



Australian Government

Australian Law Reform Commission

# Elder Abuse

ISSUES PAPER

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





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This Issues Paper reflects the law as at 1 June 2016

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

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## Making a submission

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

The closing date for submissions to this Issues Paper is **18 August 2016**.

### Online submission form

The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual questions: <https://www.alrc.gov.au/content/elder-abuse-ip47>. Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few questions as you wish. There is space at the end of the form for any additional comments.

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

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

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

### Open inquiry policy

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

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

The ALRC may redact certain information from submissions in order to protect the privacy of submitters or others mentioned in submissions. This may include withholding the name of the submitter. Publication or redaction of information in submissions is at the discretion of the ALRC.

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



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# Terms of reference

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## Protecting the Rights of Older Australians from Abuse

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

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

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

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

### *Scope of the reference*

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

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

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

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

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

### ***Collaboration and consultation***

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

### ***Timeframe***

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

# Questions

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## What is elder abuse?

**Question 1** To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse:

- harm or distress;
- intention;
- payment for services?

**Question 2** What are the key elements of best practice legal responses to elder abuse?

**Question 3** The ALRC is interested in hearing examples of elder abuse to provide illustrative case studies, including those concerning:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse communities;
- lesbian, gay, bisexual, transgender or intersex people;
- people with disability; or
- people from rural, regional and remote communities.

**Question 4** The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in the evidence?

## Social security

**Question 5** How does Centrelink identify and respond to people experiencing or at risk of experiencing elder abuse? What changes should be made to improve processes for identifying and responding to elder abuse?

**Question 6** What changes should be made to laws and legal frameworks relating to social security correspondence or payment nominees to improve safeguards against elder abuse?

**Question 7** What changes should be made to the laws and legal frameworks relating to social security payments for carers to improve safeguards against elder abuse?

**Question 8** What role is there for income management in providing protections or safeguards against elder abuse?

**Question 9** What changes should be made to residence requirements or waiting periods for qualification for social security payments, or the assurance of support scheme, for people experiencing elder abuse?

**Question 10** What other risks arise in social security laws and legal frameworks with regard to elder abuse? What other opportunities exist for providing protections and safeguards against abuse?

## **Aged care**

**Question 11** What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

**Question 12** What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?

**Question 13** What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient?

**Question 14** What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?

**Question 15** What changes to the requirements concerning quality of care in aged care should be made to improve safeguards against elder abuse?

**Question 16** In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

**Question 17** What changes to the requirements for reporting assaults in aged care settings should be made to improve responses to elder abuse?

**Question 18** What changes to aged care complaints mechanisms should be made to improve responses to elder abuse?

**Question 19** What changes to the aged care sanctions regime should be made to improve responses to elder abuse?

**Question 20** What changes to the role of aged care advocacy services and the community visitors scheme should be made to improve the identification of and responses to elder abuse?

**Question 21** What other changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?

## **The National Disability Insurance Scheme**

**Question 22** What evidence exists of elder abuse being experienced by participants in the National Disability Insurance Scheme?

**Question 23** Are the safeguards and protections provided under the National Disability Insurance Scheme a useful model to protect against elder abuse?

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## Superannuation

**Question 24** What evidence is there of older people being coerced, defrauded, or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented and redressed?

## Financial institutions

**Question 25** What evidence is there of elder abuse in banking or financial systems?

**Question 26** What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

## Family agreements

**Question 27** What evidence is there that older people face difficulty in protecting their interests when family agreements break down?

**Question 28** What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

## Appointed decision-makers

**Question 29** What evidence is there of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney? How might this type of abuse be prevented and redressed?

**Question 30** Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?

**Question 31** Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?

**Question 32** What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?

## Public advocates

**Question 33** What role should public advocates play in investigating and responding to elder abuse?

**Question 34** Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?

## Health services

**Question 35** How can the role that health professionals play in identifying and responding to elder abuse be improved?

**Question 36** How should professional codes be improved to clarify the role of health professionals in identifying and responding to elder abuse?

**Question 37** Are health-justice partnerships a useful model for identifying and responding to elder abuse? What other health service models should be developed to identify and respond to elder abuse?

**Question 38** What changes should be made to laws and legal frameworks, such as privacy laws, to enable hospitals to better identify and respond to elder abuse?

## **Forums for redress**

**Question 39** Should civil and administrative tribunals have greater jurisdiction to hear and determine matters related to elder abuse?

**Question 40** How can the physical design and procedural requirements of courts and tribunals be improved to provide better access to forums to respond to elder abuse?

**Question 41** What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services, and where should they be located?

## **Criminal law**

**Question 42** In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

**Question 43** Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?

**Question 44** Are protection orders being used to protect people from elder abuse? What changes should be made to make them a better safeguard against elder abuse?

**Question 45** Who should be required to report suspected elder abuse, in what circumstances, and to whom?

**Question 46** How should the police and prosecution responses to reports of elder abuse be improved? What are best practice police and prosecution responses to elder abuse?

**Question 47** How should victims' services and court processes be improved to support victims of elder abuse?

**Question 48** How should sentencing laws and practices relating to elder abuse be improved?

**Question 49** What role might restorative justice processes play in responding to elder abuse?

**Question 50** What role might civil penalties play in responding to elder abuse?

# Issues Paper

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## **The Inquiry**

1 On 23 February 2016, the Attorney-General of Australia, Senator the Hon George Brandis QC, asked the Australian Law Reform Commission (ALRC) to consider existing Commonwealth laws and frameworks that seek to safeguard and protect older persons from misuse or abuse by formal and informal carers, supporters, representatives and others. The ALRC was directed to consider the interaction of those laws with state and territory laws and to identify and model best practice legal frameworks which promote and support older people’s ability to participate equally in their community and protect against misuse or advantage taken by formal and informal supporters or representatives.

2 In being asked to consider ‘Commonwealth laws and frameworks’, the focus of the Inquiry is on more than just law in the form of Acts and legislative instruments to include policy and practice guides, codes of conduct, standards, education, information sharing and other related matters.



3 This Issues Paper is the first consultation document in the Inquiry. It introduces the range of areas covered by the Terms of Reference and asks questions to assist in the development of reform responses through submissions from stakeholders. The submissions and further consultation rounds will inform the next stages of the process: a Discussion Paper to be released in November 2016; and the Final Report in May 2017.

## Background

4 Australia's population is ageing. In 1901, 4% of the Australian population was aged 65 years and older. In 2011 it was 14% and by 2040 it is projected that the figure will be 21%; while those over 85 years will be up to 5% of the population by 2050.<sup>1</sup> As the ALRC acknowledged in the report, *Access All Ages—Older Workers and Commonwealth Laws* (ALRC Report 120, 2013), an ageing population has implications for a wide range of public policy concerns.

5 This Inquiry focuses on another area associated with older people: namely what has been called, in the shorthand expression, 'elder abuse'. As the population ages, and the frailties of age and the vulnerabilities of older people increase, the potential reach of elder abuse may grow. The *Toronto Declaration on the Global Prevention of Elder Abuse* (2002) stated that '[p]reventing elder abuse in an ageing world is everybody's business'. While there are increasing anecdotal suggestions of improper exploitation and abuse of older people, there is limited evidence available about the prevalence and incidence of elder abuse in Australia. Internationally, the World Health Organization (WHO) has estimated that the prevalence rate of elder abuse in high- or middle-income countries ranges from 2% to 14%.

6 In the background to this Inquiry are a number of particular reviews: including the 2007 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law*; the 2015 report of the Senate Community Affairs References Committee, into violence, abuse and neglect against people with disability in institutional and residential settings; and the 2016 study by the Australian Institute of Family Studies (AIFS), 'Elder Abuse: Understanding Issues, Frameworks and Responses'.

7 The ALRC's previous work in the report, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124, 2014) also frames the Inquiry. The Report recommends a model for decision-making based on 'supported decision-making'. The Report sets out principles and guidelines that can be applied to Commonwealth and state and territory laws—in particular, guardianship and administration laws. Central to the recommendations were the 'National Decision-Making Principles' and a Commonwealth decision-making model. Key to the principles is the paradigm shift signalled in the *United Nations Convention on the Rights of Persons with Disabilities*

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1 Australian Bureau of Statistics, *Who Are Australia's Older People? Reflecting a Nation: Stories from the 2011 Census* <<http://www.abs.gov.au>>; Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse Understanding Issues, Frameworks and Responses' (Research Report No 35, Australian Institute of Family Studies, 2016) figure 1.

away from ‘best interests’ decision-making to a focus on ‘wills, preferences and rights’, so that when people with disability are supported to make decisions, or have decisions made for them, it is their wishes and preferences that drive those decisions—not other people’s ideas about their best interests.

### **Framing principles**

8 The two key principles informing the Inquiry are expressed in the Terms of Reference as:

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

9 These ideas may be expressed on the one hand as a principle that focuses upon autonomy; on the other, one that focuses on protection. The ALRC is also to have regard to relevant international obligations relating to the rights of older people under United Nations human rights conventions to which Australia is a party.

### **Getting involved**

10 This Issues Paper is intended to encourage informed community participation by providing some background information and highlighting the issues so far identified by the ALRC as relevant to the areas listed in the Terms of Reference. The Issues Paper may be downloaded free of charge from the ALRC website: <[www.alrc.gov.au](http://www.alrc.gov.au)>.

