving the new role to public advocates is that most public advocates already have a role in investigating abuse, so their existing powers might simply be clarified and extended to other adults. It would also limit the number of state agencies, which would save costs and be less confusing for the public. Public advocates could also build on their existing working relationships with the police, government departments, helplines and other bodies.

14.43 However, a number of stakeholders noted that giving adult safeguarding work to public advocates would, in the words of one stakeholder,

represent a significant departure from the current business of public guardians, from working with people who do not have mental capacity to make decisions to working with people who have ‘care and support needs’ but may still have mental capacity.<sup>39</sup>

---

35 Law Council of Australia, *Submission 351*.

36 Disabled People’s Organisations Australia, *Submission 360*.

37 Different agencies might even investigate different types of abuse.

38 ACT Human Rights Commission, *Submission 337*.

39 Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*.

14.44 Some expressed concern that public advocates, given their traditional role, may tend to be too ‘paternalistic’ towards older people. While supporting new safeguarding laws, the Disabled People’s Organisations Australia said that giving investigation powers to public guardians may ‘lead to unnecessary guardianship for individuals who are currently not under guardianship or administrative arrangements, as a strategy for responding to violence’.<sup>40</sup>

14.45 Aged and Disability Advocacy Australia (ADA Australia) submitted that giving this role to public advocates would be a ‘large cultural shift’, and many people will think that if a public advocate or guardian is involved, the ‘person has impaired capacity for decision making’.<sup>41</sup> Some suggested there was a conflict of interest. One stakeholder submitted:

We do not support State Public Advocates having dual roles as Investigators and being able to make recommendations appointing themselves or their Department as Guardians. ... People need to have faith in a system that will seriously investigate Elder Abuse without being seen to gain in anyway.<sup>42</sup>

14.46 Seniors Rights Service also submitted that it was ‘not convinced that the public guardian should have an investigatory role’:

We recommend that another constituted independent authority should take that role of investigation. Issues of conflict arise when investigation and implementation are conducted by the same organisation.<sup>43</sup>

14.47 Professor Wendy Bonython and Assistant Professor Bruce Baer Arnold said the proposal ‘creates a conflict of interest which fundamentally distorts the role of the public guardian or advocate’: ‘Any power to be exercised by a public guardian or advocate is to be restricted to matters related to the person’s identified lack of capacity’.<sup>44</sup>

14.48 Many stakeholders noted that public advocates would need a considerable increase in funding and resources to do this work.<sup>45</sup> Some public advocates expressed concern at the prospect of such a considerable expansion of their jurisdiction. The Office of the Public Advocate (Qld) submitted that, giving it powers to investigate elder abuse, would ‘result in a dramatic increase in the workload of guardianship agencies’:

The jurisdiction of guardianship agencies is limited to dealing with children and adults with impaired decision-making capacity (generally as guardians of last resort).

---

40 Disabled People’s Organisations Australia, *Submission 360*.

41 ADA Australia, *Submission 283*.

42 Name Withheld, *Submission 290*. See also Women’s Electoral Lobby, *Submission 261*.

43 Seniors Rights Service, *Submission 296*.

44 W Bonython and B Arnold, *Submission 241*.

45 ‘This would amount to a considerable increase in the investigation responsibilities of all jurisdictions’ relevant guardianship agencies. ... [It] will require significant legislative reform by state and territory governments and, if adopted, would result in a dramatic increase in the workload of guardianship agencies, with no commensurate funding being proposed’: Office of the Public Advocate (Qld), *Submission 361*. ‘If the ACT Public Advocate were to be given expanded functions of investigating and responding to elder abuse as proposed, this would require significant additional resourcing’: ACT Human Rights Commission, *Submission 337*.

Their expertise is in dealing with this cohort. Although their responsibilities often involve them dealing with people with age-related illnesses such as dementia, there is no reasonable basis to assume that public guardians/advocates necessarily have the expertise or the skills to deal with, or investigate, elder abuse generally.<sup>46</sup>

14.49 The authors of the *Closing the Gaps* report considered whether new safeguarding powers should be given to the Office of the Public Advocate, but concluded that there should be a new body, perhaps within the relevant state department:

Whereas OPA [Office of the Public Advocate (SA)] is a government body, it is a statutorily independent body and performs a very important role in delivering an independent advocacy role. To add to the powers of OPA by conferring upon it the power to coordinate and lead an intervention or multi-agency response, would have a detrimental effect on the ability of OPA to act as an independent advocate for an older person within that process.<sup>47</sup>

14.50 Given these concerns, the ALRC does not suggest that the recommended adult safeguarding function should necessarily be given to public advocates, but rather that the states and territories decide which of their agencies might perform this role, or whether a new agency might need to be created. One option might be to give new coercive powers to public advocates, so that they can better investigate people in their current jurisdiction, while giving another agency the role of investigating the abuse of other at-risk adults.

## Duty to make inquiries

**Recommendation 14–2** Adult safeguarding agencies should have a statutory duty to make inquiries where they have reasonable grounds to suspect that a person is an ‘at-risk adult’. The first step of an inquiry should be to contact the at-risk adult.

14.51 Adult safeguarding agencies should have a clear duty to inquire, when they have reasonable grounds to consider that an ‘at-risk adult’ is being abused. In nearly all cases, this should start with simply speaking with the adult thought to be at-risk of abuse.<sup>48</sup>

14.52 In the UK, where a local authority has ‘reasonable cause to suspect’ that an adult is at-risk, it ‘must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult’s case ... and, if so, what and by whom’.<sup>49</sup> Similarly, in Scotland, councils ‘must make inquiries about a

46 Office of the Public Advocate (Qld), *Submission 361*.

47 Office of the Public Advocate (SA), above n 14, 26.

48 As discussed below, in most cases, the adult’s consent should be obtained before family members or others are approached about the concerns.

49 *Care Act 2014* (United Kingdom) s 42(2).

person's well-being, property or financial affairs if it knows or believes ... that the person is an adult at risk, and ... that it might need to intervene'.<sup>50</sup>

14.53 Safeguarding agencies should be able to investigate either upon receipt of a complaint or referral or on its own motion. This approach was supported by stakeholders who commented on the matter.<sup>51</sup> For example, the Law Council submitted that the power to investigate on the agency's own motion was 'critical to responding early where abuse is occurring or suspected, as abuse is often reported after it has been occurring for a long period of time'.<sup>52</sup> In relation to the abuse of people with impaired decision-making ability, the Victorian Law Reform Commission recommended that the Victorian Public Advocate be able to investigate following a complaint or on its own motion.<sup>53</sup>

14.54 If agencies investigate abuse without having received a complaint, this is likely to result in more cases of abuse being investigated, which in turn would require additional resources.<sup>54</sup>

### At-risk adults

**Recommendation 14–3** Adult safeguarding laws should define 'at-risk adults' to mean people aged 18 years and over who:

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

14.55 Should safeguarding services be available to all adults who are at risk of abuse, or should it be confined to a subcategory of people, such as older adults or vulnerable adults? The ALRC recommends that adult safeguarding services should be available to vulnerable or 'at-risk' adults, as defined in the recommendation above.<sup>55</sup> This is broadly in line with safeguarding laws in other jurisdictions and will focus safeguarding agencies on those who are most in need of protection and support.

14.56 'At-risk adult' is not a proxy for older adult. Many people over the age of 65 years do not have care and support needs and are able to protect themselves. But many 'at-risk' adults will be older people, and therefore the recommendation is a suitable measure to address some forms of elder abuse.

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

51 Disabled People's Organisations Australia, *Submission 360*; Law Council of Australia, *Submission 351*; ADA Australia, *Submission 283*; NSW Trustee and Guardian, *Submission 120*.

52 Law Council of Australia, *Submission 351*.

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

54 ADA Australia, *Submission 283*.

55 In the Discussion Paper, this was confined to 'older people'. See Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 3–1.

14.57 Also, a 65-year-old age threshold in the legislation would present a number of problems. For one thing, it would seem perverse that a 64 year old with advanced dementia or a serious physical disability would not have access to safeguarding services, while a 66 year old with full decision-making ability and no physical limitations would. State Trustees submitted that safeguarding agencies should ‘investigate cases of abuse involving all vulnerable adults’, not just older people.<sup>56</sup>

14.58 The ALRC’s recommendation is broadly in line with safeguarding laws in other countries. It is modelled on the provision in the UK *Care Act*, under which local authorities have a duty to enquire into cases of suspected abuse where they have ‘reasonable cause to suspect’ that an adult:

- (a) has needs for care and support (whether or not the authority is meeting any of those needs),
- (b) is experiencing, or is at risk of, abuse or neglect, and
- (c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.<sup>57</sup>

14.59 Although the adult must need ‘care and support’, notes to the Act explain that this should be understood broadly, and that this was not intended to confine the operation of the section to people who are eligible for other social services.<sup>58</sup>

14.60 This appears to draw upon the UK policy document, *Who Decides?*, which defined vulnerable adult to mean:

someone over the age of 18 who is or may be in need of community care services by reason of mental or other disability, age or illness and who is or may be unable to take care of him/herself or unable to protect him/herself against significant harm or exploitation.<sup>59</sup>

14.61 In Scotland, the term ‘adults at risk’ is defined in the legislation to mean adults who:

---

56 State Trustees (Vic), *Submission 367*. It might be noted that, if resources were limited and support and protection could not be made available to all ‘at-risk’ adults, support and protection could be offered to adults who are *both* ‘at-risk’ and older (eg, over 65 or 80). This option is not recommended in this Report, but it would be preferable to deeming all people over 65 (or even 80) to be at-risk, which would be overly paternalistic, particularly given the ALRC recommends that, in limited cases, support and protection might be provided without the consent of the at-risk adult.

57 *Care Act 2014* (United Kingdom) s 42(1).