11 You can get involved in the Inquiry in a number of ways, including by making a submission or by participating in a consultation. The ALRC invites individuals and organisations to make submissions in response to specific questions, or to any of the background material and analysis provided.

12 There is no specified format for submissions, although the questions provided in this document are intended to provide guidance for respondents. Submissions may be made in writing, by email or using the ALRC online submission form. Submissions made using the online submission form are preferred. You are encouraged to answer as many—or as few—of the questions in the Issues Paper as you wish. Generally, submissions will be published on the ALRC website unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

Submissions using the ALRC’s online submission form can be made at: <<https://www.alrc.gov.au/content/elder-abuse-ip47>>. All submissions should reach the ALRC by **18 August 2016**.

## What is elder abuse?

13 The key terms in the Terms of Reference are ‘older Australians’ and ‘abuse’. Definitions may be used for a number of purposes. For example, they may be used as general descriptions to inform discussion or to inform service responses. They may also be used to define criminal offences, where particularity and precision become crucial. Definitions may also be significant where data about prevalence of abuse is to be collected.

14 The context in which a definition of ‘elder abuse’ is required for definition is therefore important. In this section the various terms are being considered in a descriptive, general sense. In later sections of this Issues Paper, and as the Inquiry develops, more specific definitions for particular legal purposes may be considered.

15 In the *Toronto Declaration on the Global Prevention of Elder Abuse*, the WHO described ‘elder abuse’ in this way:

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

16 This description is used across a range of government and non-government bodies and was used in the AIFS study. It will be used as a starting point in this Inquiry.

17 There are several elements in this definition of elder abuse: the type of act or omission; the element of harm or distress; the question of intention; the person who is the ‘abuser’—the kind of relationship involved; and the target of the abuse, namely an ‘older person’. Further questions include the relationship between elder abuse and family violence and the dynamics within particular contexts.

## Types of abuse

18 There are instructive guidelines in several states and territories for recognising abuse of older persons. Types of abuse include:

- financial abuse;
- psychological abuse (including social abuse);
- physical abuse or neglect;
- sexual abuse (including non-physical actions such as obscene language); and
- chemical abuse (including inappropriate use, underuse or overuse, of prescribed medication).

**Harm or distress**

19 The WHO definition concerns ‘harm or distress’ to an older person. Harm may be defined by virtue of certain conduct being considered wrongful—such as fraud or physical abuse.

20 Harm may also be seen where the relevant conduct is directed towards personal benefit after the older person’s death. Forcing or coercing changes to a will, for example, is included in some lists as financial abuse.

**Intention**

21 The WHO definition of elder abuse includes unintentional conduct in relation to neglect. Tasmanian and Victorian elder abuse guidelines note that abuse may occur as a result of ignorance or negligence, or it may be deliberate.<sup>2</sup>

22 The Tasmanian guidelines also suggest that for the purposes of identifying and defining abuse of older persons, ‘the focus should be on the effects on the older person, rather than the intention of the perpetrator’.

23 The question of intention raises a number of issues. One is identifying abuse, where an older person is affected. A further issue concerns the development of appropriate responses. Elder abuse may include criminal and non-criminal conduct. In some of these, such as responses involving the criminal law, matters of intention may be crucial. In others, where the abuse arises for example through ignorance rather than, say, malevolence or greed, the response may be to provide better understanding to those undertaking roles like carers or attorneys.

**Abuser—types of relationship**

24 The Terms of Reference for this Inquiry refer to abuse of an ‘older person’ by ‘formal and informal carers, supporters, representatives and others’. The WHO definition of elder abuse refers to abuse occurring within any relationship where there is an ‘expectation of trust’.

25 Elder abuse is often committed by a family member of the older person—notably, by adult children, but also the older person’s spouse or partner. The approach reflected in the WHO definition is wider than the concept of ‘family violence’, in that the relationships of trust may be wider than ‘family’ and the group of relationships listed in the Terms of Reference. However, elder abuse is closely related to family violence. Like family violence, elder abuse can be physical, sexual, psychological or financial in nature, and is usually committed by a family member. Like family violence, available research also suggests that women are more likely to experience elder abuse than men.<sup>3</sup>

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

3 Kaspiew, Carson and Rhoades, above n 1, 5.

26 There may be some differences in the dynamics of family violence and elder abuse. Family violence is often characterised as a manifestation of power and control.<sup>4</sup> There is less agreement about the dynamics of elder abuse. In 1999, it was said that ‘research to date has not been successful in identifying theoretical frameworks that are useful in understanding the issue as a social phenomenon’ and this may still be true today.<sup>5</sup>

27 Some instances of elder abuse may be a continuation of family violence that began when the perpetrator and victim were not old. In other cases, ageism, cognitive impairment, social isolation or relationships of dependence may contribute to the risk of elder abuse.<sup>6</sup>

### **Target—older person**

28 The idea of someone being an ‘older’ person is a relative concept—chronologically, medically and culturally. It does not have a precise definition; and specific ages may be used for particular purposes. For example, the Australian Bureau of Statistics groups people into population age cohorts, and differentiates between 15–64, ‘65 years and over’ and ‘85 years and over’. In an earlier ALRC Inquiry, into barriers to work for older Australians, the Terms of Reference defined ‘older persons’ as anyone over the age of 45 years, which is consistent with the definition of ‘mature age worker’ used by the Australian Bureau of Statistics.

29 For some purposes, treating all people of over a particular age as warranting special treatment under the law may be appropriate. Whether someone may access their superannuation funds, for example, turns on the person’s age. For some other purposes, however, it may be better to consider people in light of whether they have a particular vulnerability. Some law reform options might be targeted at people who require decision-making support, for example because of dementia, rather than a category of people who are over a certain age. Other law reform options might be best directed at people with a physical frailty or disability, rather than all older people, even though most frail people are also likely to be old.

### **Legal responses to elder abuse**

30 Issues surrounding elder abuse relate to areas of Commonwealth, state and territory and possibly local government responsibility. For example, the Commonwealth makes laws relating to financial institutions, superannuation and aged care. Laws relating to representative decision-making, including guardianship and powers of attorney, are the province of the states and territories. This makes responding to elder abuse a complex issue. AIFS commented that:

Fundamentally a human rights issue, responses to the management and prevention of elder abuse sit within a range of complex policy and practice structures across

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4 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 18.

5 Pamela Kinnear and Adam Graycar, ‘Abuse of Older People: Crime or Family Dynamics’ (Trends & Issues in Criminal Justice 113, Australian Institute of Criminology, 1999) 6; Kaspiew, Carson and Rhoades, above n 1, ch 3.

6 Kaspiew, Carson and Rhoades, above n 1, ch 3.

different levels of government, and various justice system frameworks within the private sector and across non-government organisations.<sup>7</sup>

31 Safeguarding against elder abuse requires addressing a range of points of intervention, including those related to:

- Risk—how is a person at risk of elder abuse identified, and how can the risk of abuse be minimised?
- Reporting—how and to whom are complaints about elder abuse made, who should have a responsibility to report elder abuse, and what data should be collected about elder abuse?
- Response—how are suspected or alleged cases of elder abuse investigated, and what service provision should be associated with such investigation?
- Redress—what forums can people go to for redressing elder abuse, and what legal remedies are available?

32 The ALRC is interested in comment about how elder abuse is defined and about best practice legal responses to elder abuse, including examples from other jurisdictions.

**Question 1** To what extent should the following elements, or any others, be taken into account in describing or defining elder abuse:

- harm or distress;
- intention;
- payment for services?

**Question 2** What are the key elements of best practice legal responses to elder abuse?

### **Older people from particular communities**

33 The nature and dynamics of abuse experienced by older people may be influenced by their being part of one or more particular communities. In answering questions raised throughout this Issues Paper, stakeholders are encouraged to note any specific concerns that might arise in particular communities, including: Aboriginal and Torres Strait Islander (ATSI), culturally and linguistically diverse (CALD), and lesbian, gay, bisexual, transgender or intersex (LGBTI) communities; older people with disability; and older people from rural, regional and remote areas. The ALRC is also interested in receiving any evidence of the types of elder abuse that might commonly occur in these communities.

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7 Ibid 1.

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***Older Aboriginal and Torres Strait Islander people***

34 Older people in ATSI communities are often designated as those 50 years and above.

35 There has been limited research on elder abuse in ATSI communities, and there may be some concerns about the appropriateness of using the term ‘elder’ abuse, because of its specific meaning in these communities. AIFS has concluded that ‘substantially more work is required to understand and conceptualise elder abuse in the Aboriginal context, especially among different groups in different circumstances, given the diversity among ATSI communities’.<sup>8</sup>

36 A Western Australian study has suggested that most concerns about abuse in Aboriginal communities relate to taking advantage of an older person’s financial resources. However, cultural expectations relating to kinship structures and sharing and reciprocity may complicate the way in which abuse is experienced and understood in those communities.<sup>9</sup>

***Older culturally and linguistically diverse people***

37 People from CALD backgrounds make up a growing proportion of the total number of older people in Australia. In 2011, 36% of Australia’s older people were not born in Australia.<sup>10</sup>

38 Cultural expectations relating to family responsibilities may inform the way in which abuse is experienced and understood in different communities. For example, it may be that a cultural norm in some communities exists that adult children are responsible for decision-making concerning their elderly parents.<sup>11</sup>

39 For some older CALD people, limited English skills may contribute to social isolation, increase dependence on family members, and in turn increase vulnerability to exploitation and abuse. There may also be issues with culturally appropriate service responses to elder abuse.

***Older lesbian, gay, bisexual, transgender or intersex people***

40 Older LGBTI people may experience abuse related to their sexual orientation or gender identity. For example, an LGBTI older person may be abused or exploited by use of threats to ‘out’ a person. Abuse of an LGBTI older person may be motivated by hostility towards their sexual orientation or gender identity. Older LGBTI people may also be at increased risk of social isolation, which may increase their vulnerability to abuse.

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8 Ibid 12.

9 Office of the Public Advocate (WA), *Mistreatment of Older People in Aboriginal Communities Project: An Investigation into Elder Abuse in Aboriginal Communities* (2005) 25.

10 Australian Bureau of Statistics, above n 1.

11 Ethnic Communities’ Council of Victoria, *Reclaiming Respect and Dignity: Elder Abuse Prevention in Ethnic Communities* (2009) 14.

41 Older LGBTI people may experience invisibility of their sexual orientation or gender identity, which may affect responses to elder abuse. They may also be reluctant to disclose their sexual orientation or gender identity for fear of discrimination.

42 LGBTI people may rely on ‘families of choice’ rather than biological family members—and may face either abuse by these people, or a failure by services to recognise and include these people as family members.<sup>12</sup>

### ***Older people with disability***

43 Older people with disability include people with disability acquired at an early age, as well as those who acquire disability with age. Rates of disability increase with age. In 2012, 39.5% of people aged 65–69, 78.7% of those aged 85–89, and 85.9% of those aged 90 and above had a disability. Those with a profound or severe core activity limitation increase from 9.4% of those aged 65–69 to 66.9% of those aged 90 and above.<sup>13</sup>

44 Older people may have some cognitive impairment, such as dementia. In 2011, 9% of people aged 65 and above, and 30% of those aged 85 and above, had dementia.<sup>14</sup> People with cognitive impairment or other forms of disability have been identified as being more vulnerable to experiencing elder abuse.

### ***Older people from rural, regional and remote areas***

45 Most older people (69%) live in major urban areas. Approximately one quarter live in smaller cities and towns, and the remainder in areas where there are populations of less than 1000 people.<sup>15</sup> Older people from rural, regional and remote areas may face particular issues in relation to elder abuse. For example, they may be more socially isolated, or may face difficulty in accessing health and other services to respond to abuse.

**Question 3** The ALRC is interested in hearing examples of elder abuse to provide illustrative case studies, including those concerning:

- Aboriginal and Torres Strait Islander people;
- people from culturally and linguistically diverse communities;
- lesbian, gay, bisexual, transgender or intersex people;

12 See, eg, the US research in National Center on Elder Abuse, *Research Brief: Mistreatment of Lesbian, Gay, Bisexual, and Transgender (LGBT) Elders*.

13 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2012* (2013).

14 Australian Institute of Health and Welfare, *Dementia in Australia* (2012) 11.

15 Australian Bureau of Statistics, *Where and How Do Australia's Older People Live? Reflecting a Nation: Stories from the 2011 Census* (2013).



- people with disability; or
- people from rural, regional and remote communities.

### Data collection

46 The way that elder abuse is defined has particular relevance for the collection of prevalence data. As the AIFS study observed, having identified the similarity of elements in a number of definitions, ‘the absence of a precise agreed definition is considered problematic for a range of reasons, not the least of which is the difficulty in measuring elder abuse’.<sup>16</sup> While there is some evidence drawn, for example, mainly from information collected by state-based elder abuse hotlines, the AIFS study pointed to the ‘emerging recognition of the need for systematic research in this area’.<sup>17</sup>

**Question 4** The ALRC is interested in identifying evidence about elder abuse in Australia. What further research is needed and where are the gaps in the evidence?

### Social security

47 Social security law includes the *Social Security Act 1991* (Cth) and the *Social Security (Administration) Act 1999* (Cth) and is administered by the Department of Human Services (DHS) through Centrelink. The Department of Social Services produces the *Guide to Social Security Law* to provide guidance to decision-makers.

48 Abuse of an older person may involve the social security system, for example through misuse of a person’s income support payments. There may also be a role for the social security system in providing information about elder abuse, identifying those at risk of abuse and providing safeguards against the abuse of older people.

#### Identifying those at risk of abuse

49 A large proportion of people engage with the social security system upon reaching Age Pension age. There may be opportunities to provide information and to undertake risk identification in relation to financial and other forms of abuse at this point.

50 DHS has an existing Family and Domestic Violence Strategy, and recognises that older people may experience abuse. The Strategy focuses on providing information about family and domestic violence, identifying those at risk of family and domestic violence, providing referrals and support, staff training in relation to family and domestic violence, and embedding responses to violence across systems and processes.

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16 Kaspiew, Carson and Rhoades, above n 1, 4.

17 Ibid 7.

51 The ALRC is interested in comment about the effectiveness of any element of this Strategy in relation to identifying and responding to elder abuse.

**Question 5** How does Centrelink identify and respond to people experiencing or at risk of experiencing elder abuse? What changes should be made to improve processes for identifying and responding to elder abuse?

### **Nominees**

52 A social security payment recipient may have a ‘payment nominee’ or ‘correspondence nominee’. A payment nominee receives payments on behalf of the social security payment recipient (the ‘principal’). A correspondence nominee may receive any social security notice on behalf of the principal. Nominees have a duty to act in the ‘best interests’ of the principal.

53 The position of payment or correspondence nominee may be abused—for example, a nominee may use payments received on behalf of the principal for their own benefit.

54 The provisions relating to nominees may benefit from reform to improve safeguards against elder abuse. For example, the process for appointment of a nominee, the duties and reporting responsibilities of a nominee, or remedies for failing to comply with the duties of a nominee may need to be changed.

**Question 6** What changes should be made to laws and legal frameworks relating to social security correspondence or payment nominees to improve safeguards against elder abuse?

### **Payment for carers**

55 People who provide care to an older person may be eligible for a social security payment—Carer Payment or Carer Allowance. A person may receive a payment for provision of care to an older person, and fail to provide that care, or provide inadequate care. This may, in some circumstances, amount to elder abuse.

56 A person receiving Carer Payment or Carer Allowance must notify Centrelink of changes in circumstances that may affect their qualification for the payment, including where the required level of care to the care recipient is not being provided. However, it may be that further reporting responsibilities on payment recipients regarding the provision of care should be imposed.

**Question 7** What changes should be made to the laws and legal frameworks relating to social security payments for carers to improve safeguards against elder abuse?

## Income management

57 Income management is a measure that quarantines a percentage of a person's social security payment to pay for basic needs like food, clothing, housing and utilities. Income management operates only in particular locations, and many of those subject to income management are Aboriginal people.<sup>18</sup>

58 Income management may be compulsorily applied to a person identified by a Centrelink social worker as 'vulnerable' for reasons that include vulnerability to economic abuse or financial exploitation. Income management may also be voluntarily entered into.

59 Compulsory income management may be considered to be an overly interventionist response to vulnerability to exploitation, and to limit the agency of a person experiencing exploitation rather than focusing on the actions of the perpetrator. The ALRC is interested in comment about the role income management might play in providing protections or safeguards against exploitation or abuse of older people's social security payments.

**Question 8** What role is there for income management in providing protections or safeguards against elder abuse?

## Older migrants' access to social security payments

60 For older migrants experiencing abuse and who are in situations of financial dependence, there may be limited options for exiting the abusive situation. Social security payments generally have a residence requirement or waiting period. For example, a person must generally have 10 years Australian residence to qualify for Age Pension.

61 Additionally, social security law provides that some classes of visa, including a number of parental visas, will only be granted where an 'assurance of support' is provided. An assurance of support is a commitment by a person or organisation (the 'assurer') to provide financial support to a person applying to migrate (the 'assuree') so that they will not have to rely on social security payments. The assurer also assumes responsibility for the repayment of any recoverable social security payments received by the assuree during the support period, which may be up to 10 years.

62 The ALRC invites comment on the impact of the residence requirement or waiting period for social security payments, or the assurance of support scheme, for older migrants experiencing elder abuse.

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18 In December 2013, 90.2% of those subject to income management in the Northern Territory were Aboriginal people: J Rob Bray et al, 'Evaluating New Income Management in the Northern Territory: Final Evaluation Report' (SPRC Report No 25/2014, Social Policy Research Centre, 2014) table 4.1.

**Question 9** What changes should be made to residence requirements or waiting periods for qualification for social security payments, or the assurance of support scheme, for people experiencing elder abuse?

### Other issues

63 The ALRC invites comment on any other aspect of social security law that may involve a risk of elder abuse or, alternatively, provide opportunities for protecting and safeguarding against abuse.

**Question 10** What other risks arise in social security laws and legal frameworks with regard to elder abuse? What other opportunities exist for providing protections and safeguards against abuse?

### Aged care

64 Older people may experience abuse or neglect in aged care. Aged care includes residential aged care, as well as aged care provided in the home, or other flexible care arrangements. Abuse may be committed by paid staff, other residents in residential care settings, or family members or friends.

65 The *Aged Care Act 1997* (Cth) provides a regulatory framework for aged care. The Commonwealth provides funding for aged care and regulates its provision through prescribing responsibilities for approved providers of care. Sanctions may be imposed on approved providers who do not meet their responsibilities. Principles made under the *Aged Care Act* also regulate the provision of aged care and are contained in a number of legislative instruments.