58 ‘The eligibility criteria that the local authority sets for services and support are not relevant in relation to safeguarding. Safeguarding enquiries should be made on the understanding of the risk of neglect or abuse, irrespective of whether the individual would meet the criteria for the provision of services’: *Ibid* s 42 Explanatory Notes.

59 Cf, ‘[I]n the context of the inherent jurisdiction, I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness, or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind, or dumb, or who is substantially handicapped by illness, injury or congenital deformity. This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive’: *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867 (Munby J). See also, Michael C Dunn, Isabel CH Clare and Anthony J Holland, ‘To Empower or to Protect? Constructing the “Vulnerable Adult” in English Law and Public Policy’ (2008) 28(2) *Legal Studies* 234; Brammer, above n 34.

- (a) are unable to safeguard their own well-being, property, rights or other interests,
- (b) are at risk of harm, and
- (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.<sup>60</sup>

14.62 An adult may be taken to be ‘at risk of harm’ for this purpose if: ‘another person’s conduct is causing (or is likely to cause) the adult to be harmed’; or ‘the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm’.<sup>61</sup>

14.63 In both jurisdictions, the fact of abuse itself is not sufficient to trigger the intervention of the safeguarding agency. The affected adult must also be vulnerable; the vulnerability must stem from certain prescribed factors; and the vulnerability must render them unable to protect themselves.

14.64 Many stakeholders broadly supported the approach proposed in the ALRC’s Discussion Paper.<sup>62</sup> One person called it a ‘significant and welcome move forward’.<sup>63</sup> Speech Pathology Australia said it supported the proposed consent-based ‘support and assist’ model, which would ‘preserve the dignity and autonomy of older people even when they are vulnerable and unable to make decisions about abuse and neglect’.<sup>64</sup>

14.65 Some stakeholders expressed reservations about the need for additional vulnerability criteria, namely, that the adult must have care and support needs and be unable to protect themselves. Some feared that such restrictions may leave many older and vulnerable people to ‘fall through the cracks’.<sup>65</sup> Legal Aid NSW said that ‘determining whether those conditions are satisfied would require the exercise of judgement regarding complex matters’ and ‘could leave investigators hesitant to use the power’:

It might be difficult to establish reasonable cause to suspect all of these matters before an investigation commences. For example, it may be unclear, without specialist

60 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 3(1).

61 *Ibid* s 3(2).

62 State Trustees (Vic), *Submission 367*; Australian Bankers’ Association (ABA), *Submission 365*; Office of the Public Advocate (Qld), *Submission 361*; Disabled People’s Organisations Australia, *Submission 360*; Eastern Community Legal Centre, *Submission 357*; M Berry, *Submission 355*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; R Lewis, *Submission 349*; Office of the Public Advocate (SA), *Submission 347*; ACT Human Rights Commission, *Submission 337*; Carers NSW, *Submission 321*; Speech Pathology Australia, *Submission 309*; Seniors Rights Service, *Submission 296*; Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*; Alzheimer’s Australia, *Submission 282*; Public Trustee of Queensland, *Submission 249*; NSW Nurses and Midwives’ Association, *Submission 248*; Office of the Public Advocate (Vic), *Submission 246*.

63 R Lewis, *Submission 349*.

64 Speech Pathology Australia, *Submission 309*. They also submitted: ‘In determining a definition of “vulnerability”, Speech Pathology Australia recommends recognition of cognitive and communication impairment as critical factors impacting an individual’s ability to look after themselves, or safeguard their own well-being, property, rights or other interests.’

65 E Davidson, *Submission 239*.

medical advice, if the person is in fact unable to protect themselves, or if they have chosen not to take steps to protect themselves.<sup>66</sup>

14.66 The National Older Persons Legal Services Network said that ‘the proposed trigger for investigation is too narrow’. A person should not be required to have care and support needs, they suggested, to receive adult safeguarding services:

The triggers may exclude cases where the abuse of the older person arises not because of any care and support needs per se, but rather because of the actions of a third party or as a direct result of an abuse of power within a relationship of trust or where one might be expected. This is particularly relevant to cases of financial abuse, where for example, a perpetrator may be trusted with banking facilities notwithstanding the capacity of the older person. In such a case, the inability of the older person to protect themselves may not be because of their support needs but rather the abusive, coercive or fraudulent actions of the other person, usually a close relative.<sup>67</sup>

14.67 Legal Aid ACT similarly suggested that the phrase ‘because of care and support needs’ be removed from the proposed criteria for safeguarding services:

There are many reasons older Australians may be unable to protect themselves from abuse. Geographic location, lack of access to appropriate facilities (such as a lock on the door), and general frailty (that does not constitute a physical impairment for the purposes of ‘care and support’) are a few examples.<sup>68</sup>

14.68 The ALRC does not intend the phrase ‘care and support needs’ to be read narrowly. Isolation and ‘general frailty’ might both suggest someone needs care and support. Further, even if it were thought desirable to offer safeguarding services to all adults, some focus on more vulnerable people is likely to be necessary. The *Closing the Gaps* report states:

Unlike in cases of child abuse, where the victim is automatically treated under the law as vulnerable and in need of support and protection, cases of abuse against older persons cannot be approached using the same assumption. Indeed, if the rights and freedoms of the older person are to be respected, the starting premise must always be that every older person is presumed to have the capacity to self-protect and to make decisions for him/herself. Until incapacity and/or an inability to self-protect are established, intervention should not be carried out.<sup>69</sup>

### Abuse or neglect

14.69 It is in response to abuse and neglect, rather than harm caused by accident or in other ways, that the safeguarding agency should act.<sup>70</sup> ‘Abuse’ should be defined in adult safeguarding legislation. The definition should capture wrongful acts or omissions by a person in a relationship of trust that causes harm to an adult. It should be confined to intentional acts and omissions and neglect. Examples of common types of abuse should be included in the definition, namely, psychological or emotional

66 Legal Aid NSW, *Submission 352*.

67 National Older Persons Legal Services Network, *Submission 363*.

68 Legal Aid ACT, *Submission 223*.

69 Office of the Public Advocate (SA), above n 14, 23.

70 In submissions, stakeholders commented on the definition of elder abuse, but few commented on the meaning of abuse in the more specific context of adult safeguarding legislation.



abuse, financial abuse, physical abuse, sexual abuse, restrictions on liberty, and neglect.

14.70 Abuse is not the only way, or even the primary way, older people are harmed. Disease, accidents, poor health and poverty all cause harm. Falls, for example, cause many more injuries to older people than assault. Although some definitions of elder abuse are very broad, the laws recommended in this chapter are not designed to safeguard against all harms.

14.71 One reason why additional safeguarding services are needed where there is abuse or neglect, rather than in response to harm caused in other ways, is that people who commit abuse may often try to impede the provision of care and undermine people's autonomy. These obstacles may not be faced to the same degree by those who suffer other types of harm. The need to overcome these hurdles is one of the justifications for an adult safeguarding agency.

14.72 Abuse is commonly used to refer to harm caused intentionally, but it may also capture certain types of neglect—harm caused recklessly or negligently by someone with a duty of care. Adult safeguarding agencies should also have a role in responding to these types of abuse.

14.73 Also inherent in the concept of abuse is the idea of moral blameworthiness or wrongfulness. Some actions that cause harm are willingly consented to by the harmed person. For example, buying cigarettes for an adult causes them harm, but it is generally not considered abusive. Dr Michael Dunn has argued that

harm is a necessary but not sufficient criterion for abuse. An action cannot be termed abusive if the action does not cause harm, but not all harmful actions are abusive. The justification for the involvement of an adult safeguarding service cannot therefore be determined by harm-related considerations alone, and harm is connected appropriately to abuse by attending to the *wrongful behaviours that can occur within interpersonal relationships* between individuals.<sup>71</sup>

14.74 Where the affected adult truly consents to the act or omission that causes harm, the act or omission is less likely to be wrongful or abusive.<sup>72</sup> Where there is such consent to the harm, there is a limited role for a safeguarding agency to intervene.<sup>73</sup> People are less likely to need the particular support of adult safeguarding agencies to deal with the results of this harm.

14.75 It may be implicit that 'abuse' concerns wrongful conduct, but this could be made explicit in legislation, to avoid doubt.<sup>74</sup>

---

71 Michael Dunn, 'When Are Adult Safeguarding Interventions Justified?' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge, 2013) (emphasis added).

72 People who play contact sports, for example, may consent to certain physical harm. Similarly, a person who willingly gives away \$100 they cannot really afford to lose may suffer the same financial harm as they would have suffered had the \$100 been stolen from them.

73 Whether a safeguarding agency should help people who do not consent to receiving help is a separate question, discussed further below.

74 In the definition of 'abuse' in the British Columbia legislation, this work may be done by the word 'mistreatment'. 'Abuse' is there defined to mean 'the deliberate mistreatment of an adult that causes the

### **Relationship of trust**

14.76 Elder abuse commonly refers to abuse by those in a relationship of trust. Should an adult safeguarding agency be focused on abuse by trusted people, or should it also investigate abuse by strangers? While strangers can cause very serious harm, the ALRC considers that this type of abuse calls for a different response, often a criminal justice response, and that this should not be part of an adult safeguarding agency's role.

14.77 Harm caused even intentionally by strangers does not have some of the features that make it more difficult for people to stop, or recover from, 'intimate abuse'. There is not the additional pain that comes when a loved one or a trusted carer breaks that trust. The 'harm in an abusive intimate relationship goes particularly deep'.<sup>75</sup> It is also less likely to come with the added complication, felt by some victims of abuse, of not wanting the abuser to be punished or suffer any other consequences. In fact, in many cases of elder abuse, an older person may wish to preserve their relationship with the abusive person.

14.78 The ALRC therefore recommends that adult safeguarding laws focus on abuse by people in a relationship of trust with the at-risk adult. This would include family members, including adult children and intimate partners, and carers, including paid carers.