66 The *Aged Care Act* regulates different forms of aged care: home care, flexible care and residential care. The Commonwealth also has responsibility for entry-level support services for older people through the Commonwealth Home Support Programme (CHSP) in all states and territories except Victoria and Western Australia. The *Commonwealth Home Support Programme Manual 2015* contains grant recipients' responsibilities relating to the provision of care. There are ongoing reforms to aged care, with a number of changes scheduled to be phased in over coming years.

67 The ALRC is interested in evidence or case studies about elder abuse in aged care.

**Question 11** What evidence exists of elder abuse committed in aged care, including in residential, home and flexible care settings?

## Right to live without exploitation, abuse and neglect

68 Recipients of care have ‘user rights’ set out in the *User Rights Principles*. The *User Rights Principles* contain Charters of care recipients’ rights and responsibilities. These include the right to be treated with dignity and to live without exploitation, abuse or neglect. In residential care, they also include the right to live in a safe, secure and homelike environment, and to move freely both within and outside the residential care service without undue restriction.

## Assessment of care needs

69 Before being approved as a care recipient, a person must have their care needs assessed. For care regulated under the *Aged Care Act*, the assessment is conducted by an Aged Care Assessment Team (Aged Care Assessment Service in Victoria). For the CHSP, the assessment is performed by a Regional Assessment Service.

70 A range of factors are considered in an aged care assessment, including risks of neglect and abuse.<sup>19</sup> The ALRC is interested in comment on the role that aged care assessment plays, or might play, in identifying and responding to elder abuse.

**Question 12** What further role should aged care assessment programs play in identifying and responding to people at risk of elder abuse?

## Decisions about care

71 The Charters of care recipients’ rights and responsibilities include rights in relation to decision-making in residential and home care, which include, broadly, the right to control or participate in decisions affecting them.

72 A person may require decision-making support or an appointed decision-maker for decisions related to aged care—including consenting to an aged care assessment and entry into agreements relating to aged care; and ongoing care decisions. In addition, home care is now delivered on a ‘consumer directed care’ basis, meaning a care recipient is responsible for choosing the services appropriate to their care needs. An appointed decision-maker may provide a safeguard against elder abuse. In some circumstances, however, such a decision-maker may take advantage of this role to facilitate abuse.

73 The *Aged Care Act* and associated Principles contain a number of provisions that contemplate support in decision-making, but these may benefit from review to ensure that they contain appropriate safeguards against elder abuse.<sup>20</sup>

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19 Department of Social Services (Cth), *Aged Care Assessment Programme Guidelines* (May 2015) 23; Department of Social Services (Cth), *My Aged Care Regional Assessment Service Guidelines* (2015) 36.

20 See, eg, *Aged Care Act 1997* (Cth) ss 96-5, 96-6; *Quality of Care Principles 2014* (Cth) s 5; *User Rights Principles 2014* (Cth) sch 2 ss 2(d), 5(d). See also Department of Social Services (Cth), *Aged Care Assessment Programme Guidelines* (May 2015) 15.

**Question 13** What changes should be made to aged care laws and legal frameworks to improve safeguards against elder abuse arising from decisions made on behalf of a care recipient?

**Question 14** What concerns arise in relation to the risk of elder abuse with consumer directed aged care models? How should safeguards against elder abuse be improved?

### Quality of care

74 An approved provider has responsibilities relating to the quality of care it provides. It must, among other things, provide specified care and services—for residential care this includes assistance with daily living activities, meals, and nursing services; maintaining an adequate number of appropriately skilled staff; providing care and services consistent with rights and responsibilities of care recipients; and complying with relevant standards for the type of care being provided.

75 The ALRC is interested in comment on the extent to which current requirements relating to the quality of care provide adequate protections or safeguards against elder abuse in aged care. For example, there may be concerns about requirements relating to background checks for staff, or the ratio of staff to care recipients.

**Question 15** What changes to the requirements concerning quality of care in aged care should be made to improve safeguards against elder abuse?

### Restrictive practices

76 ‘Restrictive practices’ involve the use of interventions to control a person’s behaviour. Examples include physical restraint, such as removal of mobility aids; chemical restraint, such as the use of sedative medicine; or environmental restraints, such as locked wards. Such practices may be an interference with a person’s rights. They may also constitute abuse and, in some circumstances, a crime.

77 Concerns exist over the use of restrictive practices in aged care, and over the processes for obtaining consent to their use where a person’s decision-making ability is impaired.

78 A national framework exists for reducing and eliminating the use of restrictive practices in the disability service sector. In aged care, the use of restrictive practices is not explicitly regulated, although guidance has been provided to support restraint-free environments in aged care.

**Question 16** In what ways should the use of restrictive practices in aged care be regulated to improve safeguards against elder abuse?

### Reporting alleged and suspected assaults

79 A reporting regime exists in residential aged care for alleged or suspected assaults. An approved provider must report an allegation, or a suspicion on reasonable grounds, of a ‘reportable assault’—broadly, unlawful sexual contact or unreasonable use of force—of a care recipient to police and the Department of Health within 24 hours.

80 There are some exemptions from reporting. Alleged or suspected reportable assaults committed by a care recipient with a cognitive or mental impairment are exempt from reporting requirements if, within 24 hours after allegation or suspicion, the approved provider puts in place arrangements for management of the care recipient’s behaviour.

81 The ALRC is interested in comment about the effectiveness of the reporting regime in aged care as a response to elder abuse.

**Question 17** What changes to the requirements for reporting assaults in aged care settings should be made to improve responses to elder abuse?

### Complaints and sanctions

82 Approved aged care providers must establish an internal complaints resolution mechanism for the aged care service. In addition, the *Aged Care Act* provides for an Aged Care Complaints Commissioner to manage and resolve complaints and concerns about aged care services.

83 There is also a separate sanctions regime, administered by the Department of Health. Sanctions may be imposed on an aged care provider that does not comply with its responsibilities. Sanctions include: revoking or suspending the provider’s approval as an aged care service provider; restricting such approval; or revoking or suspending the allocation of some or all of the places allocated to a provider.

84 There may be concern about the effectiveness of the complaints and sanctions regimes in responding to the abuse of people receiving aged care. For example, some have suggested that individual remedies should be available for breaches of the Charters of care recipients’ rights and responsibilities.

**Question 18** What changes to aged care complaints mechanisms should be made to improve responses to elder abuse?

**Question 19** What changes to the aged care sanctions regime should be made to improve responses to elder abuse?

### **Support services**

85 Aged care support services may play a role in identifying and responding to abuse in aged care. The National Aged Care Advocacy Program (NACAP) provides assistance to people receiving aged care. Advocacy services may provide individual advocacy or information to clients, as well as educational activities including sessions for aged care recipients and workers.

86 There is also a community visitors scheme, in which recipients of both residential and home care are matched with volunteer visitors to facilitate contact with the community. Community visitors are not advocates, and are directed to report any concerns they have about care to the organisation that coordinates their visits. Some community visitors schemes in the disability sector take a more active role in monitoring potential cases of abuse and neglect. In Victoria, for example, it is a function of a community visitor to inquire into any case of suspected abuse or neglect of a resident, and the use of restrictive interventions and compulsory treatment.

**Question 20** What changes to the role of aged care advocacy services and the community visitors scheme should be made to improve the identification of and responses to elder abuse?

### **Other issues**

87 The ALRC invites comment on any other changes that should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse.

**Question 21** What other changes should be made to aged care laws and legal frameworks to identify, provide safeguards against and respond to elder abuse?

## **The National Disability Insurance Scheme**

88 The National Disability Insurance Scheme (NDIS) supports people with a 'permanent and significant disability'. A person must be under the age of 65 at the time they seek to become a participant in the NDIS. However, if a person is already in the NDIS when they turn 65, they may elect to remain in the NDIS or enter the aged care framework.

89 Participants can access information and referrals to services, as well as individualised plans and supports. The National Disability Insurance Agency (NDIA) works with a participant to develop a plan. It considers the extent to which families, carers and informal networks may reasonably be expected to assist. However, risks to the participant's wellbeing, and the impact on a participant's level of independence will be taken into account in evaluating whether informal carers may reasonably be relied upon.



## Safeguards and protections

90 The Australian Government, in collaboration with the NDIA and state and territory governments, is working towards a national quality and safeguards framework that would enable people with a disability to live free from abuse, neglect and exploitation. In the interim, the NDIA uses existing state and territory quality and safeguarding frameworks in making decisions relating to the registration of service providers. Each of the existing quality and safeguarding frameworks requires that serious incidents are reported. These include physical assault and inappropriate behaviour or inadequate care by caregivers or staff. However, unlike in aged care, there is no legislative requirement to report alleged or suspected assaults.

91 Additionally, in discussing the making of a plan with a participant, NDIA staff and contractors are required to take into account a person's 'vulnerability' (including whether they are at risk of elder abuse). For instance, where a participant is identified as 'vulnerable', a shorter timeframe may be set for review of a participant's plan, or arrangements may be put in place for regular contact between the NDIA and the participant. In short, an approach which facilitates jointly identifying and exploring risk is encouraged. Operational guidelines also set out the responsibilities of NDIA staff when they suspect or receive information about abuse, neglect or exploitation. The NDIA's primary role is to report abuse, neglect or exploitation to responsible state and territory authorities. NDIA staff will also consider whether there are any implications for the participant's plan.

### *Nominees under the NDIS*

92 Supported decision-makers are provided for under the *National Disability Insurance Scheme Act 2013* (Cth). Under this scheme, participants can access individualised plans and funding for access to support services. A 'plan nominee' can act on behalf of the participant in relation to the making, review or replacement of an individualised plan, or the management of funding for supports under the plan. A 'correspondence nominee' can act on behalf of the participant in other matters.

93 There are a number of safeguards relating to nominee appointments under the NDIS. Nominees must only be appointed when it is not possible for participants to be assisted to make decisions for themselves. A nominee must act in accordance with the wishes of the participant. Nominees may be appointed by the participant, or on the initiative of the CEO of the NDIA. The instrument may impose limits on what a nominee can do under the appointment, and may also specify that it is valid for a limited time, or until a specified event occurs. Where a nominee is appointed on the initiative of the CEO, the nominee may only act if they consider the participant is not capable to do so.

94 A plan nominee must, when required by a notice from the CEO, give the NDIA a statement relating to the disposal of monies paid to the nominee on behalf of the participant. A failure to provide the statement is an offence.

95 The scheme also provides that the CEO may suspend or cancel the appointment of a nominee where there are reasonable grounds to believe the nominee has caused, or is likely to cause, physical, mental or financial harm to the participant.

96 The ALRC is interested in comment on whether participants in the NDIS are experiencing elder abuse, and whether the safeguards and protections provided under the scheme are a useful model to protect against elder abuse.

**Question 22** What evidence exists of elder abuse being experienced by participants in the National Disability Insurance Scheme?

**Question 23** Are the safeguards and protections provided under the National Disability Insurance Scheme a useful model to protect against elder abuse?

## Superannuation

97 Over \$2 trillion are held in Australian superannuation funds,<sup>21</sup> and a significant portion of the wealth of older people is held in these funds. Abuse of an older person may include the use of deception, threats or violence to coerce the person to contribute, withdraw or transfer superannuation funds, to spend those funds in a way that benefits the abuser, or even to make a binding death benefit nomination in favour of the abuser. Other issues relating to possible elder abuse include questions about the ability of a person acting under a power of attorney to deal with superannuation.

### Regulation of superannuation

98 The Australian Prudential Regulation Authority is the prudential regulator for the superannuation industry, other than self-managed superannuation funds. Self-managed superannuation funds are supervised by the Australian Tax Office.

99 The Australian Securities and Investments Commission is responsible for consumer protection with regard to superannuation. It is concerned with the relationship between superannuation trustees and consumers, and aims to ensure members receive proper disclosure, useful information, and can access complaints-handling procedures.

100 The Superannuation Complaints Tribunal deals with complaints about the decisions and conduct of trustees of superannuation funds.

101 None of these agencies is responsible for addressing concerns about the coercion of an older person, or the misuse of a power of attorney, with regard to their superannuation funds. Such concerns are largely the domain of state and territory laws, including:

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21 Australian Prudential Regulation Authority, *Statistics: Annual Superannuation Bulletin June 2015* (2016) 2.

- criminal laws regarding assault, theft or fraud;
- statutes regulating the use of powers of attorney; and
- equitable remedies for breach of fiduciary duty.

102 These state and territory laws are discussed in more detail elsewhere in this Issues Paper. The ALRC is interested in comment as to whether these laws are an adequate response to elder abuse in the context of superannuation funds.

**Question 24** What evidence is there of older people being coerced, defrauded, or abused in relation to their superannuation funds, including their self-managed superannuation funds? How might this type of abuse be prevented and redressed?

## Financial institutions

103 Financial abuse of older people will often involve misusing funds in a bank or other financial institution. For example, money may simply be withdrawn from an older person's account, or used to pay someone else's bills, without the account holder's permission. Sometimes abuse might involve presenting banks with fraudulent or revoked guardianship or power of attorney instruments.

104 There may be other ways of committing elder abuse that involve some sort of interaction with a bank or other financial institution. This raises the question of what, if anything, banks might do to prevent and respond to financial abuse of older people.

**Question 25** What evidence is there of elder abuse in banking or financial systems?

## The role of financial institutions

105 Financial institutions such as banks can play an important role in preventing financial abuse in two ways. First, by helping to raise general awareness of financial abuse among their customers and by outlining measures customers can take to better protect themselves. The Australian Bankers' Association (ABA) has prepared two consumer fact sheets for this purpose: *Protecting yourself from financial abuse* and *Setting up a power of attorney to help manage your banking needs*. Further, banks offer products and services, such as joint accounts, which may be used as a form of support for an older person, but may also be subject to abuse.

106 Secondly, financial institutions can assist in protecting against financial abuse by detecting financial abuse and intervening. The ABA has developed two industry guidelines on financial abuse: *Protecting vulnerable customers from potential financial abuse* and *Responding to requests from a power of attorney or court-appointed administrator*. While these industry guidelines are voluntary, they have been agreed to by the ABA's member banks. The ABA also worked with Capacity Australia to

develop a new online education and assessment tool to build on existing training programs for bank staff.

107 There have been calls for all banks to provide mandatory training for staff about financial abuse (using the resources developed by Capacity Australia) and dementia (using resources developed by Alzheimer's Australia).

### **Reporting suspicions of financial abuse**

108 Neither statute nor the ABA's *Code of Banking Practice* specifically require financial institutions to report suspected financial abuse. This differs from the approach taken in the United States (US) where almost every state encourages or mandates that financial institutions report concerns of financial abuse. The bodies to whom bank tellers must report varies across states. There have been calls for financial institutions in Australia to be required to establish protocols to report suspected financial abuse.

109 The ABA has suggested that financial institutions are constrained from reporting suspicions of financial abuse because of their legal obligations. Such obligations include: a financial institution's duty to carry out a customer's mandate, including where a person is acting as agent for the older person and an instrument or order contains the necessary authority; the need to refrain from discriminating against people based on age or disability; and requirements under privacy laws. Obligations of confidentiality and concerns about a possible action in defamation may also serve to constrain these institutions from reporting suspected financial abuse.

110 While there are exceptions and defences to a breach of confidentiality, breach of privacy and a claim of defamation that may be relevant in particular circumstances, at present there is no statutory immunity for financial institutions reporting suspected elder abuse. Some states in the US have immunity provisions for the reporting institutions. Relevant legislation and codes in Australia could possibly be amended to protect financial institutions from any breach of contract, breach of confidentiality, interference with privacy, and defamation suit when the suspected financial abuse was reported in good faith. In addition to the introduction of immunity provisions, banks could amend their contractual terms and conditions to obtain prior written agreement permitting disclosure of suspected abuse to the police or a regulator.

111 Further, it may be that some states do not have a government body to which banks might report suspected abuse. It has been suggested that reports of suspected financial abuse should be made to state public advocates. The role of public advocates is discussed below.

### **Further reform suggestions**

112 The ABA has called for a nationally consistent approach to elder abuse.<sup>22</sup> In particular, it considers that inconsistent regimes with respect to formal arrangements across the states and territories are a key risk for the financial abuse of older

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22 Australian Bankers' Association, Submission No 113 to New South Wales Legislative Council General Purpose Standing Committee No 2, *Inquiry into Elder Abuse in New South Wales* (7 March 2016).

Australians. The ABA has also called for formal instruments to be registered to assist in establishing the authenticity and currency of an instrument. This is discussed further below.

**Question 26** What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

## Family agreements

113 A specific type of financial abuse has been recognised in the context of family agreements. A ‘family agreement’ is one name for arrangements made between an older person and a family member (usually intergenerational), or other trusted person such as a friend or carer, where the older person transfers title to their property, or proceeds from the sale of their property, or other assets, to the trusted person—who may use the funds to discharge a mortgage or purchase another property—in exchange for the trusted person promising to provide ongoing care, support and housing. The older person may enter into the arrangement in preference to formal assisted residential care. Other names for such an agreement include: an ‘assets for care’ arrangement, independent or private care agreement, personal services contract, and lifetime care contract. These terms may be preferable as they signify that the agreement is not confined to ‘family’.

114 Such an agreement can be a written document but more typically it is made orally, with limited legal advice having been obtained so there is little detail as to the terms, and without all of the relevant issues having been discussed and agreed.

115 Other than writing requirements for contracts concerning interests in land, there is no Commonwealth, state or territory legislation specifically governing or regulating these family agreements. This section uses family agreements to illustrate the application of the common law and equitable doctrines (together referred to as ‘common law doctrines’, as distinct from statute law) that may be of use to an older person who seeks to commence civil litigation to obtain redress for financial abuse.

### Risk for the older person

116 A family agreement is not an inherent form of financial abuse. Rather, such agreements recognise the reality that these arrangements can be mutually beneficial in facilitating a caring relationship. Further, many adult children or other trusted persons cannot afford to take on such caring responsibilities without financial compensation.

117 While such arrangements can fulfil a useful social purpose, there can be serious consequences for the older person if the promise of ongoing care is not fulfilled or the relationship otherwise breaks down. The existing legal regime may inadequately protect the rights of an older person where the arrangement breaks down.

118 It may be difficult to establish that a contract was intended, and what its terms were. The trusted person is likely the registered proprietor of the property, and it may be difficult to establish a specific interest in the land.

**Question 27** What evidence is there that older people face difficulty in protecting their interests when family agreements break down?

### **The role of lawyers**

119 In recognition of the role that lawyers can play in helping prevent financial abuse of older Australians, Seniors Rights Victoria (SRV) produced *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse*, which includes a checklist of points to consider when drafting an agreement. SRV also includes a sample family agreement on its website which lawyers are permitted to use.