## **Consent**

**Recommendation 14–4** Adult safeguarding laws should provide that the consent of an at-risk adult must be secured before safeguarding agencies investigate, or take any other action, in relation to the abuse or neglect of the adult. However, consent should not be required:

- (a) in serious cases of physical abuse, sexual abuse, or neglect; or
- (b) if the safeguarding agency cannot contact the adult, despite extensive efforts to do so; or
- (c) if the adult lacks the legal capacity to give consent, in the circumstances.

14.79 Whether state agencies should investigate and prosecute abuse when an abused person does not want the abuse investigated or prosecuted is a contested question that figures prominently in debates about responses to family violence. It is also an important question in relation to elder abuse.

---

adult: (a) physical, mental or emotional harm, or (b) damage or loss in respect of the adult's financial affairs, And includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors': *Adult Guardianship Act 1996* (British Columbia) s 1. To mistreat a person is to treat them 'badly, cruelly, or unfairly': Oxford Dictionary, definition of 'mistreat'.

<sup>75</sup> Jonathan Herring, *Caring and the Law* (Hart Publishing, 2013) np. Herring also writes that 'intimate violence can be seen as a breach of trust. Intimate relationships involve becoming physically and emotionally vulnerable. The trust which is central to close relationships creates special obligations not to misuse that vulnerability. Intimate relationships rely on trust so that we can flourish': Herring.

14.80 Securing consent before taking action that will affect someone is one way of respecting that person's autonomy. Respecting autonomy is a guiding principle in this inquiry, and its importance has been widely stressed by stakeholders.<sup>76</sup> Many consider that help should not be forced upon adults.

14.81 Some fear that adult safeguarding laws will result in the state second-guessing or undermining people's choices, and that vulnerable people will be given less liberty and autonomy than other people. The ALRC therefore recommends that adult safeguarding legislation should provide that consent should be obtained before an adult safeguarding agency investigates or responds to suspected abuse, except in limited circumstances.

14.82 A person's subjective feeling of vulnerability may be as important as objective risk factors, in determining their need for greater protection from abuse:

The vast majority of adults who fulfil the criteria for an inherent vulnerability will be able to live full, meaningful and autonomous lives, and should not be judged to be automatically at heightened risk of being constrained, coerced, or unduly influenced, relative to other adults, regardless of their circumstances.<sup>77</sup>

14.83 In the Discussion Paper, the ALRC proposed that a set of principles be included in adult safeguarding legislation that emphasise respecting the autonomy of people affected by abuse:

- (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.<sup>78</sup>

14.84 These principles attempt to strike a balance between respecting people's autonomy and protecting people from abuse, but give greater weight to respecting autonomy. The principles acknowledge people's right to take risks and make decisions that some others may regard as poor ones. The principles also seek to ensure that people are involved in decisions about how the agency will respond to elder abuse, and suggest that safeguarding agencies should play a supportive role.

14.85 Similar principles appear in adult safeguarding legislation in other countries. For example, the legislation in British Columbia features the following principles:

- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;
- (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;

---

76 See ch 2.

77 Dunn, Clare and Holland, above n 59, 244.

78 Australian Law Reform Commission, *Elder Abuse*, Discussion Paper No 83 (2016) prop 3–2.

- (c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.<sup>79</sup>

14.86 In England and Wales, and Scotland, guiding principles also 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>80</sup>

14.87 The principles proposed in the ALRC's Discussion Paper were widely supported in submissions.<sup>81</sup> Disabled People's Organisations Australia said it supported the proposed principles,

including the right for older people experiencing violence to refuse assistance or support, and that they have the right to make their own decisions about their care. This should form the basis of any investigations around elder abuse and violence against people with disability, as individuals are entitled to make their own decisions and have their legal capacity upheld.<sup>82</sup>

14.88 The Law Council noted that *The Principles for Older Persons*, adopted by the United Nations General Assembly, affirm the right of older persons to make decisions about their care and quality of their lives. But the guiding principles proposed by the ALRC 'could be strengthened by specifically allowing an older person to stop an investigation from commencing or continuing'.<sup>83</sup>

14.89 Some suggested that older adults and vulnerable adults should be free to take risks, and that this was one way to treat them with respect and dignity. For example, the Women's Electoral Lobby submitted:

The right of older people to take risks, just as people of all ages do every day, is often referred to as 'the dignity of risk'—to retain the dignity of control over one's life and key decisions, even where there might be some risk of harm or exploitation. This issue is possibly more relevant for women where society has a view that we need to be 'looked after' and are less able to manage on our own than a man might be.<sup>84</sup>

14.90 Additional autonomy-respecting principles were suggested by some stakeholders. For example, the National Older Persons Legal Services Network said:

79 *Adult Guardianship Act 1996* (British Columbia) s 2.

80 *Adult Support and Protection (Scotland) Act 2007* (Scotland) ss 2(b), (d); *Care Act 2014* (United Kingdom) s 1.

81 See, eg, State Trustees (Vic), *Submission 367*; Disabled People's Organisations Australia, *Submission 360*; Eastern Community Legal Centre, *Submission 357*; Law Council of Australia, *Submission 351*; Institute of Legal Executives (Vic), *Submission 320*; Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*; Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*; ADA Australia, *Submission 283*; Public Trustee of Queensland, *Submission 249*; Women's Electoral Lobby, *Submission 261*; Office of the Public Advocate (Vic), *Submission 246*; Assets, Ageing and Intergenerational Transfers Research Program, the University of Queensland, *Submission 243*; Carers Queensland, *Submission 236*; W Millist, *Submission 230*; Legal Aid ACT, *Submission 223*.

82 Disabled People's Organisations Australia, *Submission 360*.

83 Law Council of Australia, *Submission 351*.

84 Women's Electoral Lobby, *Submission 261*.

There should be a guiding principle that the older person has the right to be informed about all investigations and supported (where necessary) to participate in the process. This includes the right to access timely, tailored and independent advice (including legal and financial advice) at all stages of any relevant processes.<sup>85</sup>

14.91 As discussed further below, some stakeholders noted that some people will not have the decision-making ability to accept or refuse support or other actions.<sup>86</sup> For example, the Office of the Public Advocate (SA) submitted that

some older people will be unable to refuse or accept support, assistance or protection, or to make their own decisions about their care, due to impaired decision-making capacity. Therefore, there may be a case for more specific practice guidance about that class of person.<sup>87</sup>

14.92 While many stakeholders emphasised the need to respect the autonomy of people subjected to abuse, many also noted that it was difficult to balance protecting vulnerable people with respecting their autonomy.<sup>88</sup> Aged Care Steps agreed that

the rights of the individual to make their own decisions about how to deal with issues of abuse are paramount. However, as many of these people face an imbalance in power or may not be in a position to exert these rights, there need to be guidelines in place that balance the need for an investigation while respecting the privacy and peace of mind of the elderly person.<sup>89</sup>

14.93 Dr Kelly Purser and others from the Queensland University of Technology said that ‘a balance must be achieved between respect for personal autonomy, self-sufficiency and privacy on the one hand, and protection and security on the other’:

While the physical security and well-being of each individual must be protected, such protective measures must respect individual autonomy, liberty and dignity. An infringement of these basic rights would only be acceptable in exceptional circumstances, such as when it is necessary to protect the individual from serious harm or to protect the rights of others, and only to the extent justified by those circumstances.<sup>90</sup>

14.94 The Office of the Public Advocate (SA) noted that people experiencing abuse ‘may be unable or unwilling to take or accept protective measures for reasons relating to complex family dynamics and relationships of power and control’.<sup>91</sup> In this respect, it suggested, elder abuse was similar to other types of family violence:

---

85 National Older Persons Legal Services Network, *Submission 363*. Another stakeholder suggested a further principle: ‘older people will be informed of alternative ways to reduce their distress through non legal pathways such as mediation and counselling’: FMC Mediation & Counselling, *Submission 284*.

86 Eg, Office of the Public Advocate (Vic), *Submission 246*; W Bonython and B Arnold, *Submission 241*; W Millist, *Submission 230*.

87 Office of the Public Advocate (SA), *Submission 347*.

88 This was called ‘a critical point, albeit fraught with difficulty’: Women’s Electoral Lobby, *Submission 261*.

89 Aged Care Steps, *Submission 340*.

90 Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*.

91 Office of the Public Advocate (SA), *Submission 347*.

This issue is complex and, when it comes to serious crimes and risk of serious harm, we believe that there must be careful consideration of how public authorities respond to the risk.<sup>92</sup>

14.95 Other stakeholders expressed their concerns with the proposed principles, and emphasised that abuse itself undermines people’s autonomy and that abused people may refuse support because they are ‘scared, bullied or suffering cognitive impairment’.<sup>93</sup>

14.96 Some suggested that failing to protect people from abuse is itself a form of abuse or neglect, and possibly a violation of a person’s human rights.<sup>94</sup> Concerning people with limited decision-making ability, one stakeholder said that it is ‘often in their best interest for someone to step in to protect them’:

Whilst every attempt should be made to respect the wishes of the represented person, there are times when this is not possible as the ‘wishes’ can be outright unreasonable, illegal or dangerous. Any Carer will tell you this.<sup>95</sup>

14.97 The GRC Institute said that if someone is being abused and they refuse support or protection, ‘the refusal should be tested’:

At the least it might need a doctor or psychologist’s report to determine the reasonableness of the refusal. We can see scenarios where financial institutions would have potentially significant issues if they were to accept at face value an older person changing financial arrangements with a pressuring adult child beside them.<sup>96</sup>

14.98 Paul Greenwood, a US lawyer with many years’ experience in prosecuting elder abuse, said that it was ‘vital that we do not allow elder abuse victims to self determine whether a case gets investigated or prosecuted’:

40 years ago in San Diego we allowed domestic violence victims to determine which cases were prosecuted. We don’t do that now because too many victims 40 years ago—who ‘declined to prosecute’—ended up as homicide victims. Elder abuse victims must not be allowed to dictate what cases get investigated. For example, one of the most common physical elder abuse incidents is that involving an elderly mother who allows her middle aged son to ‘mooch’ off her. He is addicted to drugs, alcohol or gambling and is lazy. He steals from his mother and when she confronts him, he physically assaults her. Many of those elderly mothers do not want us to prosecute. But we must.<sup>97</sup>

14.99 However, given concerns about the potential for adult safeguarding schemes to undermine people’s autonomy, the ALRC has recommended that the legislation, rather than only feature guiding principles, should specifically require an adult safeguarding agency to obtain a person’s consent before taking action to support or protect them.