120 Families may be reluctant to consult lawyers in respect of family agreements before entering into such arrangements, considering lawyers to be unnecessary and/or costly. Rather, lawyers are more likely to be consulted once relations have broken down.

### **Existing redress**

121 The main form of redress is by way of civil litigation. Pursuing litigation in these cases, however, may be prohibitively costly, unsatisfactorily lengthy and stressful for the older person. Proof, presumptions and remedies also pose significant issues in such cases.

122 A tribunal may be a preferable forum to hear and determine disputes about family agreements as tribunals are considered to be less expensive, more expedient, and less formal than courts. The Victorian Civil and Administrative Tribunal (VCAT), for example, has jurisdiction to hear disputes in its Joint Property List about co-owned land and goods and has a range of orders available to it.

### **Reform suggestions**

123 Social security laws recognise that family agreements may be entered into to support older people. Generally, there are limits to the amount of assets that can be given by a person without reducing the entitlement to receive, or rate of payment for, the Age Pension. ‘Granny flat interest rules’ reduce the effect of these rules.

124 It is recommended, but not required, that the existence of a ‘granny flat interest’ is documented in writing for social security purposes. Requiring some form of documentation of such an interest for Age Pension purposes may prompt a person to seek professional advice about such an arrangement, and provide a safeguard for older persons if agreements break down.

125 In its 2007 report, *Older People and the Law*, the House of Representatives Standing Committee on Legal and Constitutional Affairs concluded that family agreements warranted a greater deal of formalisation and some form of regulation. The

Committee recommended that there be an investigation of legislation to regulate family agreements—such as the desirability of formalisation, registration, and courts being able to dissolve family agreements and grant appropriate relief—and also that guidelines and model clauses be developed.<sup>23</sup> The Australian Government accepted these recommendations in principle.<sup>24</sup>

126 Some commentators have called for specific legislation to:

- define the type of agreement broadly;
- include a standard form agreement; and
- provide for appropriate remedies and penalties.<sup>25</sup>

**Question 28** What changes should be made to laws or legal frameworks to better safeguard the interests of older people when family agreements break down?

## Appointed decision-makers

127 Some older people, particularly those with advanced dementia or significant cognitive impairment, may need help to make decisions about their lives—for example, where to live, how to pay their bills and manage their finances, and when to seek medical care. Often this help is given informally, by family and friends. But there are also a number of legal arrangements designed, in part, to support people to make decisions when they need it. Formal appointed decision-makers include guardians, administrators and people acting under a power of attorney. Where the decisions are about medical, health care or lifestyle matters they are often described as ‘advance care directives’.

128 Some of these arrangements are made by individuals themselves (eg, powers of attorney and advance care directives); other appointments are made by a court or tribunal (guardians, administrators). Sometimes the person appointed to a decision-making role will be a friend or family member of the principal; other times a lawyer, accountant, guardian or other professional unrelated to the principal may be appointed.

129 While these arrangements are often necessary and have many benefits, they are also open to abuse. For example, an appointed decision-maker may take advantage of their legal powers and position of trust for personal benefit. They may even steal from the principal, or use the principal’s home as security for a personal loan.

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23 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) recs 30, 32.

24 Australian Government, *House of Representatives Standing Committee on Legal and Constitutional Affairs: Older People and the Law—Government Response* (2009).

25 Eileen Webb and Teresa Somes, ‘What Role for the Law in Regulating Older Persons’ Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements in Australia’ in *International and Comparative Law on the Rights of Older Persons* (Vandeplas Publishing, 2015) 333, 353–4.

130 This section focuses on powers of attorney, guardians and financial administrators. There is also consideration of decision-makers appointed for health, medical and lifestyle matters. Appointed decision-makers under aged care and social security law are considered separately earlier in this Issues Paper.

131 Depriving people of their right to make decisions for themselves may in some circumstances also amount to elder abuse, or create a risk of elder abuse. The ALRC's 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*, was about ensuring people with disability have such a right—about respecting people's dignity, autonomy and independence, while supporting them to make their own decisions, where such support is needed. The report was based on a model of supported decision-making, with the positions of 'supporter' and 'representative' incorporated in a Commonwealth model. Importantly, the report recommended a shift away from decision-making arrangements based upon the 'best interests' of a person towards one in which a person's will and preferences direct decisions that affect their life.

132 Many of the findings in the ALRC's 2014 report about disability will be relevant to older people with impaired decision-making ability. The findings in that report will therefore inform this Inquiry.

### **Powers of attorney**

133 Powers of attorney may present a risk of financial abuse by an appointed decision-maker, in part because many 'attorneys' are untrained and sometimes do not properly understand their responsibilities.

134 Enduring power of attorney instruments carry a particular risk of abuse. Unlike other power of attorney instruments and unlike traditional agency relationships, enduring powers of attorney may continue to operate—or sometimes only begin to operate—when the principal loses the ability to make decisions. There is therefore a risk that an older person will be mistakenly declared or be mistakenly regarded to have lost capacity. Where this is somehow arranged intentionally and dishonestly, it may amount to abuse.

135 Powers of attorney are regulated by state and territory laws, governing the appointment and powers and duties of the attorney. They also provide for various safeguards, such as offences or remedies when a person acts beyond the scope of their power.

### **Appointed decision-makers for health, medical and lifestyle decisions**

136 A person may make planning instruments relating to health, medical and lifestyle decisions. These instruments allow a person to plan ahead by providing what a person may want in certain situations and to authorise another person to make such decisions on their behalf. They are used in all states and territories but take different forms and have different names. For example, in South Australia, an 'advanced care directive' allows a person to record their wishes, preferences and instructions for future health care, end of life, living arrangements and personal matters, and to appoint a decision-maker to make these decisions when they are unable to do so themselves. In New South Wales, a combination of instruments may be used—an 'enduring



guardianship’ to appoint a decision-maker for decisions relating to living arrangements, health care or personal services, and an ‘advance care directive’ to record instructions about future medical treatment. In 2011, the Australian Health Ministers’ Advisory Council (AHMAC) suggested that the term ‘advance care directive’ be adopted to describe the range of instruments in which a person can record future preferences and appoint another person to make decisions on their behalf.

### ***Some options for reform***

137 A number of reforms to state and territory power of attorney laws have been suggested to reduce and remedy elder abuse by appointed attorneys. For example, some have suggested that a register of decision-maker instruments—perhaps even a national register—should be created. Registration of the instruments could be made compulsory. This might prevent people from trying to act under false instruments or instruments that have expired or been revoked.

138 Some have called for uniform state and territory laws governing powers of attorney, although this may be for reasons other than reducing elder abuse. Uniform laws might make it easier for banks and other financial institutions operating throughout Australia to train staff to detect the misuse of powers of attorney. The AHMAC has similarly recognised the need for a standardised national format and approach for advance care directives.

139 Compulsory training for attorneys has also been suggested. Training might particularly benefit those attorneys who do not fully understand their powers and responsibilities. It might also be a vehicle for warning attorneys of the legal consequences of the misuse of powers of attorney. Other mechanisms to this end might include requiring potential attorneys to sign a declaration stating that they will comply with their responsibilities and duties and not abuse their position of trust. Some jurisdictions already have such requirements.

140 The introduction of new offences for dishonestly obtaining or misusing a power of attorney instrument have also been suggested, and introduced in some jurisdictions.

### ***Danger of too many safeguards?***

141 Introducing additional safeguards for power of attorney arrangements may deter some people from appointing or acting as an attorney. The responsibilities may be considered too onerous or the penalties for misuse too great. The risk of harm to an older person from not appointing an attorney may need to be weighed against the risk of harm caused by the misuse of powers of attorney.

142 Importantly, a power of attorney allows people to choose for themselves who can make decisions for them and act on their behalf. This is generally considered preferable to courts or tribunals deciding who might make decisions for a person, because it gives greater control to the principal and better respects their autonomy.

### ***A greater role in preventing abuse***

143 This section has considered the risk of attorneys committing elder abuse, but attorneys may play an important role in safeguarding against abuse committed by other people against the principal. Should this role be expanded, perhaps by placing upon attorneys additional statutory duties to take steps to prevent abuse, in some circumstances?

**Question 29** What evidence is there of elder abuse committed by people acting as appointed decision-makers under instruments such as powers of attorney? How might this type of abuse be prevented and redressed?

**Question 30** Should powers of attorney and other decision-making instruments be required to be registered to improve safeguards against elder abuse? If so, who should host and manage the register?

**Question 31** Should the statutory duties of attorneys and other appointed decision-makers be expanded to give them a greater role in protecting older people from abuse by others?

### **Guardianship and administration**

144 A guardian is a person appointed by a tribunal (for example, the NSW Civil and Administrative Tribunal) or a court to make lifestyle or personal decisions for a person. An administrator is a person appointed by a court or tribunal to make financial and some legal decisions for a person. The criteria for granting guardianship and administration are similar in each state and territory.

145 A person appointed as a guardian or administrator may be a public guardian (for example, a public advocate or delegate), public administrator (for example, a public trustee or delegate) or a private guardian or administrator (for example, a relative or friend). The same person often performs both roles.

146 Guardians and administrators have statutory duties, including to exercise their powers in the way that is least restrictive of a person's freedom of decision, in the 'best interests'<sup>26</sup> of the person represented and taking account of the wishes of that person.