---

92 Ibid.

93 G Arnold, *Submission 279*.

94 Name Withheld, *Submission 290*.

95 Ibid.

96 GRC Institute, *Submission 358*.

97 P Greenwood, *Submission 304*.

The recommended consent provision, set out above, is intended to give more concrete effect to the principles proposed in the Discussion Paper.<sup>98</sup>

14.100 Where someone consents to accepting safeguarding services, the policy justification for providing the support is relatively unproblematic. Questions will remain about the coercive powers the agency should have when dealing with other people, such as the person suspected of committing the abuse but, as far as the victim of the abuse is concerned, where they give consent, the policy justification for providing support is more straightforward.<sup>99</sup>

14.101 However, there are circumstances in which abuse and neglect should be investigated and acted upon even without the affected adult's consent. For the reasons discussed below, the ALRC considers that consent should not be required where the at-risk adult is being subject to 'serious' physical or sexual abuse or neglect; where the safeguarding agency has been unable to contact the adult, despite extensive efforts to do so; and where the adult lacks the ability to give consent. These circumstances should be set out in safeguarding legislation.

14.102 In this regard, the principles proposed in the Discussion Paper may have placed insufficient weight on the need to protect vulnerable adults from some types of serious abuse. Although the second proposed principle referred to the need to 'balance' protection with respect for people's right to make their own decisions, the first principle was that people have a '*right*' to refuse support, assistance or protection' and the third principle was that 'the will, preferences and rights of the older person *must* be respected'. However, although a person's wishes should always be respected, in some limited cases it may be appropriate to act without their consent.<sup>100</sup>

14.103 Before further considering the situations in which consent should not be required, it should be emphasised that this is in the context of the abuse of at-risk adults, as defined above. This does not apply to all older people, much less all adults, but only those who need care and support and cannot protect themselves.

### **Serious physical or sexual abuse or neglect**

14.104 The ALRC recommends that consent need not be required where there is serious physical or sexual abuse or neglect of an at-risk adult. Serious abuse will usually mean that there is a significant harm to the affected adult and significant moral culpability of the person suspected of the abuse.

14.105 All abuse is, in one sense of the word, 'serious'. But the ALRC uses the word 'serious' in this context to refer to abuse at the higher end of the spectrum. An adult child who steals small amounts of money from a wealthy parent may be committing abuse, but the abuse may not be serious. A safeguarding agency should not

---

98 This is not to say that the legislation should not also include guiding principles.

99 Whether the support should be provided may then become largely a question of cost.

100 This is also reflected in the 'Will, Preferences and Rights Guidelines' in relation to 'representative decision-making' in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 3–3.

intervene in such a matter without the parent's consent, even if the parent is in some respects vulnerable.

14.106 If consent is not required where there is serious abuse, this should not be taken to mean that consent should not be *sought*. The wishes of the affected adult should always be carefully considered by the relevant agency and given significant weight. But there will be circumstances in which consent is refused, but the agency should nevertheless act.

14.107 Actions taken might include reporting abuse to the police, seeking medical assistance for the at-risk adult, and contacting other agencies who might offer support and protection. In more limited cases, it might be appropriate for safeguarding agencies to speak to friends, family members, or carers of the affected person, to discuss the health and safety of the older person, without disclosing the suspected abuse itself.

### ***Autonomy***

14.108 Some may object that intervening without the at-risk adult's consent will undermine their autonomy. But is consent *always* required, to respect autonomy?

14.109 It should first be stressed that abuse itself also undermines people's autonomy.<sup>101</sup> Abuse and living in fear can inhibit a person's ability to make choices about their own lives, to pursue what they value. Interventions to stop abuse may therefore support and enable people's autonomy, rather than undermine it. Professor Martha Fineman has criticised how promoting autonomy is sometimes 'cast as at odds with the provision of safety and security for the elderly':

Not only is autonomy inappropriately prioritized in this comparison, safety and security are not conceptualized as necessary for its exercise. A vulnerability approach might well reveal the ways in which safety and security are prerequisites for the meaningful exercise of autonomy, not in conflict with it. Safety and security are necessary to have the ability to fully and freely exercise options and make choices.<sup>102</sup>

14.110 Discussing the impact on autonomy of certain mandatory responses to domestic violence, Professor Marilyn Friedman has written that '[a]nything that succeeds in deterring an abuser's future abusiveness promotes his victim's long-run autonomy'.<sup>103</sup>

14.111 In the UK Court of Appeal, discussing the court's inherent jurisdiction in relation to vulnerable people, McFarlane LJ has said that 'the will of a vulnerable adult of any age may, in certain circumstances, be overborne' and that such individuals may

---

101 Debates about how the state should respond to domestic and family violence, while respecting a victim's autonomy, are relevant to elder abuse policy. Professor Marilyn Friedman has argued that domestic violence 'profoundly undermines a woman's autonomy': Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003) 150.

102 Martha Fineman, "'Elderly' as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility" (2012) 20 *Elder Law Journal* 71, 94.

103 Friedman, above n 101, 150. 'Thus, the short-run interference with an abused woman's autonomy that comes from a legal process over which she has no control may well be outweighed by her long-run gain in autonomy if the mandatory legal processes are successful in deterring her future abuse': *Ibid.*



sometimes ‘require and deserve the protection of the authorities and the law so that they may regain ... [their] autonomy’.<sup>104</sup>

14.112 Protecting people from abuse will therefore usually support their autonomy, particularly when protection is given with the adult’s consent. However, as Professor Nina Kohn has written, while ‘safety and security may support and facilitate autonomy, autonomy can also support and facilitate safety and security’:

Individuals are often in the best position to know what makes them safe and secure and in a better position than governments or other institutional actors to act quickly and efficiently in their own interest; thus, having the autonomy to act independently can itself be protective. In addition, individuals’ subjective feelings of control can enhance both their subjective sense of well-being and their objective physical and mental health.<sup>105</sup>

14.113 The autonomy interests of the at-risk adult, while crucial, are not the only interests that might be relevant when deciding whether the state should intervene. Particularly where there is serious physical or sexual assault or neglect, the interests of others, particularly other potential victims of abuse, should also be considered. For example, where a paid carer is violent and abusive towards one person, the interests of other people they may care for might also need to be considered.<sup>106</sup>

14.114 Intervention without consent can also be justified on the grounds of respecting the dignity of the affected person. Some have argued that dignity should essentially be equated with autonomy, suggesting that respecting autonomy will always also respect dignity.<sup>107</sup> However, others stress that dignity is a deeper value than autonomy; that while supporting autonomy will usually respect dignity, the two values will sometimes conflict; and that where they do conflict, dignity should prevail.<sup>108</sup>

---

104 *DL v A Local Authority* [2012] EWCA Civ 253, [63].

105 Nina Kohn, ‘Vulnerability Theory and the Role of Government’ (2014) 26(1) *Yale Journal of Law and Feminism* 14. Kohn also claims, at least in relation to people in the United States, that ‘older adults tend to place great priority on independence, even elevating it above safety and security’: *Ibid* 15.

106 In the context of intimate partner violence, Friedman writes: ‘[T]he law’s treatment of each particular abused woman is a public matter with potential impact on many other women. The impact is at once both material and symbolic. Materially, the legal treatment of each individual domestic violence case has an impact on the level of domestic violence in the future. The best reason for mandated legal proceedings in domestic violence cases is their apparent effectiveness in reducing the level of domestic violence in the community. Symbolically, the legal response to each case makes a public statement about how society regards the seriousness of domestic violence. ... Domestic violence is a public crime, not simply a private family matter, and this imposes a duty on the state to intervene with the full power of criminal law’: Friedman, *above n* 101, 150.

107 Some go further and argue that dignity adds nothing to the concept of autonomy. See, eg, Ruth Macklin, ‘Editorial: Dignity Is a Useless Concept’ (2003) 327 *British Medical Journal* 1420. ‘Is dignity a useful concept for an ethical analysis of medical activities? A close inspection of leading examples shows that appeals to dignity are either vague restatements of other, more precise, notions, or mere slogans that add nothing to an understanding of the topic.’

108 For example, Charles Foster has written that while ‘crucial’ and deserving ‘a prominent voice in all ethical and legal discussions’, autonomy is ‘a second order principle, ultimately drawing its authority from something akin to human dignity’: Charles Foster, ‘Autonomy in the Medico-Legal Courtroom: A Principle Fit for Purpose?’ (2014) 22(1) *Medical Law Review* 48. See also Charles Foster, *Human Dignity in Bioethics and Law* (Hart, 2011). ‘The right answer to an ethical or legal problem will be one that maximises the amount of dignity (defined as objective human thriving), in the transaction that is being analysed. Dignity provides not only the normative foundation of the answer to the question: ‘What is the

From this perspective, it seems hard to consider that respecting a vulnerable person's decision to live with serious physical and sexual abuse will always respect their dignity.

14.115 As discussed earlier in this chapter, the state's obligation to protect people's human rights may also justify intervention in some cases, even against the wishes of the person being protected. The right to life and the right not to be tortured or subject to degrading treatment, for example, are considered absolute rights, imposing a clear duty on governments to protect people from violations of those rights.

14.116 Finally, it should be emphasised that although safeguarding agencies should have a duty to investigate abuse, they should also have discretion to decide whether further action should be taken. Later in the chapter, the ALRC sets out a number of actions the agency 'may' take. Where there is serious assault, but no consent to act from the affected adult, the agency may in some cases exercise its discretion and not act (other than to report the abuse to the police, where this is required). In such cases, clear records should be kept, explaining why no action was taken.

14.117 Wherever possible, action should only be taken with the older person's consent. In the few cases in which action is taken without consent, safeguarding agencies should nevertheless work with the adult at every stage, if this is what the adult wants, and consent should continue to be sought at later stages of the process.

### **Limited ability to consent**

14.118 Safeguarding agencies should also not require the consent of a person who does not have the decision-making ability to give such consent. This should not be confused with the idea that consent need not be required from people with limited ability to make *other* decisions about their life. Rather, the relevant ability is the ability to make a decision about whether to consent to an investigation or a particular response. This is consistent with the 'functional approach' to capacity.<sup>109</sup> For example, a person may not be able to understand their banking records, but be perfectly able to consent to an investigation of their son or daughter for stealing their money.

14.119 Furthermore, as noted above, state public advocates and guardians already commonly have functions in relation to the abuse of people with limited decision-making ability.<sup>110</sup>

---

right thing to do?', but also suggests, as a matter of process, how one should seek to answer it (by auditing the dignity interests of the stakeholders)': *Ibid.*

109 See ch 2 and Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 'Support Guidelines', 'Assessing Support Needs', rec 3–2.

110 'If a public guardian or advocate has been appointed, the older person does not generally retain the right to refuse support, assistance or protection if it falls within the scope of the guardian's or advocate's appointment. Although advocates and guardians should be required to consider the will and preferences of the person, those wishes must be balanced against the best interests of the person, in accordance with the appointment of the guardian or advocate. As such, the advocate or guardian cannot be bound by them where they are inconsistent with the person's health or welfare': W Bonython and B Arnold, *Submission 241*.

14.120 The need to sometimes act without the consent of people with impaired decision-making ability was noted by a number of stakeholders. The Office of the Public Advocate (Vic) said that people ‘with significant cognitive impairment may not have the capacity to refuse assistance or protection’.<sup>111</sup> Another stakeholder submitted that there is a need to ‘acknowledge the reality of dementia’:

The person’s right to make their own decisions must be balanced not only with the need to promote their own sense of well-being but also with their actual well-being and safety as well as the well-being and safety of others (who may themselves be elderly).<sup>112</sup>

14.121 Legal Aid NSW also submitted that if an agency has concerns about a person’s ability to consent to an investigation, ‘the usual avenues regarding the appointment of a guardian are available’.<sup>113</sup> The ALRC considers that this will usually be the appropriate action for safeguarding agencies to pursue, where they suspect that an at-risk adult may not have the ability to give consent, in the circumstances.

### **Unable to contact adult**

14.122 Consent should also not be required where the safeguarding agency has been unable to contact the affected adult, despite extensive efforts to do so. This is necessary to deal with cases where someone essentially blocks access to another person. For example, an abusive carer may simply refuse to let an officer of the safeguarding agency into the home of the affected adult. The carer may always answer the phone and open the mail of the person they care for. It may be that support and protection is most necessary where such people block the efforts of safeguarding agencies to speak with an older adult.

14.123 The ALRC has not recommended that the safeguarding agency have powers of entry. As discussed below, this can be left to the police. But other actions may be called for. If serious abuse is suspected, the safeguarding agency may call the police. In other cases, the agency may seek to contact the family and friends of the older person. Usually, the agency should talk to the at-risk adult first, and secure their consent to these actions, but where they are unable to contact them, they should in some cases take action without consent.

### ***Other countries***

14.124 In Scotland, protection orders (ie, assessment orders, removal orders or banning orders) generally cannot be made without the consent of the affected adult.<sup>114</sup> But a refusal of consent ‘may be ignored’ where it is reasonably believed that,

- (a) the affected adult at risk has been unduly pressurised to refuse consent, and

---

111 Office of the Public Advocate (Vic), *Submission 246*.

112 Name Withheld, *Submission 215*.

113 Legal Aid NSW, *Submission 352*.

114 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 35(1).

- (b) there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.<sup>115</sup>

14.125 Further, an 'adult at risk may be considered to have been unduly pressurised to refuse to consent to the granting of an order or the taking of an action if it appears'—

- (a) that harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in whom the adult at risk has confidence and trust, and
- (b) that the adult at risk would consent if the adult did not have confidence and trust in that person.<sup>116</sup>

14.126 A refusal to consent to participate in an interview or a medical examination cannot be ignored.<sup>117</sup>

14.127 Under the *Care Act 2014* (UK), local authorities are not required to carry out a needs assessment of a person if a person refuses the assessment, but they must carry out an assessment if:

- (a) the adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out the assessment would be in the adult's best interests, or
- (b) the adult is experiencing, or is at risk of, abuse or neglect.<sup>118</sup>

14.128 In British Columbia, the legislation provides that the adult must be involved 'to the greatest extent possible' in decisions about support and assistance.<sup>119</sup> However, in some circumstances, the court 'may make an order for the provision of support and assistance to the adult without his or her consent'.<sup>120</sup>

## Actions

**Recommendation 14–5** Adult safeguarding laws should provide that, where a safeguarding agency has reasonable grounds to conclude that a person is an at-risk adult, the agency may take the following actions, with the adult's consent:

- (a) coordinate legal, medical and other services for the adult;
- (b) meet with relevant government agencies and other bodies and professionals to prepare a plan to stop the abuse and support the adult;
- (c) report the abuse to the police;

115 Ibid s 35(3).

116 Ibid s 35(5).

117 Ibid s 35(6).

118 *Care Act 2014* (United Kingdom) s 22.

119 *Adult Guardianship Act 1996* (British Columbia) s 52. 'The designated agency must involve the adult, to the greatest extent possible, in decisions about how to: (a) seek support and assistance, and (b) provide the support and assistance necessary to prevent abuse or neglect in the future.'

120 Ibid 56(3)(a).

- (d) apply for a court order in relation to the person thought to be committing the abuse (for example, a violence intervention order); or
- (e) decide to take no further action.

14.129 This recommendation highlights the primary objective of adult safeguarding laws—the actions that might be taken to support and protect at-risk adults. In some cases, the response might be relatively straightforward: for example, arranging for the adult to see a doctor, counsellor or lawyer. In more complex cases, a detailed plan might need to be made, with the cooperation and input of multiple government agencies and other service providers. The safeguarding agency should be given the role of coordinating this work.

14.130 As discussed above, the at-risk adult’s consent should be secured before taking any action, except in limited circumstances. Safeguarding agencies should work with at-risk adults to determine what support and services may be needed to recover from and stop the abuse.

14.131 The legislation need not prescribe specific responses to specific scenarios. Not only will different cases call for different responses, but the agency should only act with the consent of the affected adult, and the adult may prefer one response to another.<sup>121</sup> However, the legislation might be more prescriptive about the actions that might be taken where consent is not required.

### **Multi-agency, multi-disciplinary**

14.132 Responding effectively to elder abuse may often require the cooperation and expertise of people from multiple disciplines and multiple agencies. Safeguarding agencies should be empowered to lead and coordinate this work.<sup>122</sup> A lack of collaboration and the absence of a lead agency to coordinate the provision of services was identified as a key limitation of existing elder abuse strategies and responses.<sup>123</sup>

14.133 Adult safeguarding agencies should be empowered and encouraged to play this crucial crisis case management and coordination role. This should be made clear in

---

121 For example, some may not wish to report the abuse to the police. For some abuse, the agency would be required to report the abuse to the police anyway, but it may have some discretion in relation to less serious types of abuse.

122 This new body should be ‘supported by a legislative mandate to coordinate and lead the response of multiple agencies working collaboratively’: Office of the Public Advocate (SA), above n 14, 26.

123 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*.

the legislation. This would require safeguarding agencies, other government agencies and service providers to share information and coordinate their services.

14.134 In England and Wales, Safeguarding Adults Boards are established to ‘help and protect’ at-risk adults.<sup>124</sup> They should seek to achieve this objective by ‘co-ordinating and ensuring the effectiveness of what each of its members does’.<sup>125</sup> In British Columbia, the investigative body may 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>126</sup>

14.135 The Office of the Public Advocate (SA) submitted that adult safeguarding agencies should have responsibility for ‘convening multi-agency adult protection case conferences and coordinating an interagency response in cases of reported abuse’.<sup>127</sup>

14.136 Carers NSW said that ‘the NSW response to elder abuse lacks coordination and relies on interagency initiatives in partnership with the NSW Elder Abuse Helpline and Seniors Rights Service’:

Service providers and consumers would undoubtedly benefit from a central agency leading stakeholder engagement, preventative education, data collection and legal intervention.<sup>128</sup>

14.137 The NSW Ombudsman submitted that, in its experience, a comprehensive adult safeguarding mechanism would feature a ‘lead agency to coordinate (where required) an effective response—with appropriate information sharing provisions relating to the safety of individuals, and appropriate powers on the part of the lead agency to require information and to monitor the implementation of agreed actions’.<sup>129</sup> The NSW Ombudsman, in relation to the potential abuse, neglect or exploitation of a person with disability, will:

bring relevant agencies together to discuss the information that is known about the person’s current care, circumstances and risks—and to reach agreement on what action is required. These agencies may include any disability service currently or formerly involved with the person, the NSW Police, the Public Guardian, and mainstream services such as housing and health services. We facilitate the exchange of relevant information, the coordination of the safeguarding approach for the person with disability, and the oversight of the agreed actions.<sup>130</sup>

---

124 *Care Act 2014* (United Kingdom) s 43(2). The Board ‘must include the local authority, the relevant local health area and local police’ and other appropriate persons: *Ibid* sch 2 cl 1.

125 *Care Act 2014* (United Kingdom) s 43(3).