147 Guardianship and administration are derived from the concept of *parens patriae*, and are intended to be protective of the interests of vulnerable people—including those vulnerable because of age-related decision-making impairment.

148 Older people constitute a significant proportion of those for whom guardianship and administration orders have been made. One standard response to elder abuse where the victim has a significant cognitive impairment is to remove decision-making authority and appoint a substitute decision-maker. However, guardianship and

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26 A 'will and preferences' model was recommended to replace a 'best interests' model in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

administration may be a problematic response to elder abuse, by focusing on the agency of the victim, rather than dealing with the conduct of those perpetrating abuse.

149 Guardianship and administration also have the potential to facilitate elder abuse, if decisions are not made in the best interests of persons represented. This may be more likely to occur where there is a private guardian or administrator.

150 A broader concern is that current guardianship and administration laws do not adequately respect human rights and, in particular, the equal recognition before the law of people with disabilities, a matter considered in *Equality, Capacity and Disability in Commonwealth Laws*.

### **Safeguards and protections**

151 Guardianship laws contain a range of accountability mechanisms that seek to ensure decision-makers exercise their powers appropriately. Tribunals have responsibility for overseeing the activities of decision-makers by reviewing guardianship and administration orders, assisted by Public Advocates or Public Guardians.

152 Guardians and administrators may be subject to regular tribunal reassessments of their appointments. Administrators are usually required to lodge a financial statement and plan, detailing how the represented person's estate will be managed. Public guardians or administrators are also accountable for their activities to their employers.

153 Commentators have suggested additional accountability mechanisms, particularly for private guardians and administrators. These include mandatory training and education, periodic reporting, statutory declarations of compliance and auditing of decisions.

154 However, the need to balance protection and autonomy means that accountability mechanisms should not be so onerous as to discourage people from accepting decision-making responsibilities. Guardianship tribunals and offices may also need new powers and associated resources to monitor compliance.

**Question 32** What evidence is there of elder abuse by guardians and administrators? How might this type of abuse be prevented and redressed?

### **Public advocates**

155 All states and territories, other than the Northern Territory, have a body that provides support services to, speaks for, and promotes the interests of people with impaired decision-making abilities. This body is sometimes called a 'public advocate'. In most states this body also functions as the guardian of last resort. While public advocates are often vested with investigatory powers, these tend to be exercised only where it is considered that a guardianship or administration order might be appropriate.

156 Some commentators have suggested that public advocates should be given broader powers to enable them to investigate and respond to the abuse, neglect or exploitation of people with impaired decision-making ability, whether or not a guardianship or administration order might be appropriate. For instance, the Victorian Law Reform Commission (VLRC) recommended that the Office of the Public Advocate (Vic) should be able to investigate the abuse, neglect or exploitation of persons with impaired decision-making abilities, or the misuse of powers by those in a substitute or supported decision-making role. It recommended that these powers be exercisable either upon receipt of a complaint, or by the Public Advocate's own motion. Under the VLRC model, these investigative powers would extend to the ability to require the production of documents, the provision of evidence and entry onto premises. Further, the Public Advocate would be permitted to share the findings of any investigation and any evidence gathered with the police.<sup>27</sup>

157 A number of jurisdictions overseas have adopted 'adult protection' legislation, which applies more broadly to vulnerable adults. These statutes can provide for investigatory powers, requirements to report suspected abuse, and the power for a court or tribunal to make a wide range of orders to respond to elder abuse (such as service provision orders or removal and placement orders).

158 Adult protection models are often characterised by a single entry point for those wishing to raise concerns or report elder abuse, the coordination of a variety of disciplines to discuss and respond to elder abuse, and a focus on providing support services to assist in circumstances of suspected or actual abuse.

**Question 33** What role should public advocates play in investigating and responding to elder abuse?

**Question 34** Should adult protection legislation be introduced to assist in identifying and responding to elder abuse?

## Health services

159 The health system is often at the front line in identifying and responding to instances of suspected elder abuse. This includes a variety of institutions and professionals, including the hospital system and health professionals such as general practitioners, nurses, and allied health professionals.

160 Older people may be reluctant to report or raise concerns about elder abuse, or seek legal assistance. However, people may be more willing to discuss concerns with their health care providers. Further, older people experiencing abuse may use health services regularly. This presents an opportunity both for identifying and reporting suspected elder abuse, and responding to such situations.

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27 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 20.

## Health professionals

161 The first step in responding to elder abuse involves identifying whether a person is at risk of, or a victim of, elder abuse. To be effective, this requires appropriate training to ensure health professionals are able and confident to identify and respond to at-risk adults.

162 Health service providers may be reluctant to ask about elder abuse for a number of reasons, including: not knowing what questions to ask; an inability to assess risk; and not knowing how and where to refer someone.

163 The WHO's *Clinical and Policy Guidelines on Responding to Intimate Partner Violence and Sexual Violence Against Women (WHO Guidelines)* provide a useful approach to training requirements. The *WHO Guidelines* recommend that in-service and pre-qualification training should be provided to enable health practitioners to provide first-line support, enquire about and identify violence, and collect forensic evidence where necessary. Following the training, health practitioners should have better communication and clinical skills, and be better able to identify referral pathways. The *WHO Guidelines* recommend intensive multi-disciplinary training, which incorporates health care providers, police and advocates.

**Question 35** How can the role that health professionals play in identifying and responding to elder abuse be improved?

**Question 36** How should professional codes be improved to clarify the role of health professionals in identifying and responding to elder abuse?

## Health-justice partnerships

164 Health-justice partnerships are a new model of collaboration between legal and medical practitioners, in which a lawyer is integrated within a health or allied health practice. Such a model may give vulnerable and disadvantaged clients easier access to legal advice while they are seeking medical assistance. This may assist in responding to elder abuse because:

- medical and legal appointments can be coordinated;
- the lawyer, the health practitioner and the older person can communicate more easily; and
- the lawyer can develop informal relationships with health professionals, facilitating greater rates of referral and interaction.

165 An example of such a partnership is one established between Justice Connect Seniors Law and cohealth in north western Melbourne to help older people experiencing elder abuse.

**Question 37** Are health-justice partnerships a useful model for identifying and responding to elder abuse? What other health service models should be developed to identify and respond to elder abuse?

## Hospitals

166 Where an older person attends a hospital, there is an opportunity to identify and respond to suspected elder abuse. In 2013, St Vincent's Hospital in Melbourne introduced a hospital-wide elder abuse policy, which included:

- the establishment of a coordination and response group with high-level participation to review data relating to suspected cases of abuse, and advise on ongoing policy development;
- a model of care which supports staff to identify pathways for intervention based on the will and preferences of the patient, and undertake safety planning;
- notification of all suspected, confirmed or witnessed cases of elder abuse to the coordination and response group; and
- a training framework focused on addressing the different roles and responsibilities of staff, including clinicians.

167 St Vincent's Hospital Melbourne has seen significant improvements in practice, with increased notification of elder abuse, and increased data collection, including in relation to the types of abuse, risk factors, level of ongoing risk, interventions delivered and case outcomes. The Victorian Royal Commission into Family Violence suggested that such a framework should be adapted for use in other hospitals, and other environments such as aged care facilities.<sup>28</sup>

168 Implementing such a model may require further consideration of issues such as clinician-patient confidentiality and the operation of privacy laws.

**Question 38** What changes should be made to laws and legal frameworks, such as privacy laws, to enable hospitals to better identify and respond to elder abuse?

## Forums for redress

169 The avenues for redress for elder abuse should be cheap, simple and accessible. However, redress for financial abuse may involve costly and complex applications to state and territory supreme courts. Other avenues of redress for both financial and other elder abuse are limited. State and territory civil and administrative tribunals are largely limited to making a guardianship or administration order as a response to elder abuse

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<sup>28</sup> Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 91.

where the victim has a significant cognitive impairment. Where criminal offences are committed, some older people may not be willing to contact police for a number of reasons, including the impact on family relationships.

170 One option to provide alternative forums for redress is to expand the jurisdiction of state and territory civil and administrative tribunals. For example, in the context of financial abuse, these tribunals could be vested with jurisdiction to hear and resolve complaints relating to the misuse of powers of attorney and arrangements such as family care agreements. As discussed in the section above relating to family agreements, VCAT has the power to hear and determine disputes in the limited circumstance where financial transactions relate to property interests.

171 State and territory civil and administrative tribunals could also be vested with jurisdiction to make a broader range of orders in relation to at-risk adults. These might include orders such as:

- service provision orders—to authorise an entity or Minister to provide services to a person experiencing, or at risk of elder abuse;
- protection orders—to direct a person not to approach, contact or live with the protected person; or
- removal and placement orders—to authorise the removal of a person experiencing, or at risk of, elder abuse from a premises and placement in other housing arrangements, including residential care facilities.

172 Other initiatives could include changes to the physical design of courts or tribunals to take into account accessibility issues, and changes to procedural requirements to take into account the vulnerability of a party or witness.

**Question 39** Should civil and administrative tribunals have greater jurisdiction to hear and determine matters related to elder abuse?

**Question 40** How can the physical design and procedural requirements of courts and tribunals be improved to provide better access to forums to respond to elder abuse?