126 *Adult Guardianship Act 1996* (British Columbia) s 51(1). In the United States, the ‘primary activities covered by most state statutes include receiving reports; conducting investigations; evaluating client risk and capacity to agree to services; developing and implementing a case plan; counseling the client; arranging for a large variety of services and benefits and monitoring ongoing service delivery’: National Adult Protective Services Association, *History of Adult Protective Services* <[www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/](http://www.napsa-now.org/about-napsa/history/history-of-adult-protective-services/)>.

127 Office of the Public Advocate (SA), *Submission 170*.

128 Carers NSW, *Submission 321*.

129 NSW Ombudsman, *Submission 160*.

130 *Ibid*.

14.138 The ALRC recommends that adult safeguarding agencies should have a similar role in relation to at-risk adults. The *Closing the Gaps* report states that the government response ‘needs leadership and coordination’ and recommends that there be a ‘clear point of accountability within the government’.<sup>131</sup>

Service providers and community members need to know where to go if they have a concern about a vulnerable older person and to have confidence that a response will be offered. A central body would provide the point of accountability and carry responsibility for leadership in these reforms both at a policy and a practical level.<sup>132</sup>

### Other actions

14.139 Reporting abuse to the police will be one action that safeguarding agencies should take, in some circumstances. There should be clear protocols for when this would be appropriate. The safeguarding agencies recommended in this Report are not intended to investigate abuse with a view to prosecuting offenders, nor to substitute for a criminal justice response when this would be appropriate,<sup>133</sup> but their capacity to work collaboratively with the police will be crucial.

14.140 Safeguarding agencies should also be able to help an at-risk adult apply for an apprehended violence order, in serious cases of abuse or when otherwise appropriate, or find another way to have an abusive person removed from the at-risk adult’s home, particularly where that person has no right to live there. In other cases, safeguarding agencies may need to help an at-risk adult find other accommodation.

14.141 In some jurisdictions, safeguarding agencies can remove an at-risk person from their home for a period of time, to remove them from danger or to assess their health and safety. For example, in Scotland, a safeguarding agency may apply to the sheriff for assessment, banning and removal orders.<sup>134</sup> 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>135</sup> Removal orders authorise it to remove the adult at risk from their premises to protect them from harm.<sup>136</sup> Banning orders restrict access to the adult at risk, or require the

131 Office of the Public Advocate (SA), above n 14, 15.

132 Ibid.

133 ‘[A]ny proposal to empower the public guardian or advocate to investigate allegations of elder abuse should not impinge or detract from a full criminal justice system response to such abuse’: Women’s Domestic Violence Court Advocacy Services NSW Inc, *Submission 293*.

134 Some stakeholders submitted that adult safeguarding agencies in Australia should have similar powers. See, eg, Justice Connect, *Submission 182*; Office of the Public Advocate (SA), *Submission 170*; Office of the Public Advocate (Vic), *Submission 95*. For a discussion of these powers in other jurisdictions, see Office of the Public Advocate (SA), above n 14, 40.

135 *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 11. Section 12 provides: ‘The sheriff may grant an assessment order only if satisfied—(a) that the council has reasonable cause to suspect that the person in respect of whom the order is sought is an adult at risk who is being, or is likely to be, seriously harmed, (b) that the assessment order is required in order to establish whether the person is an adult at risk who is being, or is likely to be, seriously harmed, and (c) as to the availability and suitability of the place at which the person is to be interviewed and examined.’ See also s 13, which provides that the person may only be taken to another place if it is ‘not practicable’ to perform the interview or medical examination where they were.

136 Ibid s 14.

preservation of moveable property owned or controlled by the person subject to the order.<sup>137</sup>

14.142 In British Columbia, safeguarding bodies may apply to a court for an order that a person who has abused an at-risk adult:

- (i) to stop residing at and stay away from the premises where the adult lives, unless the person is the owner or lessee of the premises,
  - (ii) not to visit, communicate with, harass or interfere with the adult,
  - (iii) not to have any contact or association with the adult or the adult's financial affairs, or
  - (iv) to comply with any other restriction of relations with the adult,
- for a period of up to 90 days.<sup>138</sup>

14.143 The Law Commission in the UK proposed the introduction of removal orders, but there was widespread objection to the introduction, and they were not introduced in the *Care Act*. In fact, the *Care Act* repealed the existing power of local authorities to remove people in need of care from their homes.<sup>139</sup>

14.144 The ALRC does not recommend that safeguarding agencies have the power to remove an at-risk person from their home without the adult's consent, even where the agencies can otherwise act without the person's consent. Even though there may be circumstances in which removing a person from their home without their consent might be in that person's interests, the response may be considered overly intrusive and protectionist.

14.145 Safeguarding agencies might also be given a role in referring a person accused of abuse to services that provide them with help and support. This might include access to services such as anger management and gambling counselling. This could be included in the functions of safeguarding agencies, without giving the agencies the power to compel people to accept such services.

14.146 In introducing adult safeguarding laws, state and territory governments should give further consideration to the need for safeguarding agencies to take some of the actions considered necessary in other jurisdictions.

---

137 Ibid s 19.

138 *Adult Guardianship Act 1996* (British Columbia) s 51.

139 *Care Act 2014* (United Kingdom) s 46.



## Coercive powers

**Recommendation 14–6** Adult safeguarding laws should provide adult safeguarding agencies with necessary coercive information-gathering powers, such as the power to require a person to answer questions and produce documents. Agencies should only be able to exercise such powers where they have reasonable grounds to suspect that there is ‘serious abuse’ of an at-risk adult, and only to the extent that it is necessary to safeguard and support the at-risk adult.

14.147 Adult safeguarding agencies will in some cases need to exercise coercive information-gathering powers to perform their functions effectively. Most importantly, they will need to gather information and evidence to determine whether a person is being abused, so that appropriate action might be taken to stop the abuse and support the affected adult.<sup>140</sup>

14.148 The Administrative Review Council report, *The Coercive Information-Gathering Powers of Government Agencies*, explains that such statutory powers are ‘conferred on many government agencies to enable them to obtain information associated with the performance of their statutory functions’.

Such powers typically permit agency officers to enter and search premises, to require the production of information or documents, and to require provision of information relevant to their statutory functions by way of oral examination or hearing without the issuing of a warrant or other external authorisation.<sup>141</sup>

14.149 The *Public Guardian Act 2014* (Qld) provides for some of these powers, to be exercised by the Public Guardian when investigating a complaint that an adult has been ‘neglected, exploited or abused’ or ‘has inappropriate or inadequate decision-making arrangements’.<sup>142</sup> The Public Guardian may, by written notice, require a person to give information to the Public Guardian and, depending on the circumstances, either give the document to the Public Guardian or allow the Public Guardian to inspect the document and take a copy of it.<sup>143</sup>

14.150 In England, Safeguarding Adult Boards have the power to require, in some circumstances, that a body or person provide it with information that would help the Board exercise its functions.<sup>144</sup> For example, information might be requested of a GP who treated the adult; a volunteer who had helped the adult; a family member or carer

140 In developing these laws, states and territories might draw upon the relevant powers as set out in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).

141 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 1.

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

143 *Ibid* s 22.

144 *Care Act 2014* (United Kingdom) s 45.

of the adult; or a minister of a church attended by the adult.<sup>145</sup> The information can only be used for the purpose of exercising the Board's functions.<sup>146</sup>

14.151 When investigating abuse, designated agencies in British Columbia 'must make every reasonable effort to interview the adult' and may also:

- (a) interview the adult's spouse, the adult's near relatives, the adult's friends or anyone else who may assist in the investigation, and
- (b) obtain any information that the circumstances require, including a report from
  - (i) a health care provider who has examined the adult,
  - (ii) any agency that provides or has provided health or social services to the adult, and
  - (iii) any person that manages the adult's financial affairs.<sup>147</sup>

14.152 Most stakeholders who commented on the matter agreed that agencies investigating the abuse of at-risk adults should have powers to require people to answer questions and produce documents, although some had reservations.<sup>148</sup>

14.153 A 2016 NSW Parliamentary inquiry into elder abuse recommended that a Public Advocate with the power to investigate complaints of abuse of vulnerable adults should be able to 'require specified documents, written answers to questions, and attendance at a conference for the purpose of resolving a matter under investigation'.<sup>149</sup>

14.154 The Law Council and Legal Aid NSW, while supporting the proposal, also suggested there should be protections against self-incrimination.<sup>150</sup> The Law Council said it 'welcomes a more robust investigative regime, but submits that fundamental rights built on established criminal law protections need to be maintained'.<sup>151</sup>

14.155 The ALRC agrees that the legislation should protect people's rights against self-incrimination and other legal safeguards, such as the right to silence and to seek legal advice. The Administrative Review Council's report states:

145 Ibid explanatory note to s 45.

146 Ibid s 45(6).

147 *Adult Guardianship Act 1996* (British Columbia) s 48.

148 State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*; Justice Connect Seniors Law, *Submission 362*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (SA), *Submission 347*; Dixon Advisory, *Submission 342*; Seniors Rights Service, *Submission 296*; Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*; ACT Greens, *Submission 267*; Public Trustee of Queensland, *Submission 249*; Office of the Public Advocate (Vic), *Submission 246*; Carers Queensland, *Submission 236*; Legal Aid ACT, *Submission 223*.

149 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [8.80].

150 Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*. See also: It is 'necessary to provide medical and other health practitioners with: protections from civil, disciplinary and criminal liability or sanction for acting in good faith in relation to the exercise of the proposed investigation powers; a reasonable excuse provision for declining or otherwise failing to provide information in response to exercise of the proposed investigation powers, which would include self-incrimination and issues of practicality': MIGA, *Submission 258*. See also Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*.

151 Law Council of Australia, *Submission 351*.

It is essential that, when using [coercive information-gathering powers], agencies impinge on the rights of individuals only in a proportionate and justifiable way. Among the individual's rights are those associated with the protection of property and privacy, the right to silence, and statutory rights to the protection of personal information. Related rights are the right to privilege against self-incrimination or self-exposure to penalty and client legal privilege.<sup>152</sup>

14.156 Others objected to the introduction of these powers, particularly if abuse is defined too broadly. In one submission, the proposed powers were said to be 'more consistent with anti-terrorism powers given to ASIO or the police, than investigation of suspected abuse, very loosely defined':

Any such powers requiring provision of evidence should be exercised in accordance with established legal principle, by police or the courts, and restricted to circumstances those entities would typically regard as warranting the exercise of those powers, ie serious and intentional injury, for example, noting that other legal requirements regarding rights against self-incrimination and the rules of evidence should also be applied.<sup>153</sup>

14.157 Some may also object that a safeguarding agency may not exercise these intrusive powers fairly or impartially, particularly if the safeguarding role were given to public advocates or guardians, who advocate for and sometimes represent people with impaired decision-making ability. Some may fear that safeguarding agencies will not treat family members and carers fairly.

14.158 In light of some of the concerns expressed in submissions, the ALRC has modified the original proposal to introduce two further limitations on the investigative powers: first, the powers should only be exercised to investigate 'serious' abuse; and second, the powers should only be exercised to the extent that it is necessary to safeguard and support the affected adult.

14.159 Safeguarding agencies should exercise coercive powers cautiously and reluctantly, and only for the purpose of safeguarding and supporting the at-risk adult. It is not proposed that the safeguarding agency be a quasi-criminal investigation body. Where possible, safeguarding and support should be provided without forcing family members and carers to answer questions. The ALRC therefore recommends that the legislation should make clear that these powers should only be exercised to the extent that it is necessary to safeguard and support the affected adult.

14.160 Safeguarding agencies should also have 'reasonable grounds to suspect' that there is abuse, before exercising their coercive powers. This is consistent with the first principle set out in the Administrative Review Council's report, which suggests that coercive information-gathering powers should only be used to gather information 'for

---

152 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 5.

153 W Bonython and B Arnold, *Submission 241*.

the purposes of the relevant legislation’<sup>154</sup> and, when used in connection with a specific investigation,

the minimum statutory trigger for using the power should be that the person exercising it has ‘reasonable grounds’ for the belief or suspicion that is required before the power can be exercised.<sup>155</sup>

14.161 The ALRC also recommends that these powers should only be exercised when safeguarding agencies have reasonable grounds to suspect the abuse is ‘serious’, that is, at the higher end of the spectrum.<sup>156</sup> An isolated incidence of a carer shouting at an older person, for example, may not meet this threshold. In such a case, if the shouting amounted to abuse, support might need to be provided to the affected adult and steps may need to be taken to stop another such incident occurring. The agency might even ask questions of the carer and any other people who may have witnessed the incident. But such a case would not seem to justify the safeguarding agency having to power to *require* the carer or other people to answer questions.

14.162 However, where the abused person has limited decision-making ability, there may be a case for allowing safeguarding agencies to exercise coercive powers in less serious cases of abuse

14.163 These powers should also only be exercised to further the primary purpose of the safeguarding agency, namely, to safeguard and support the affected adult, not to determine the guilt or innocence of the person accused of abuse. Support should usually be given without using coercive investigation powers, in part because their exercise may sometimes be counterproductive or inappropriate in domestic settings. Seniors Rights Service submitted that such powers should be restricted and used carefully.<sup>157</sup>

***Should the at-risk adult be required to answer questions?***

14.164 In the Discussion Paper, the ALRC proposed that, unlike other people who may have relevant information, at-risk adults should not be required to answer questions or produce documents. It may be distressing for a person who has been abused to answer questions about that abuse; handled poorly or insensitively, the questions themselves might aggravate the abuse.

14.165 However, sometimes only the affected adult will have information, without which the safeguarding agency will have a very incomplete picture. In any event, given the affected adult will need to consent to the investigation and response,<sup>158</sup> they should usually be able to refuse to answer questions by withdrawing their consent to the investigation.

---

154 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) xi.

155 Ibid.

156 Although without coercive powers, it may be difficult to determine whether the abuse is serious.

157 Seniors Rights Service, *Submission 296*.

158 Except in limited circumstances: see above.

14.166 The ALRC therefore concludes that at-risk adults need not be specifically exempted from laws that give a safeguarding agency powers to require people to answer questions or produce documents.

### ***Powers of entry***

14.167 In some jurisdictions, adult safeguarding agencies have powers to enter a person's home. For example, in Scotland, the investigative body's powers include a power to enter premises without a court order.<sup>159</sup> In British Columbia, designated agencies may also apply to the court for an order authorising (a) someone from the agency to 'enter the premises and interview the adult'; and/or (b) a health care provider ... to 'enter the premises to examine the adult to determine whether health care should be provided'.<sup>160</sup> The agency must believe it is necessary to enter the premises to interview the adult, and the agency must have been 'denied entry to the premises by anyone, including the adult'.<sup>161</sup>

14.168 Should Australian safeguarding agencies have similar powers of entry? The ALRC recommends that they should not.

14.169 However, some stakeholders supported such powers, particularly where the person refusing entry is the person thought to be abusing an at-risk adult. Health professionals have reportedly stressed the 'importance of being able to visit a person at their home to establish the existence or extent of abuse', and the difficulty when they are refused entry.<sup>162</sup> Justice Connect therefore submitted that there should be 'the power to enter premises with a warrant issued by a judicial officer ... where there are reasonable grounds for suspecting a person has been neglected, abused or exploited on the premises'.<sup>163</sup>

14.170 The Office of the Public Advocate (Vic) submitted that powers of entry were necessary, at least in relation to investigating the abuse of people with impaired decision-making ability, and that the Public Advocate should be able to apply to a court for a warrant authorising entry in such circumstances.<sup>164</sup>

In OPA's experience, the circumstances of older people in private homes (even when they are under a guardianship order) are often difficult to ascertain. Where access to the person is blocked (usually by a co-resident relative), the older person is effectively out of reach and their living circumstances (including whether they are suffering abuse and neglect) hidden from view.

---

159 'A council officer may enter any place for the purpose of enabling or assisting a council conducting inquiries under section 4 to decide whether it needs to do anything ... in order to protect an adult at risk from harm': *Adult Support and Protection (Scotland) Act 2007* (Scotland) s 7.

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

161 *Ibid* s 49(1).

162 Justice Connect, *Submission 182*. See also Justice Connect Seniors Law, *Submission 362*.

163 Justice Connect, *Submission 182*.

164 Office of the Public Advocate (Vic), *Submission 246*.

Of course, the police would play an essential role when and where an entry warrant is issued. To this end, it will be necessary to develop protocols between police and public advocates and public guardians in each state and territory.<sup>165</sup>

14.171 Powers of entry and inspection were also among the powers thought necessary for an agency investigating the abuse of vulnerable adults by a NSW Parliamentary inquiry into elder abuse.<sup>166</sup>

14.172 However, Legal Aid ACT submitted that ‘powers of entry and inspection without consent be restricted to police agencies’:

Unauthorised entry is inconsistent with an investigative process committed to respecting the integrity and autonomy of older persons, particularly if an older person has the right to terminate the investigation at any time. Legal Aid ACT submits that in situations where an investigative body, as a result of evidence obtained in the investigative process, has real concerns as to the personal safety of an older person, they immediately alert police. Police may then progress the matter, applying for a warrant or taking other action.<sup>167</sup>

14.173 The ALRC is also wary of recommending safeguarding agencies have the power to enter people’s homes without their consent. When an officer of a safeguarding agency is refused entry by someone other than the at-risk adult, and they think it is necessary to gain entry to protect an at-risk person from serious abuse, the ALRC considers that officers should consider contacting the police. The police might then, among other things, seek the at-risk adult’s consent for the safeguarding agency to take other actions.

14.174 Powers of entry are even harder to justify where it is the at-risk adult who refuses entry; provided there is no coercion, the at-risk adult’s wishes in such cases should be respected. Where there is serious physical or sexual abuse or neglect, safeguarding agencies might take other action, for example contacting the police, but this should not extend to forcing entry into the person’s home.

## Reporting abuse

**Recommendation 14–7** Adult safeguarding laws should provide that any person who, in good faith, reports abuse to an adult safeguarding agency 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

---

165 Ibid.

166 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) [8.80].

167 Legal Aid ACT, *Submission 223*.

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

**Recommendation 14–8** Adult safeguarding agencies should work with relevant professional bodies to develop protocols for when prescribed professionals, such as medical practitioners, should refer the abuse of at-risk adults to adult safeguarding agencies.

### Protections

14.175 People should be encouraged to report abuse to adult safeguarding agencies, particularly where the at-risk adult indicates that they would like the abuse reported. Recommendation 14–7 is designed to encourage people to report abuse by protecting them from legal liability or other consequences when they report abuse.

14.176 Health professionals, banks, and aged care workers have expressed concerns about disclosing suspicions of elder abuse for fear of breaching confidentiality and privacy laws.<sup>168</sup> The Law Council submitted:

stakeholders such as health professionals, financial institutions and employees in the aged care sector may not report elder abuse for a number of reasons. These include fear of contravening state, territory or Commonwealth privacy laws, fear of dismissal or adverse treatment by employers, fear of breaching their clients' trust and lack of education around what constituted elder abuse.<sup>169</sup>

14.177 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>170</sup>

14.178 Privacy laws commonly contain a general exception for the disclosure of private information where the disclosure is required or authorised by law.<sup>171</sup> Adult safeguarding legislation should clearly authorise the reporting of suspected abuse to an adult safeguarding agency, to ensure that this exception to privacy laws applies.

14.179 The proposed protections are similar to those provided for in the *Public Guardian Act 2014* (Qld). The Victorian *Interagency Guideline for Addressing Violence, Neglect and Abuse* states that the head of an organisation or senior departmental officer should 'protect whistleblowers', that is, 'ensure that any person

168 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*.