### **Alternative dispute resolution**

173 In addition to cheaper and more accessible court- or tribunal-based responses, there may be a greater role for mediation and conciliation services to assist in responding to elder abuse. Some examples of existing services include:

- the Elder Relationship Centre, a pilot counselling and mediation service run by Relationships Australia, to support families in negotiating complex issues related to ageing;

- the Seniors Mediation Program run by Family Mediation and Counselling Victoria and Benetas, which provides mediation services relating to the move into aged and community care; and
- community justice centres in NSW, which provide free mediation services in a number of contexts, including where there is a disagreement between family members.

174 The VLRC has recommended that the Public Advocate (Vic) be empowered to require persons to attend conferences to resolve a matter being investigated.<sup>29</sup>

**Question 41** What alternative dispute resolution mechanisms are available to respond to elder abuse? How should they be improved? Is there a need for additional services, and where should they be located?

## Criminal law

175 Elder abuse is closely related to family violence. Like family violence, elder abuse can be physical, sexual, psychological or financial in nature, and is usually committed by a family member. State and territory criminal law includes offences that respond to some forms of physical, sexual and financial elder abuse. Offences relevant to elder abuse include common assault, assault occasioning actual bodily harm, wounding with intent to cause grievous bodily harm, false imprisonment, choking, suffocation and strangulation, sexual assault, larceny, robbery or stealing from the person, demanding property with intent to steal and fraud.

176 In some jurisdictions, reforms to the criminal law to better respond to family violence have begun to address psychological and emotional abuse.<sup>30</sup>

### Offences against older people

177 Some overseas jurisdictions—for example, California, Missouri and Florida—have specific offences for causing or permitting an older person to suffer, be injured, or be placed in a situation in which their health is endangered. Creating specific offences for crimes against older people may change attitudes, increase awareness and encourage prosecutions.

178 On the other hand, it may be more in keeping with the dignity of older people for the criminal justice system to treat them in the same way as other citizens.

**Question 42** In what ways should criminal laws be improved to respond to elder abuse? For example, should there be offences specifically concerning elder abuse?

<sup>29</sup> Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 330(c).

<sup>30</sup> See, eg, *Family Violence Act 2004* (Tas) ss 8–9; *Family Violence Protection Act 2008* (Vic) s 5.



## Neglect

179 Elder abuse includes neglect, that is, the failure to do something for an older person that results in harm and is in the context of a relationship of trust. State and territory statutes in most jurisdictions (but not the Australian Capital Territory and Victoria) provide that a person who has a duty to provide the ‘necessities of life’ to another person, and fails to do so, causing harm to that person, has committed a criminal offence.

180 Concerns have been expressed that state and territory laws regarding neglect are not well suited for addressing elder abuse.

**Question 43** Do state and territory criminal laws regarding neglect offer an appropriate response to elder abuse? How might this response be improved?

## Protection orders

181 Each state and territory has a protection order regime designed to respond to repeated acts of violence, threats or intimidation committed by family members (defined widely) or other known people. Protection order regimes are civil in nature, but a breach of a protection order is a criminal offence. Older people, like all others, can apply to the court for a protection order if they have fears for their safety. Police officers may also apply for a protection order on behalf of an older person. Protection orders can direct a person not to approach, contact or live with the protected person, or they may direct the person not to assault, threaten or harass the protected person.

**Question 44** Are protection orders being used to protect people from elder abuse? What changes should be made to make them a better safeguard against elder abuse?

## Reporting crimes to police

182 Some older people are not willing to contact police regarding elder abuse, even where criminal offences have been committed. When crimes are committed by family members or trusted people, the victim may not wish to damage the relationship further by involving police. In some cases, an older person may be unable to make a report, for example, due to advanced dementia.

183 In Australia, there is no general obligation for witnesses or victims of crimes to make a report to the police. However, in all states and territories, people in certain occupations are required to report child abuse. In the Northern Territory, all adults must report a reasonable belief that a person has caused serious physical harm to someone with whom they are in a domestic relationship. In NSW, a person who is aware of a serious indictable offence and does not report it commits an offence (except people in certain health care professions).

184 The *Aged Care Act* requires approved aged care providers to report unlawful sexual contact or unreasonable use of force on a resident of an aged care home to the police and the relevant department.

185 Overseas jurisdictions—including the US, Canada, Israel and South Africa—have laws requiring certain people to report elder abuse. For example, in California, doctors, clergy, all employees of health care facilities, and any person who assumes responsibility for the care and custody of an elderly person must report known or suspected elder abuse, and failure to do so is a crime.<sup>31</sup> Reports can be made to Adult Protective Services agencies in each county, or to the police.

186 In its 2007 report, *Older People and the Law*, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered whether there should be an obligation to report suspected financial abuse of older people. It did not support this approach because such laws impinge upon the autonomy of older people. It also noted that there is a lack of evidence that such laws increase reporting or decrease the incidence of abuse. The Committee instead considered that reporting should be encouraged and that information should be available about options for responding to elder abuse. The Committee commended the work of state-based elder abuse prevention units and recommended ongoing funding for the Australian Network for the Prevention of Elder Abuse to assist it in its information sharing role.

187 In its 2010 report, *Family Violence—A National Legal Response*, the ALRC expressed concerns and reservations about a legal duty to report family violence. In particular, the ALRC was concerned about creating a disincentive for victims to seek assistance, guidance and medical care, because of fears that disclosure to a professional would result in a report to the police. The ALRC was also concerned about the damage to relationships of trust if professionals are required to report abuse. Some of these concerns may be less relevant with regard to abuse of older people where the person is unable to report that crimes have been committed against them.

188 The absence of a legislated requirement to report does not prevent organisations from requiring their employees to report suspected abuse. Organisations may require employees to report all suspected abuse, or require reporting only of emergency situations. Privacy laws permit the disclosure of health information about a person without the consent of the person in certain limited circumstances. Some organisations provide protection from retaliation for people who report elder abuse.

189 The ALRC is interested in comment about whether there should be further legal requirements to report elder abuse, in addition to those in the aged care system.

<p><b>Question 45</b>      Who should be required to report suspected elder abuse, in what circumstances, and to whom?</p>
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31 California Department of Justice, *A Citizen's Guide to Preventing and Reporting Elder Abuse* (2002) 21.

## Police and prosecution response

190 There have been significant changes to the police responses to family violence in recent times. For example, the NSW Police Force has a ‘policy of mandated action’<sup>32</sup>—that is, their policy indicates that ‘police will respond to domestic and family violence incidents reported to them’.<sup>33</sup> In addition, some police agencies have established specialist liaison officers for seniors.

191 However, there have been some suggestions that police may be reluctant to investigate crimes such as fraud when the victim has dementia. There are also concerns about the low rate of prosecutions for elder abuse and calls for a review of criminal laws to ensure that elder abuse is susceptible to prosecution.<sup>34</sup>

192 The Victorian Royal Commission into Family Violence recently recommended that the Victoria Police trial a dedicated family violence and elder abuse response team, with capacity to investigate financial abuse.<sup>35</sup>

**Question 46** How should the police and prosecution responses to reports of elder abuse be improved? What are best practice police and prosecution responses to elder abuse?

## Court processes

193 The court process can be very stressful for victims of crime, particularly when a person must give evidence against a family member, trusted person or carer. Most states and territories provide support services to victims. In some jurisdictions, changes have been made to court processes in an effort to reduce the difficulty of giving evidence, largely in response to the concerns of victims of sexual assault and child sexual assault.

**Question 47** How should victims’ services and court processes be improved to support victims of elder abuse?

## Sentencing

194 Sentencing statutes usually specify that the circumstances of the victim and the impact of the crime on the victim are relevant factors. In some jurisdictions the age of the victim is specifically mentioned as an aggravating factor in sentencing. The common law also requires judicial officers to take into account the age and

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32 NSW Police Force, *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* (2013) 21.

33 Ibid 26.

34 Wendy Lacey, ‘Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia’ (2014) 36 *Sydney Law Review* 99, 126; Alzheimer’s Australia NSW, *Preventing Financial Abuse of People with Dementia* (Discussion Paper No 10, 2014) 26.

35 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 155.

circumstances of the victim and the impact of the crime on the victim. It is an aggravating factor if the crime was committed by a person in a position of trust, or where the offender has a responsibility to care for and protect the victim.

**Question 48** How should sentencing laws and practices relating to elder abuse be improved?

### Restorative justice

195 People experiencing elder abuse may be reluctant to engage with the criminal justice system because they wish to maintain their relationship with the abusive person, or because they do not wish the abusive person to be punished. Restorative justice models may address these concerns because they can maintain and improve relationships, and emphasise offender accountability. Restorative justice models include victim-offender mediation, conferencing, and circle sentencing.

196 In its 2010 report, *Family Violence—A National Legal Response*, the ALRC expressed the preliminary view that restorative justice responses to family violence are generally inappropriate, and noted a need for further research, trials and evaluations. In 2016, the Victorian Royal Commission into Family Violence found that restorative justice processes have potential as suitable responses to family violence, and recommended a pilot program with strong safeguards.<sup>36</sup>

**Question 49** What role might restorative justice processes play in responding to elder abuse?

### Civil penalties for abuse

197 The VLRC recommended in 2012 that a person with responsibility to care for a person with impaired decision-making ability should be liable for civil penalties if the carer abuses, neglects or exploits the impaired person.<sup>37</sup> Civil penalties have the purpose of punishing an offender, but use civil court procedures. The VLRC suggested that this public wrong would overlap with existing criminal offences, but would be available when criminal proceedings are unlikely to succeed.

**Question 50** What role might civil penalties play in responding to elder abuse?

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36 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 1093; Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) rec 122.

37 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 18.