169 Law Council of Australia, *Submission 351*.

170 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.

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

who reports an instance of violence, neglect or abuse is not thereby subject to adverse consequences'.<sup>172</sup>

14.180 The proposal in the Discussion Paper concerning the consequences of reporting abuse, similar to the above recommendation, was widely supported in submissions.<sup>173</sup> The NSW Nurses and Midwives' Association said that 'aged care workers/employers and members of the public would also benefit from an information campaign to ensure they are fully aware of such protections':

We cannot over-emphasise the power imbalance between employer and employee in many aged care settings. The more protections are afforded in legislation the more security this offers our members.<sup>174</sup>

14.181 Some stakeholders noted more subtle ways people can be punished for reporting abuse. One stakeholder referred to people threatening to 'restrict or prevent visitation with the older person by the person who reports the abuse'.<sup>175</sup> Reducing a worker's shifts following an unwanted report of abuse was called 'a very subtle form of discrimination' and punishment, one stakeholder said.<sup>176</sup> The NSW Nurses and Midwives' Association similarly observed:

Not all reprisals are overt and our members have cited circumstances such as being given unfavourable shift patterns or ostracised by management as a result of raising matters with external agencies.<sup>177</sup>

14.182 The Institute of Legal Executives noted that the professional rules for legal practitioners in various jurisdictions might need to be reviewed to ensure lawyers can report abuse without facing professional sanctions.<sup>178</sup>

14.183 Some have suggested that a provision such as the one recommended above might inadvertently protect a person who reports abuse that they themselves commit.<sup>179</sup> However, the provision is intended to protect people from liability that might otherwise follow from, or 'as a consequence of', the making of the report. It will not protect people from the consequences of their abusive actions.

---

172 Office of the Public Advocate (Vic), *Interagency Guideline for Addressing Violence, Neglect and Abuse (IGUANA)*.

173 State Trustees (Vic), *Submission 367*; National Older Persons Legal Services Network, *Submission 363*; Eastern Community Legal Centre, *Submission 357*; Legal Aid NSW, *Submission 352*; Law Council of Australia, *Submission 351*; Office of the Public Advocate (SA), *Submission 347*; M Winterton, *Submission 336*; Institute of Legal Executives (Vic), *Submission 320*; Australian Nursing and Midwifery Federation, *Submission 319*; AnglicareSA, *Submission 299*; Office of the Public Advocate (Vic), *Submission 246*; NSW Nurses and Midwives' Association, *Submission 248*; Public Trustee of Queensland, *Submission 249*; FMC Mediation & Counselling, *Submission 284*; Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*.

174 NSW Nurses and Midwives' Association, *Submission 248*.

175 A Salt, *Submission 278*.

176 Name Withheld, *Submission 240*.

177 NSW Nurses and Midwives' Association, *Submission 248*.

178 Institute of Legal Executives (Vic), *Submission 320*.

179 'The Network is also wary of providing a statutory defence to perpetrators of abuse who use reporting procedures to avoid sanctions. Any protections should only be available to those reporters who are not perpetrators of abuse': National Older Persons Legal Services Network, *Submission 363*.



14.184 In the Discussion Paper, the ALRC suggested that to be protected from liability, the report should have been based on a ‘reasonable suspicion’. On further reflection, a good faith proviso should be enough. If the suspicion is unreasonable, but the report is made in good faith, the reporter should still not suffer adverse consequences for making the report. Also, requiring people to have a ‘reasonable suspicion’ of abuse to be protected from liability may be too high a threshold and inhibit people from reporting abuse that should be reported.

### Protocols

14.185 There is also a need for guidance and protocols to ‘support health, aged care and other relevant professionals with the decision to make a report’, as noted by the Australian Association of Gerontology and the National Ageing Research Institute.<sup>180</sup> The Financial Services Institute of Australasia said that the ‘lack of clarity in reporting pathways is a significant issue for the financial services professionals’.<sup>181</sup>

14.186 The ALRC has therefore recommended that adult safeguarding agencies work with relevant professional bodies to develop protocols for when prescribed professionals, particularly medical practitioners, should refer the abuse of at-risk adults to adult safeguarding agencies.

14.187 Another way to encourage people to report suspected abuse is to make it an offence to fail to do so. This is known as mandatory reporting. It is mandatory for aged care facilities to report certain assaults to the police and to the relevant government department.<sup>182</sup> Broadly speaking, it is also mandatory for doctors, teachers, police, nurses and other designated professionals to report child abuse.<sup>183</sup>

14.188 The ‘core principle’ motivating mandatory reporting of child abuse is said to be that ‘many cases of severe child abuse and neglect occur in private, cause substantial harm to extremely vulnerable children, and are unlikely to be brought to the attention of helping agencies’.<sup>184</sup> ‘Generally, the primary aim is to protect the children from significant harm.’<sup>185</sup>

14.189 Older people must not be treated like children, and the ALRC considers that professionals should not be required to report all types of elder abuse. Elder abuse is a broad category, and older people should generally be free to decide whether to report abuse they have suffered to the police or a safeguarding agency or to not report the abuse at all. However, although not recommended in this report, there is a case for requiring professionals to report serious abuse of particularly vulnerable adults. The Financial Services Institute of Australasia submitted that some of its members supported the mandatory reporting of financial elder abuse:

---

180 Australian Association of Gerontology (AAG) and the National Ageing Research Institute (NARI), *Submission 291*.

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

182 The ALRC recommends changes to this scheme in ch 4.

183 See Ben Matthews and Kerryann Walsh, ‘Mandatory Reporting Laws’ in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (2014).

184 *Ibid* 132.

185 *Ibid* 133.

the vulnerability of this sector of the population to cognitive decline and abuse by family members or persons in caring or decision-making roles presents a compelling argument to establish mandatory reporting for professionals, including those in financial services.<sup>186</sup>

14.190 While it did not support mandatory reporting laws, Aged and Community Services Australia noted that they can help put elder abuse ‘on the social agenda’ and provide ‘clear procedures to be followed when abuse is identified’.<sup>187</sup> The North Australian Aboriginal Legal Service acknowledged ‘the limitations of mandatory reporting but also the exposure to problems that it brings’.<sup>188</sup>

14.191 Many stakeholders said they were opposed to mandatory reporting of elder abuse. State Trustees Victoria said mandatory reporting requirements may be seen by the elderly as ‘intrusive and patronising’.<sup>189</sup> Relationships Australia said ‘the concept of mandatory reporting is fraught with difficulty in this area since it casts elders essentially as children reinforcing ageist attitudes’.<sup>190</sup> National Seniors similarly said that mandatory reporting of elder abuse ‘undermines the rights of older people to make their own decisions’.<sup>191</sup>

14.192 Aged and Community Services Australia summarised a number of the objections to laws mandating the reporting of elder abuse:

Approaches to elder abuse need to be based on an empowering approach, respecting the older person’s autonomy, right and ability to make decisions for themselves. It is important that paternalistic and stereotypical views of older people as being frail, dependent and cognitively impaired do not hijack the agenda, treating elder abuse in the same way as child abuse, but rather recognise its greater similarities with other forms of family or domestic violence.

It is important not to take away the right of the older person to make their own decision thus further disempowering them at a time when they may already be feeling vulnerable. Mandatory reporting can lead to older people not seeking help for fear of a report being made whether they want it to be or not.<sup>192</sup>

14.193 Another objection to mandatory reporting laws is that they might be counterproductive. They may, for example, result in too many reports of trivial cases. National Seniors Australia said they could even be harmful:

A mandatory reporting regime is likely to lead to over reporting from well-meaning individuals worried they might be prosecuted if they do not. This could be extremely

186 Financial Services Institute of Australasia, *Submission 137*. The ABA, on the other hand, said it did not support mandatory reporting: Australian Bankers’ Association, *Submission 107*.

187 Aged and Community Services Australia, *Submission 102*.

188 North Australian Aboriginal Legal Service, *Submission 116*.

189 State Trustees Victoria, *Submission 138*.

190 Relationships Australia, Victoria, *Submission 125*.

191 National Seniors Australia, *Submission 154*. They noted that the Elder Abuse Prevention Unit in Queensland rejected mandatory reporting on the grounds that it ‘denies the rights of seniors to make their own decisions, thereby reinforcing ageist stereotypes of all older people’.

192 Aged and Community Services Australia, *Submission 102*.

---

problematic if there were inadequate resources available to field and investigate high volumes of reports.<sup>193</sup>

14.194 The Legal Services Commission (SA) said it ‘supports the reporting of incidents of elder abuse to appropriate authorities such as the police and public advocates’, however,

as the mandatory reporting of child abuse has shown, lack of resourcing to triage reports and over reporting of minor matters can paralyse the agencies tasked with taking action.<sup>194</sup>

14.195 There is little point in requiring professionals to report abuse to safeguarding agencies, if safeguarding agencies do not have the resources to respond to the abuse.

14.196 Some objections to mandatory reporting of ‘elder abuse’ might be met by requiring professionals to report only serious abuse of ‘at-risk’ adults, rather than any abuse of all older people.<sup>195</sup> Confining the requirement to ‘serious’ abuse might also address concerns about overwhelming agencies with trivial reports. Safeguarding agencies might also be given the discretion not to inquire into trivial cases.

14.197 However, although there may be a case for mandatory reporting of some types of serious abuse of at-risk adults, given the widespread concerns about mandatory reporting policies, the ALRC does not recommend that such laws be introduced at this time. Instead, as discussed above, clear protocols should be created setting out when it might be appropriate for professionals to report abuse to safeguarding agencies.

---

193 National Seniors Australia, *Submission 154*.

194 Legal Services Commission SA, *Submission 128*.

195 While many ‘at-risk’ adults may be older people, most older people are not ‘at-risk’, as this is defined earlier in the chapter.

